

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA REGISTRY

SITTING AT MPANDA

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 43 OF 2020

THE REPUBLIC

VERSUS

1. MUSSA ^S/o ANTONY@KIDEMA..... 1ST ACCUSED

2. EMMANUEL ^S/o JILALA@LUCHUNGA..... 2ND ACCUSED

3. JUMA ^S/o KASHINJE @ANTONY..... 3RD ACCUSED

JUDGMENT

12th December, 2022 & 02nd January, 2023

A.A. MRISHA, J.:

The three accused persons namely **Musa ^S/o Antony@Kidema, Emmanuel ^S/o Jilala@Luchunga na Juma ^S/o Kashinje@Antony** were jointly charged before this court with one count of Murder Contrary to Sections 196 and 197 of the Penal Code, Cap 16 R.E. 2002[**Now R.E of 2022**].

one **Khamis ^S/o Ngusa@Mkono**. Such serious allegations were strongly denied by such accused persons during a preliminary hearing, save for their names, addresses and their ages, hence the hearing of this case commenced.

The prosecution side which had the legal service of M/s Flavia Shiy-State Attorney, paraded a number of seven witnesses and managed to tender four exhibits which include a Sketch map, a Post mortem Report, one Witness statement and one Caution statement; the same were admitted as **Exhibits P1, P2, P3 and P4** respectively.

Such witnesses were **Shululu Ngelelela (PW1), WP 9800 D/C Elizabeth (PW2), Mussa Emmanuel (PW3) and Dr. Anold Fungo (PW4)**. The rest were **Emmanuel Ibrahim Paul (PW5), H.2625 Constable Deogratius (PW6) and F.4373 D/CPL James (PW7)**.

On the other hand, the defence side had three witnesses who were the first accused person **Mussa Antony (DW1)**, the second accused person **Emmanuel Jilala@Luchunga (DW2)** and the third accused person **Juma Kashinje (DW3)**. All of them were represented by learned advocates. Thus, while the **DW1** and **DW2** were represented by M/s Sekela Amulike and Sweetbert Nkupilo- Learned advocates, **DW3** enjoyed the legal service of Mr. Hamad Said, learned advocate.

A summary of evidence adduced by both sides as described above can be made by starting with that of the prosecution side. **PW1** who introduced himself as a retired militia man testified that on 04.10.2017 at 0000 hours he was called by someone who informed him about an incident of murder at Chamaland village. Thereafter he went to Chamaland Dispensary where he found a dead body of Hamis Mkono.

That the people he met there asked him to find and arrest Mussa Antony, Emmanuel Tano and Juma Kashinje as well as Malisha Embasi because they are the ones who beat the victim to death. After getting this information he accompanied with other persons to trace the whereabouts of Mussa Antony and Emmanuel Tano whom he knew before and managed to apprehend them.

That, upon being arrested the first accused did not give them a reason why he killed the deceased. **PW1** managed to identify the first and the second accused person at their docks. As to the third accused person **PW1** said their efforts to find him proved failure. Talking further about the first accused person **PW1** said when interrogated by him such accused person told him that they were four persons who murdered the deceased person and he mentioned his fellows by the names of Emmanuel Tano, Juma Kashinde and Malisho Embasi.

On cross examination **PW1** said he is a retired militia man; he does not remember the number of persons he had arrested and that he arrived at the incident at 0000 Hours and met people who mentioned those who committed the offence among whom was Emmanuel Tano. He added that he arrested the first accused at Minyoso village while the second was arrested at Chamaland and the exercise took place at night.

When probed by advocate Hamad Said **PW1** he knew the accused persons before and he heard people mentioning their names. He also said he did not see the accused committing the offence of murder.

When re-examined **PW1** said he knows Mussa Antony, that he resides at Chamaland Mabambasi and he arrested Mussa Antony at Minyoso then proceeded with Emmanuel Tano whom he arrested at 0500 hours.

PW2, PW6 and **PW7** are police officers. **PW2** testimony is that she is the one who drew a sketch map at the scene of crime on 04.10.2017 after receiving instruction from her superior boss who is the Officer Command of Inyonga Police Station. That she went to Chamaland, the scene of crime with a Village Executive Officer (**VEO**) one Albert Sanga and drew a sketch map.

PW2 identified such map in court and prayed to tender it as an exhibit.

The same was admitted in court as **Exhibit P1**; then its contents were

read by **PW2**. She concluded her testimony by saying that after drawing such map she handled it to her superior boss.

When cross examined **PW2** said she used a meter to measure the distance; it is 2.5-meter distance from the Dispensary to the scene of crime. She also said that the **place of the scene was rough as if it was disturbed**. Responding to Mr. Hamad Said, advocate **PW2** said the place marked 'A' is not measured.

PW3 and **PW5** testified to be the eye witnesses of the incident of murder. According to their testimony, **PW3** is a son of **PW5** and that on 03.10.2017 at 2200 hours they saw the first, second and the third accused person together with Malisha Embasi beating the deceased then took to their heels. **PW3** said while asleep he heard dogs barking outside their home.

He got outside and saw his father who is **PW5**, and proceeded to him then while there they saw a person being beaten by people whom they used to know. That they managed to see that with the aid of a big torch which was capable of illuminating a maximum of 100 metres distance due to its four dry cells; the same was belonged to **PW5**. **PW3** added that it was 10 metre distance from where he stood with **PW5**.

He also said that when he was outside, he saw the deceased Hamis Mkono being beaten by Malisha Embasi, Mussa Antony, Emmanuel Jilala and Juma Kashinde. That he was able to identify them by using a torch which was hold by **PW5**, but also, he knew them before the incident. He added that the all the accused persons are his neighbours and he knew the deceased person because he too was his neighbour.

PW3 added that he mentioned four persons in his evidence and identified three of them in the accused dock because Malisho Embasi was not at the dock. He also said he was not able to see the weapons used by the accused persons in beating the deceased person. **PW3** said after the incident the accused persons run to their houses leaving the deceased lying down. He then went to the first accused father's home with other people to search for him and his companions but could not find them. Then they assisted each other to take the deceased's body to Chamaland Dispensary with a wheel barrow.

When cross examined **PW3** said he heard a person crying outside the back of his house; it was 2200 hours and there was no electricity, hence it was hard for him to see. He could not see without a torch. That he saw a person beating the deceased before the incident. He also said he does remember if he saw the deceased persons before 03.10.2017. He

also said that there are neighbours nearby but they joined him to trace the accused persons after calling for their help.

PW3 also responded by saying that Mussa Antony and Juma Kashinde are also living in the house of Mzee Antony who is the first accused's father. Also, **PW3** said Emmanuel Tano is famous name in Chamaland village but is famous known as Emmanuel Jilala. When cross examined **PW3** said he resides at his father's different homestead which is about 4 metres from where his father's is. That he did not have a torch but he used his father's torch which had new batteries and could light up to 100 metres. That his father lightened up the torch towards the accused persons who began to run away after recognizing that they were illuminated.

When re-examined **PW3** said a person holding a torch is able to see, that he saw persons beating the deceased and not their clothes. He also said his father is the one who had a torch and used to buy some batteries and that he saw Hamisi Mkono beaten by the accused persons.

PW4's testimony is that he is the Assistant Medical Doctor and that on 04.10.2017 he was performing his duties at Mamba Health Centre in Mlele District, Katavi Region. That he has a ten years' experience on that career. That on the fateful day received a call from the Police In charge

of Majimoto Police Station who informed him about the incident of murder at around 2200 hours.

Then he was taken by police to Chamaland Dispensary where he found the deceased body being kept there. That he found the body of the deceased with a wound at the back of its head; the wound was deep that showed it was caused by a sharp object. He was informed the deceased's name is Hamis Ngusa, a male.

That after examining the deceased's body he discovered that the cause of death was haemorrhagic shock. He then filled the report and submitted the same to the Police Officer Incharge of Majimoto Police Station. **PW4** managed to identify such report and prayed the Court to admit it as an exhibit; the same was admitted as prayed by **PW4** and marked **Exhibit P2**.

Thereafter **PW4** was cross examined about his education and professional status and he said he is a Medical Officer with a Diploma. That he graduated on 2010 and he is a Registered Medical Doctor. That, he received an order from Police instructing him to conduct a post-mortem was dated 04.10. 2017. That the cause of death is shock severe bleeding as blood was bleeding at the front of the head's wound and

from the nose and mouth. That he discovered the wound was caused by a blunt object leading to affection of the deceased's skull.

During re-examination by M/s Flavia Shio **PW4** said he was at Mamba Health Centre which is a Government Hospital. That he is a government employee with a registration as a Medical Practitioner. Then came **PW5** who is the father of **PW3**.

His testimony is that on 03.10.2017 at 2200 hours he was at his home Chamaland Village taking bath; while there he heard someone outside saying, "*Hamis una dharau sana*" which literally means, "*Hamis you're so disrespectful*".

According to him, that forced him to get out and saw four persons whom he alleged to have known by face and voices because they were his neighbours and he identified them by using his four-battery torch which could light up to 100 metres' distance. He mentioned them as Mussa Antony, Emmanuel Tano, Juma Kashinje and Malisha Embasi.

That, while at the scene of crime **PW5** saw the above accused persons beating one Hamis Mkono on his head and he tried to stop them but they continued to do so even after his son **PW3** came from his home, until when he illuminated them with a torch then they run away. According to **PW5** even **PW3** witnessed such brutality by the said

accused persons and he used to light up his torch to enable **PW3** see such accused acts.

He added that at first, he asked the accused what is the matter and they repeated saying Hamis (the deceased) disrespects them; he asked them to stop beating him but they could not listen to him. He added that he was close to them with about 2 metres distance and he was illuminating them by his torch. That he saw the accused persons using a stick to beat the deceased whom he used to know because he was his neighbour too.

That he tried to chase the accused persons with his son but they could not manage to arrest them, hence they decided to call for help from people nearby, then they took the deceased body to Chamaland Dispensary and met a nurse who tried her level best to nurse the deceased but unfortunately, he passed away. Thereafter the matter was reported to a nearby Police station and efforts to trace and apprehend the culprits were successfully taken.

When cross examined by M/s Sekela Amulike, advocate **PW5** said it was night around 2200hours when the incident occurred and he identified the accused persons' voices and they are his neighbours and they met most of the time. That the scene of crime is an open area with no

bushes but has some few trees. That he did not consider the accused's clothes.

When cross examined **PW5** said he is a Christian who knows the importance of telling the truth. That, he was at his home and he heard the accused persons' voices from outside. He also saw them when he got out. That he made a statement to the policemen when they arrived at the scene of crime. When probed about such statement with a view of contradicting him **PW5** said he made a statement at Police and knows to read and write. Also, **PW5** said he asked the accused not to continue beating the deceased but they did not agree. He prayed for the same to be admitted as an exhibit and this court admitted it as **Exhibit P3**.

On re-examination **PW5** said he did not participate in arresting the accused person and he is not a Village leader. That, Mussa Antony and Juma Kashinje are living in the house of Mzee Antony. That, Mussa Antony, Emmanuel Tano, Juma Kashinje and Malisha Embasi attacked the deceased person.

The above witness's testimony was followed by that of **PW6** and **PW7** who are all police officers. **PW6** is the one who testified to have recorded the *witness statement of one Elizabeth Emmanuel* after

introducing himself to her as a policeman. Then he read it out to her and asked her to sign on it something which the said witness consented to do.

When **PW6** asked this court to admit such statement to form part of prosecution evidence the defence counsel objected and they assigned several reasons one being failure by the prosecution side to describe reasons for failure to procure such witness. After going through the rival submissions by counsel from both sides ***I sustained such objection and expunged such statement due to none compliance*** of the provisions of section 34B (2) of The Evidence Act, CAP 6.

On re-examination **PW6** said he interrogated Elizabeth Emmanuel and she told him she met with the first accused person who is her brother; the accused asked to use her mobile phone to transfer songs and in the course of using it he noted Elizabeth had relation with the deceased one Hamis. Then he sat a trap with other accused person and began to beat the deceased to death.

PW6 was cross examined and said his evidence is the information he got from Elizabeth Emmanuel. He does not know the accused persons and he never met them before. On re-examination **PW6** said he was recording the statement of a witness called Elizabeth Emmanuel.

On his part **PW7** said he is a police investigation officer at Usevya Police Station. That on 04.10.2017 he was at Majimoto Police station and his superior boss instructed him to record the caution statements of the two suspects who are Emmanuel Jilala and Mussa Antony. He did as instructed but after informing their rights at different occasions. He prayed the ***caution statement of Emmanuel Jilala*** to be admitted in court as evidence; the same was admitted as **Exhibit P4**.

As for ***the caution statement of Mussa Antony***, **PW7** narrated on how he recorded the same and asked this court to admit the same as exhibit. This time his prayer was not granted and the Court sustained the objection by defence counsel due to discrepancies noted in such statement. Hence ***the same was expunged from record***.

PW7 then testified that the first accused told him that he beat the deceased on his head by a stick with his fellow accused persons after realizing that the deceased person had sexual relation with his sister who is Elizabeth Emmanuel.

When cross examined by the 1st and the 2nd accused's counsel **PW7** ***said he knows a Justice of Peace can be a VEO or a Primary Court Magistrate but he does not know whether the 2nd accused was taken to a Justice of Peace***; he was informed by the 1st accused

person about what transpired. On being re-examined **PW7** said he was instructed to record caution statement of the 1st and the 2nd accused persons.

On the other hand, the three accused persons herein stood as defence witnesses. They adduced their evidence as **DW1**, **DW2** and **DW3**. None of them conceded to have participated in the killing of Hamis Ngusa@Mkono, the deceased. They strongly denied the accusations levered against them by the prosecution side saying that the prosecution evidence is fabricated and they went on to raise the defence of alibi. They also denied to have known each other. Finally, they asked this court to acquit them.

When cross examined, **DW1** who is the 1st accused said he resides at Mabambasi, Chamaland but he does farm activities at Minyoso. That he remembers **PW1**, **PW3** and **PW5**, that he has a land dispute with **PW5** but he does not remember if his advocate cross examined such witness about a land dispute.

That he left Chamaland on 15.09.2017 and went to Minyoso and he was arrested on 04.10. 2017. That he does not know the procedure. That he was arrested while sleeping at his uncle's house. On his part **DW2** (2nd accused) said he did not have a conflict with any person. That he was

arrested on 01.10.2017 and stayed in police custody until 18.10. 2017. Also **DW2** said he saw **PW7** who said he recorded his statement but he did not object it. That he did not cross examine **PW1** as to when he was arrested. Also, he said he does not know the 1st and the 3rd accused persons.

When responding to cross examination questions by M/s Flavia Shio, State Attorney **DW3** (3rd accused) said he resides at Chamaland B with his grandparents. That he was not arrested by a **VEO**, but by a Militiaman. That he was arrested due to the order of the Village leader for disobeying his order. That he told his lawyer he was arrested on 29.09.2017 and that he was not at the incident.

After the closure of evidence by both sides, it is now the task of this court to determine whether the prosecution side has established its case to the required standard. In order to reach to that stage, it is important to address the points of law raised by both sides.

As indicated above all the accused persons stand charged with an offence of murder contrary to sections 196 and 197 of the Penal Code. It is a trite law that in order to prove its case the prosecution is duty bound to prove the same beyond any reasonable doubt. That means the prosecutions side must prove all the ingredients of an offence to which

an accused person stands charged. That, was emphasized in the case of **Christian S/o Kaale and Rwekiza S/o Benard vs Republic** [1992] T.L.R. in which the Court of Appeal stated that, "*...the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused person ought to be convicted on the strength of the prosecution case.*"

Now comes a question, what are the ingredients of a murder offence? Going by the provisions of section 196 of the Penal code one can analyse them as, (i)**that, the deceased died an unnatural death,** (ii)**that, the death was caused by the accused person,** and (iii)**that, the accused person caused the said death maliciously/intentionally.**

The above ingredients can also be reduced into two; that is **actus reus** and **mens rea**. Actus reus is an unlawful action or conduct. The second ingredient is the intention or knowledge of wrongdoing, better known as malice aforethought (mens rea). See the case of **Jackrine Exavery vs Republic**, Criminal Appeal No.485 of 2019(CAT) at page 17 (Unreported).

Having identified the above ingredients, the main issue for determination now is whether the prosecution in this case has proved

the offence of murder against the three accused persons beyond any reasonable doubt. In determining such main issue I will start with the first ingredient by finding out whether the deceased person one Khamis Ngusa@Mkono died an unnatural death.

Almost all the prosecution witnesses are in one that the said deceased person died after being beaten by the known persons. **PW3** and **PW5** who seems to be the eye witnesses testified that on a material date that is 03.10.2017 at 2200 hours they heard the deceased person crying outside their homes and when they got out, they saw four persons beating such deceased person on his head. **PW5** when re-examined added that the deceased was beaten by stick.

Yet according to **PW4** who is a Medical Practitioner, after conducting a post mortem of a deceased body he discovered that there was a deep wound on the back of deceased's head and the same was bleeding with blood. He also noted that such wound was caused by a sharp object and the deceased died due to haemorrhagic shock. His evidence is supported by **Exhibit P2** which is a post-mortem reported. If that is not enough none of the accused persons denied the fact that the said deceased person died an unnatural death. Even **Exhibit P1** shows the deceased body lying between two houses marked A and B with one tree nearby.

All that indicates and convince this court to believe that the prosecution has proved without any reasonable doubt that the deceased person Khamis Ngusa@Mkono died an unnatural death, and whoever caused his death might have done so with malice aforethought.

Next is the second issue that is whether the accused persons Mussa Antony, Emmanuel Tano and Juma Kashinje are the ones who caused the death of Khamis Ngusa@Mkono.

I have careful gone through the evidence adduced by both sides in this case and observed that the prosecution evidence relies on several pieces of evidence namely evidence of eye witnesses who are **PW3** and **PW5**; whose evidence is based on *visual identification as well as voice identification*.

Other pieces of evidence are **hearsay evidence** of **PW1, PW2, PW6** and **PW7**. Another is the **evidence of a medical expert** who is **PW4**. Finally, there is *documentary evidence* which is obtained from **exhibits P1, P2, P3** and **P4**. On the other side of the coin my careful perusal on defence evidence shows that the evidence relied upon by the accused persons hinges on *alibi evidence* and mainly *oral evidence* which denies the allegations against them.

In answering the above second question I will be dealing with each of the above pieces of evidence, save for that of medical expert which I have already dealt with in the course of answering the first issue. I will start with identification evidence. It is a general principal of law that in criminal cases where determination depends essential on identification, then evidence of conditions favouring identification is of the utmost importance. See the case of **Raymond Francis vs Republic** [1994] T.L.R. 100.

The conditions favouring identification were described in the landmark case of **Waziri Amani vs The Republic** [1980] T.L.R. 250. At pages 251-252 the Court of Appeal had this to say, "*We would for example, expert to find on record questions such as the following posed and resolved by him: **the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance whether it was day or night time, whether there was good or poor lightning at the scene, and further whether the witness knew or had seen the accused before or not.***" See also the case of **Gozibert Henerico Vs The Republic**, Crim. Appeal No. 114 of 2015.

In the instant case **PW3** and **PW5** said that on 03.10.2017 at 2200 hours they saw the accused persons Mussa Antony, Emmanuel Jilala@Luchunga and one Malisha Embasi beating the deceased person. They claimed to have known them by voice and by face because they were their neighbours.

However, their evidence seems to vary in terms of distance they had the accused persons under observation. For instance, while cross examined **PW3** said he was 10 metres from the scene of crime with **PW5**, on his part **PW5** said he was 2 metres, hence he and **PW3** were close to the accused persons.

Again, on the issue of visual identification while **PW3** said he did not see the weapons used by the accused in beating the deceased, **PW5** said he saw them using a stick to beat the deceased. From there one would reasonably ask why didn't **PW3** see such weapon while he was at the scene with **PW5**. Definitely, such evidence leaves a reasonable doubt whether such witnesses were telling the truth.

If that is not enough, **PW3** and **PW5** when cross examined by defence counsel, they said they did not see the type of clothes worn by the accused persons but they saw them by using a torch. In their evidence

they have said such torch had a capacity of illuminating up to 100 metres distance because it had new batteries.

If that was true then one could not expect them to fail to identify the types of clothes worn by the accused persons. Failure to do so indicates that their evidence is weak and leaves a possibility of mistaken identification; hence the same cannot be believed.

In addition to that, the evidence by **PW3** and **PW5** shows that **PW5** remained with a torch when the accused persons ran away. However, such torch was not brought by the prosecution before this court as an exhibit. It is such a device which according to **PW3** and **PW5** enabled them to identify the accused persons as it was night when the alleged incident occurred.

In my view, the same ought to have been tendered in court as an exhibit so as to enable the court and the defence side to examine its capacity in terms of illumination. Failure to tender it as an exhibit leaves a doubt in the evidence of such prosecution witnesses.

On the issue of voice identification, the law is very clear that in principle voice identification is an unreliable means of identification as was held by Chua, J (as he then was) in the case of **Mohamed Bakari and 7 others v. Republic** [1989] TLR 134 at page 135.

Also see the case of **Nuhu Selemani Vs R.** [1984] T.L.R. 94 and the case of **Stuart Erasto Yakobo Vs R**, Crim. Appeal No. 202 of 2002 (CAT) (Unreported) in which it was held that, *"Voice identification is one of the weakest kinds of evidence and great care and caution must be taken before action is taken on it as there is possibility people may imitate other people's voice."*

In this case only **PW5** alleged to have heard the accused persons exchanging words with the deceased person while at the scene of crime. He says he heard the accused persons telling the deceased, *"Yani wewe Hamisi una dharau sana"*.

If such phrase has to be translated into English it would mean, *"Hamisi you're so disrespectful"*. **PW5's** evidence also shows that after getting out of his house and met the accused persons he asked them 'what is the matter?' they told him Hamis (deceased) disrespects them.

However, despite insisting that he heard such voice and that he and **PW3** knew the accused persons before, **PW5** did not go further by describing the names of accused persons who uttered such words, nor did he describe how each of them worn their clothes while at the scene.

In my view such evidence leaves a reasonable doubt because **PW5** failed to give a detailed description of the accused persons and his

failure to mention the name of the one who uttered such words indicates that he was imitating the accused's voice something cannot be relied upon.

Having evaluated the above evidence, I will now turn to the evidence adduced by **PW1**, **PW2**, **PW6** and **PW7** and finally end up with the documentary evidence as indicated above. **PW1** is a retired militiaman who participated in arresting and interrogating the 1st and the 2nd accused person. His evidence shows that he was not at the scene but was told about the incident by the people whom he found at the scene of crime. According to him such people asked him to find and arrest the accused persons because they are the ones who killed the deceased person.

However, none of the said persons was brought to testify that he or she saw the accused persons beating the deceased person to death. Hence, his evidence remains to be a hearsay subject to be corroborated by direct evidence. **PW2** is the one who drew a sketch map relating to the incident of murder.

On cross examination she said the scene appeared to be rough indicating that the same was disturbed. She also said she was told about the incident and instructed to go there and draw a sketch map (**Exhibit**

P1). On my part I do not see if such evidence proves participation of the accused persons in causing the death of Khamis Ngusa@Mkono. I think that is why even the accused person decided not to object it.

Then there is the evidence of **PW6** and **PW7**. **PW6** testified that he is the one who recorded the witness statement of one Elizabeth Emmanuel who is alleged to be a sister of the 1st accused person and who told him about the reason why such accused participated with his co-accused persons in beating the accused person to death.

His testimony shows that Elizabeth told him that the 1st accused used her phone to transfer songs and that in the course of doing so he came across some text messages which show she had sexual relation with the Khamis Ngusa@Mkono; then the said accused person sat a trap with his co-accused and began to beat him. Unfortunately for the reasons known to the prosecution side such witness was not brought to testify before this court and the efforts by **PW6** to have her statement being admitted in court and form part of prosecution evidence failed due to objections raised by the defence counsel which were sustained.

Since such witness did not testify before this court and her statement expunged from court records, then the whole of **PW6** evidence cannot

be relied and/or being used by this court to enter conviction against the accused persons.

Finally, is the evidence of **PW7**. His evidence shows that he recorded the caution statement of the 1st and the 2nd accused persons. Among the two documents, only the caution statement of the 2nd accused person was admitted in court; the former was not admitted due to non-compliance of the law relating to recording of caution statement. But in my view even such admitted statement (**Exhibit 4**) cannot help the prosecution side to build their case. This is because its contents show that the 2nd accused person confessed to cooperate with the 1st and the 3rd accused person in beating the deceased person to death.

However, such accused person was not taken before a Justice of Peace to have his confession recorded as under section 59 of the Magistrates Courts Act [Cap 6 R.E. 2019]. Had that been done then the prosecution could be in a good position to the 2nd accused person and his co accused with the allegations levered against them by tendering the 2nd accused person's confession statement. Worse still the 2nd accused person denied to have participated in causing the death of the deceased person.

On their side, the accused persons have denied to have killed the deceased person and have gone far by saying they were not at the

scene of crime. I think it is not the duty of the accused person to prove his denial; he can only raise a doubt on the prosecution evidence.

On the issue of alibi defence, the law is clear that in order for such defence to be given weight the accused person must give notice to the court and to the prosecution side. That is a mandatory procedure provided under section 194 of the Criminal Procedure Code, Cap 20 R.E. 2019 (The Criminal Procedure) which provides that,

"... (4) Where an accused person intends to rely upon an alibi in his defence, he shall give the court and the prosecution notice of his intention to rely on such defence before the hearing of the case."

(5) Where the accused does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of alibi at any time before the case for the prosecution is closed.

(6) Where the accused raises a defence without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence".

From the above provisions it is clear that the accused person is duty bound to give notice to the court and the prosecution side of his intention to rely of the defence of alibi and if he fails to do so then he

has another option of furnishing the particulars of his alibi at any time before the case for the prosecution is closed.

Presumably, that legal requirement is intended to disclose such defence to the prosecution so that they can investigate on its truthfulness and counter it. The consequence for none disclosure of such defence is to accord it no weight. However, that depends with the discretion of the trial court after considering the evidence of both parties, as provided under sub section (6) of section 194 of the Criminal Procedure Code.

In the case at hand, it is evident that all the accused persons raised a defence of alibi when testifying before this court. Despite doing so, none of them gave a notice to the court and the prosecution of their intention to use such kind of defence. That indicates that they failed to comply with the mandatory procedure as described above. Should their defence be accorded no wait by this court? My answer to such important question is in the negative.

It is a trite law that when an accused person raises a defence of alibi, he does assume the duty of proving it. It depends with the circumstance of each case for a court after the trial court has compared evidence from both parties. That was provided by the Court of Appeal of Tanzania in the case of **Richard Wambura vs The Republic**, Criminal Appeal

No.167 of 2012 CAT-Mwanza, where it held that, "It is established law that when the Accused raise on alibi he does not assume the duty of proving it, it will be sufficient to earn him an acquittal when compared to the prosecution case."

Having analysed the above principles governing the defence of alibi and evaluated the evidence by both parties in this case I am in a position to hold that although the accused persons in this case did not comply to the legal procedure relating to defence of alibi, they still deserve to be given benefits of doubt due to the weakness of the prosecution evidence which has failed to prove beyond any shadow of doubt that the above accused persons are the ones who caused the death of Khamis Ngusa@Mkono, just as indicated above. Having said the above, I would also answer the second issue in the negative.

The third issue for determination is whether the said accused persons caused the death of Khamis Ngusa@Mkono with malice afore thought. I am aware that such issue touches the third important ingredient of an offence of murder. However, I do not see if it is necessary for me go deep in answering the above issue. Such ingredient depends upon proof of the second issue which deals with who caused the death of a

deceased person. Hence, since the second issue has been answered in the negative, then the third issue must fall under the same vein.

In the case of **Maliki George Ndengakumana v. R**, Criminal Appeal No. 353 of 2014 (Bukoba) (Unreported), the Court of Appeal observed that, *"...It is the principle of law that in criminal cases the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it was the accused who committed it."*

From the reasons given above, it is obvious that the prosecution side in this case has only succeeded to prove that the offence of murder of one Khamis Ngusa@Mkono was committed, but on the other hand it has failed to prove beyond any reasonable doubt that it was the accused persons Mussa Antony, Emmanuel Jilala@Luchunga and Juma Kashinje are the ones who committed it.

Therefore, basing of the above reasons, I find the first, second and third accused persons not guilty of the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E. 2019 and I hereby acquit them under section 235 of the Criminal Procedure Code.

I am aware that such accused persons have been remanded in custody awaiting trial and disposal of their case up to the moment this judgment

is being delivered. I order their immediate release from custody, unless they are otherwise being held for a lawful cause.




A.A. Mrisha
Judge
02/01/2023

Court: Judgment delivered on 02/01/2023 in the presence of Mr. Dickson Makilo for Republic, Ms. Sekela Amulike for all accused persons and the accused persons.




A.A. Mrisha
Judge
02/01/2023

Right of appeal is fully explained.




A.A. Mrisha
Judge
02/01/2023

Dated at **MPANDA** this 02nd Day of January, 2023.




A.A. Mrisha
Judge
02/01/2023