IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT TARIME

CRIMINAL SESSIONS CASE No. 64 OF 2019

REPUBLIC

VERSUS

MWITA S/O CORNEL PHILIMON @ GAUCHO

JUDGEMENT

Date of last order: 26/06/2020
Date of judgement: 03/07/2020

KISANYA, J.:

The accused person, Mwita Cornel Philemon @ Gaucho has been charged with two counts of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16, R.E 2002, (the Penal Code). In the first count, it is alleged by the prosecution that the accused person did murder one, Rhobi Mwita Mang'enyi on 10/02/2019 at Kemange Village within Tarime District, Mara Region. On the second count, it is alleged in the second that, he murdered one, Bracia Mahende on 10/02/2019 at Kemange Village within Tarime District, Mara Region.

The brief facts which gave rise to the information levelled against the accused can be summarized as follows: The deceased persons namely, Rhobi Mwita Mange'nyi (Rhobi) and Bracia Mahende (Bracia) are daughter

in law and daughter of Nyanchama Chacha (PW3) respectively. Rhobi had married Charles Wambura (PW2) and was biological mother of Joyce Paulo Chacha (PW1). The offence was committed in the premises of the said Charles Wambura located at Kemange Village within Tarime District.

On the fateful day, around 08:30 pm, Nyanchama Chacha (PW3) was in her house within the same compound. She was seated on the door, having dinner with Rhobi and Bracia. On the other hand, Charles Wambura (PW2) was watching TV in his house while Joyce Paul Chacha (PW1) was in the kitchen peeling groundnuts. Suddenly, Joyce (PW1) saw two persons entering through the kitchen's window. Also, she saw other two persons who entered the premises by jumping the fence.

Thereafter, Joyce ran inside to his father's house. She was calling for him. Her father, Charles Wambura (PW2) got out to find out what was going on. He met four persons. He fought with two of them, who were unknown to him. They robbed his mobile phone and restrained him from calling for help. The other two persons went into PW3's house. These were Tanu Chacha and the accused person, Mwita Cornel Philemon @ Gaucho (hereinafter referred to as Gaucho). Tanu Chacha is still at large. He was PW2's brother in law and married to Bracia (the deceased). The accused person was known to PW1, PW2 and PW3 as Tanu Chacha's friend. The accused person and his companion left after thirty minutes. Upon going inside PW3's house, Bracia and Rhobi were found dead. Also, PW2 and PW3 were found wounded. The accused person was arrested on the next day while Tanu Chacha escaped.

When the information was read over to the accused person, he pleaded *"Not Guilty"* to both counts of murder. In order to prove the charges beyond

all reasonable doubts, the prosecution paraded four witness and tendered three exhibits. The evidence adduced by all prosecution's witnesses sought to implicate the accused person in the two counts of murder.

The first prosecution's witness was Joyce Paul Chacha (PW1). She testified to have identified the accused person and Tanu Chacha when they entered the premises through the kitchen's window. She identified them by using a light from solar tube light which illuminating in the kitchen. Further, the accused person and Tanu Chacha remained under her observation for two minutes. Thereafter, she ran to her father's house (PW2). From her father's room, she peeped through the window and saw two unidentified or unkown persons who were fighting with her father. She went on to depose that, the accused person and Tanu Chacha entered PW3's house. PW1 testified further that the accused person was in black jacket and black trouser while Tanu Chacha dressed a black jacket with the word "PUMA" at the back and black trouser. She contended that the accused person was armed with panga while Tanu Chacha had a panga and an iron (chuma). Lastly, PW1 testified that she named the accused person in her statement recorded before the police on 11/02/2019. Upon being cross-examined, PW1 conceded that she did not witness the accused person killing the deceased persons.

On his part, Charles Wambura (PW2) testified that he got outside the house when he heard PW1 calling him. He met four persons who divided themselves into two groups. The first group was constituted by two persons whom he failed to identify because it was his first time to meet them. They robbed his mobile phone and restrained him from calling for a help. The second group was composed by the accused person and Tanu Chacha

(his brother in law). PW2 deposed that, he fought with the first group and that, Tanu Chacha and the accused person entered PW3's house. He claimed that he identified the accused person and Tanu Chacha at a distance of 1 pace and that, they remained under his observation for two minutes. PW2 went on to testify that, the accused person was in black jacket and black trouser; and that, Tanu Chacha dressed black trouser and black jacket with the word "PUMA" on the back. On cross-examination, he confirmed that he did not witness the accused person killing any of the deceased persons.

The third prosecution witness is Nyanchama Chacha (PW3). She was having dinner with both deceased persons. She deposed to have identified the accused person and his son in law Tanu Chacha, when they entered into her house. She testified to have been attacked by the accused person when she wanted to call for a help. PW3 went on to depose that, the accused person assaulted and wounded her daughter in law Rhobi by using panga, while Tanu Chacha used iron bar (nondo) to attack and assault his wife Bracia. During cross-examination, PW3 conceded that she did not name the accused person before the police on the reason that she was not feeling well that day. However, she stated to have informed the police that the assailants were two.

The last prosecution witness is E7050 DC Mohamed (PW4). This is an investigator of this case. He testified that he went to the scene of crime to inspect the scene and record the witnesses' statements. PW4 deposed that, PW2 and PW3 told him to have identified the accused person and Tanu Chacha at the scene of crime. He went on to testify that, Tanu chacha is at large because he escaped the police and that, an investigation

against him is underway. In cross-examination, PW3 deposed that he was told by the OC-CID that, the accused person was seen at Buhemba around 09.30 pm on 10/02/2019. He confirmed that PW3 had been injured by the bandits and that, she was issued with PF3.

On 12/02/2019, the deceased persons' bodies were examined at Tarime District Hospital. The report on post mortem examination on the cause of death of Bracia Mahende and Rhobi Mwita Mang'enyi were admitted un-objected during preliminary hearing as Exhibit P2 and P3 respectively. According to Exhibit P2, the cause death of Bracia Mahende was intracranial hemorrhage secondary to deep penetration wound around the ear measuring about 5" deep. The report provides further that, the deceased sustained injuries around the ear which caused intracranial hemorrhage which led to her death.

On the other hand, Exhibit P-3 shows the cause of death of Robhi Mwita Mang'enyi as hemorrhage secondary to severe cut wounds. It indicates that the deceased was assaulted and sustained injuries at posterior of the neck and left shoulder thus, cause hemorrhage which led to her death. Also, the prosecution tendered the sketch map of the scene of crime (Exhibit P1) which was drawn by H. 3314 DC Elly.

In his defence, the accused person denied the commission of the offence. He testified to know nothing about the incident and that he was not at the crime scene by the time the incident occurred. He gave an account on how he left his home place on 10/02/2019 to his business place at Mjata Pub located at Kenyata Road, Tarime Township. He stated to have left Mjata Pub from 11.00am when he went to MT Hotel for lunch with his visitors. The accused person went on to depose that, he returned to Mjata Pub at

04:00 pm where he served his customers up to 10:10pm when the pub was closed. He also accounted that from 08.30pm to 9:45pm, he was watching football match at Mjata Pub. The accused person went on to testify that he was with his wife Lydia (DW2) who was preparing the food for Mjata Pub's customers.

The accused person contended that he got arrested on 11/02/2019 by OCCID of Tarime at the Tarime Urban Primary Court where, he was attending injunction/ objection case No. 1 of 2019 before Hon. Boha. He claimed that, the OCCID asked him the whereabouts of Tanu Chacha and that he called Tanu Chacha who was in the court's premises. That, upon his arrest, the police took his vehicle with Reg. No. T 208, DCD, Toyota Noah which he bought from Tanu Chacha on 26/10/2018. He conceded that the registration's card of the said vehicle was in the name of Tanu Chacha. However, he claimed that the transfer process was with Tanzania Revenue Authority.

The accused person went on to depose that, he had never met PW1 and PW2. He conceded to have met PW3 once at the Police Station when he was called by the police to participate in mediating the dispute between Tanu Chacha and his wife Bracia. The accused person stated further that, the case against him was fabricated due to grudges between him and PW4. He claimed to have caught PW4 in fragrento delicto with his wife one, Mwanaidi in September, 2018 and that, he reported him to the Regional Police Commander (RPC).

On cross examination, the accused confirmed that Tanu Chacha was his friend since 2016. The accused deposed that, between January and 20

February 2019, he met Tanu Chacha on 10/2/2019 at Mjata Pub and on 11/2/2019 at the Tarime Urban Primary Court.

The accused person called one witness to support his defence. This was his wife one, Lydia Saimon Mwita (DW2). She testified that the offence was committed when the accused person was at Mjata Pub which is located at Anglican Area or Serengeti area near Chris Bar. DW2 went on to state that she was with the accused at Mjata Pub and that, they left the pub around 09:45 pm to their home place at Buhemba area.

When DW2 was cross examined, she deposed that the accused person caught his second wife with one, Mudy in January, 2019. She stated further that, the accused person had no visitors at Mjata Pub on the fateful day (10/2/2019). DW2 deposed further that, the accused person started to watch football match at 09.30 pm. She went on to state that, Tanu Chacha used to visit Mjata pub as other customers. Also, she claimed that it takes 10 minutes from Kenyata Road to Serengeti area.

At the hearing of this case, the Republic was represented by Mr. Donasian Chuwa, learned State Attorney assisted by Mr. Peter Ilole, learned State Attorney. On the other hand, the accused person enjoyed the legal services of Mr. Leonard Magwayega, learned advocate assisted by Mr. Paul Kipeja, learned advocate. The Court was addressed by the learned counsel for both parties.

Mr. Magwayega and Mr. Kipeja, learned counsels for the accused person urged the Court to find the accused person not guilty of the charged offences on the ground that the prosecution had not proved its case beyond reasonable all doubts. Counsel Magwayega argued that PW1,

PW2 and PW3 failed to prove that the accused person was identified at the scene of crime.

With regard to evidence of PW1, the learned counsel argued that, the conditions were not conducive or favourable for her to identify the four bandits who entered the premises on the material night due to the reasons that: One, she ran away to her father's house immediately when the bandits entered the premises through the kitchen's window. Two, the incident happened in the night and that, even if there was solar light, it was impossible for the house to have 20 solar tube lights. Three, PW1 did not state whether the window at her father's house was close or open to enable her to see her father (PW2) being assaulted by the two bandits. Four, the size of the window and wires' hole (matundu) were not stated. Five, it was impossible for PW1 to stand watching his father being assaulted by the two bandits.

Counsel Magwayega cited the case of **Bulabo Kabelele and Another vs R, Criminal Appeal No. 244 of 2011**, CAT (unreported) where it was held that, every witness is entitled to credence and has to be believed unless there are reasons for not believing him or her. The learned counsel urged us not to believe PW1 on the ground that her evidence is questionable. Citing the case of **Waziri Amani vs R** (1980) TLR 250, the learned counsel was of the firm view that the circumstances of the case at hand were not favourable for PW1 to identify the accused person.

As to evidence of Charles Wambura (PW2), Counsel Magwayega submitted that the circumstances were not favorable for him to identify the accused person due to reasons that: One, he was assaulted by unknown people on the head and other parts of the body by using panga. Two, he

recorded a statement before PW4 where he stated to have fought with Gaucho and Tanu Chacha thereby contradicting his evidence before the Court and that, the said contradiction raises doubts on identification by PW2.

Counsel Magwayega went on to challenge evidence of PW3. He argued that PW3 could not identify the accused person due to the fact that, she is an elderly person who was hit or wounded by the bandits who entered her house; and that PW3 did not name the accused person in her statement before the police.

Counsel Magwayega submitted further that, evidence adduced by PW1, PW2 and PW3 was different from their statement before the police. He therefore urged us to consider the said contradictions under section 154 of the Evidence Act, Cap. 6, R.E. 2019 and decide in favour of the accused person. He cited the case of **Kabelele** (supra) in support of his argument.

After challenging the evidence adduced by the prosecution's witnesses, Counsel Magwayega urged the Court to consider the evidence on defence of *alibi* as adduced by DW1 (the accused) and DW2 to prove that, the accused person did not go at the crime of scene. Counsel Magwayega pointed out that, section 194 of the Criminal Procedure Act, Cap. 20, R.E. 2002 which governs the defence of alibi was complied with by the defence. Citing the case of **Richard Michael Wambura vs R**, Criminal Appeal No. 167 of 2012 and **Ali S. Msutu vs R** (1980) TLR 1, Mr. Magwayega argued that the accused person is not bound to prove the defence of *alibi* and entitled to acquittal when compared to the prosecution's evidence. He was of the firm view that the accused person has raised doubt on the

prosecution's case as evidence on identification of the accused person at the scene of crime was not watertight.

On his part, Counsel Kipeja argued that, PW1, PW2 and PW3 were not credible witnesses. He stated that PW3 is not credible because she did not name the accused person in her statement before the police. Counsel Kipeja was of the considered view that if the accused person was known to the said PW3 and seen at the crime scene, she could have named her at the time of recording the statement before the police. He urged the Court to consider the case of **Marwa Wangiti Mwita and Another vs R** (2002) TLR 39 where it was held that the ability to name the accused person at the earliest possible time makes the evidence credible. Also, Counsel Kipeja referred us to the case of **Jaribu Abdala vs R** (2003) TLR 201 where it was held that credibility of the witness is important factor in identifying the offender and that ability to name the suspect at the earliest possible time is a vital factor.

For the aforesaid reasons, the defence counsel, concluded by submitting that the accused person is not guilty of the offence and prayed to this Court to discharge him.

In reply, Mr. Donasian Chuwa, learned State Attorney submitted that the prosecution had proved its case against the accused person. Starting with the issue of identification, the learned state attorney argued that solar light is the best. He submitted that, the factors to be considered whether the environment was favourable to identify the accused were underscored in the case of **Waziri Amani** (*supra*) and that, age of the witness is not one of the factors. The learned State Attorney described the factors for proper identification as follows:

(a) Source of light used to identify the accused person. On this factor, the learned State Attorney argued that, evidence of PW1, PW2 and PW3 shows that the accused person and Tanu Chacha were identified by using solar light which was clear and sufficient to identify them.

(b) The distance from where the witness identified the offender. On this aspect, Mr. Chuwa argued that PW1 testified to have identified the persons who were fighting with his father (PW2) at the distance of 3 meters (paces).

(c) The time used to identify the accused person. The learned state attorney urged us to consider that, PW1 had testified on the time under which the accused person and Tanu Chacha were under her observation.

(d) Whether the witnesses knew the accused person before the incident. Mr. Chuwa answered this issue on affirmative that, PW1, PW2 and PW3 proved to have known and met the accused person before the fateful day.

(e) The ability to name the suspect at the earliest possible time. It was contended by Mr. Chuwa that, PW4 testified how he recorded the statement of PW2 and PW3 who stated to have identified the accused person and Tanu Chacha at the scene of crime.

In the light of the above, Mr. Chuwa was of the firm view that, evidence on identification of the accused person at scene of crime was watertight. Citing the case of **Godfrey Gabinues @Ndimba vs R**. Criminal Appeal No. 273 of 2017, the learned State Attorney urged the Court to believe the prosecution's evidence on the ground that the defence had not raised any

doubt to the prosecution's case. The learned state attorney went on to submit that there was no possibility of mistaken identity in the case at hand and that the prosecution' witnesses were credible. He referred us to the case of **Abdala Rajabu Waziri vs R**, Criminal Appeal No. 118 of 2004 (unreported).

Responding to the defence of alibi raised by the defence, Mr. Chuwa submitted that the defence of alibi cannot stand in the circumstances where the accused person was identified at scene of crime by PW1, PW2 and PW3. He cited the case of **Edgar Kayumba vs DPP**, Criminal Appeal No. 498 of 2017 (unreported) in support of his argument.

As to the contradictions between the evidence of PW1, PW2 and PW3 and their respective statements before the police, the learned State Attorney urged us to consider the case of **Abdala Rajabu Waziri** (*supra*) where it was held that contradiction if any should not vitiate the credibility of witnesses. The learned state attorney was of the opinion that the contradictions were minor and do not go to the root of the case.

Mr. Chuwa submitted further that, the deceased persons died a brutal death and that, the assailant had malice aforethought. He cited the case of **Enock Kipela** (supra) where it was held that malice aforethought can be established by considering: *(1) The type and size of the weapon if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case be sufficient for this purpose; (5) The kind of injuries inflicted. (6) The attacker's utterances if any; made before, during or after the killing and the conduct of the attacker before and after the killing. (7)*

The conduct of the attacker before and after the killing. The learned state attorney argued that those factors were positively established and proved by the prosecution.

Mr. Chuwa addressed us on the common intention. He argued that pursuant to the evidence of PW1 and PW2, the accused person and Tanu Chacha entered PW3's house, where the accused person hit and stopped PW3 from screaming for a help and that the accused person killed Rhobi Mwita. Therefore, Mr. Chuwa urged the Court to find that, the accused person and other bandits had common intention of killing the deceased persons. The learned State Attorney referred us to the case of **DPP vs ACP Abdallah Zombe and Others**, Criminal Appeal No. 358 of 2013, CAT at Dar es Salaam where section 22 of the Penal Code [Cap. 16 R.E. 2002] was discussed at length.

The learned counsel went on to point out contradictions on the defence case. He argued that DW1 and DW2 contradicted on the number of ushers at Mjata Pub, visitors who visited the accused person at Mjata Pub and location of Mjata Pub.

Having considered the evidence on record and the submission by both parties, I find that the prosecution has established and proved beyond all reasonable doubts that, the poor innocent ladies, Rhobi Mwita Mang'enyi and Bracia Mahende met violent painful death at the hands cruel people. I hold so basing on evidence of PW3 who was with the deceased persons in the same house. She testified how Rhobi Mwita Mang'enyi was assaulted and wounded by using panga and that, Bracia Mahende was hit and inflicted with an iron which penetrated in the ear. Also, as stated herein, Exhibit P3 shows that the cause of death of Robhi Mwita Mang'enyi was

hemorrhage secondary to severe cut wounds; and that deceased was assaulted and sustained injuries at posterior of the neck and left shoulder thus, cause hemorrhage which led to her death.

On the other hand, Exhibit P2 shows that the cause death of Bracia Mahende as intracranial hemorrhage secondary to deep penetration wound around the ear measuring about 5'' deep. She sustained injuries around the ear which caused intracranial hemorrhage which led to her death.

Therefore, it is clear that the deceased persons' deaths were unnatural. In the same vain, the nature of injuries sustained by the deceased person, the nature of weapons used (panga and iron) and the parts of the body where the said weapons were inflicted (head, neck and ear) suggest that the assailants intended to cause the death or to do grievous harm to the deceased persons.

The critical issue is whether the accused person at hand is the one who killed the deceased persons. According to the information and the prosecution's evidence, the offence was committed on 10/02/2020 around 08.30 pm thus, at night. The vital evidence, in my opinion, is deduced from PW1, PW2 and PW3 who testified to have identified the accused person and Tanu Chacha who is still at large as among of the four persons who were at scene of crime on the material date and time.

It is trite law that evidence of visual identification is one of the weakest kind. For evidence of visual identification to be relied upon, the Court must be satisfied that, the evidence is watertight and that, there was no any possibility of mistaken identity. The land mark case on the weight of evidence of visual identification is **Waziri Amani** (*supra*) cited by the

learned counsel for both parties. In that case, the Court of Appeal established the guidelines or principles to be considered in establishing whether the evidence of visual identification is watertight, when it held that:

> *"The court should act on evidence of visual identification unless, all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight. The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so was there moonlight or hurricane lamp etc) whether the witness knew or has seen the accused before or not.*

It is important to note that, the above guidelines are not conclusive. They have to be applied depending on the circumstances of each case. See **Njamba Kulamiwa vs R.,** Criminal Appeal No. 460 of 2007, CAT at Tabora (unreported) when the Court of Appeal held that:

> *"As is clear, from the above passage **WAZIRI AMANI's** case just gave broad guidelines, and it is for the trial court, in each case to assess and apply those guidelines, in the light of the circumstances of each case."*

Furthermore, in the case of **Jaribu Abdalla v. R**., Criminal Appeal No.220 of 1994(unreported), the Court of Appeal concisely held as follows:

> *"in matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of eyewitnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."*

Not only that, but also in **Mengi Paulo Samwel Luhana and Another v. R.**, Criminal Appeal No. 222 of 2006 (unreported) the Court emphasized that:

> *"eyewitness testimony ...can... be devastating when false identification is made due to honest confusion or outright lying."*

In the instant case, the witness who testified to have witnessed the deceased persons being killed is Nyanchama Chacha (PW3). She was having dinner with both deceased persons. It is not in disputed that, the accused person and Tanu Chacha were known to PW3. While Tanu Chacha was her son in law, the accused person was Tanu Chacha's friend who used to come to her house and driving Tanu Chacha. This evidence was not contradicted during cross examination. In fact, the accused person conceded to have met PW3.

It is in evidence that, PW3 identified the accused person and Tanu Chacha when they entered into her house with a help of light which was illuminating from solar the tube light. Although PW3 did not mentioned the number of solar tube lights which were on, it was deposed she was having dinner with the deceased persons. Therefore, I find that the light which enabled PW3 and the deceased persons to take their dinner was sufficient for her to identify the persons who entered therein.

Another factor to be considered is the time under which the accused person and Tanu Chacha remained under observation of the accused person. Although PW3 testified that he heard people saying that the incident had lasted for thirty minutes, she did not tell the time under which the accused person and Tanu Chacha remained under her observation. This factor was required to be stated when it is considered that pursuant to

her own evidence, upon entering the house, the bandits ordered her to keep quit and that, she was assaulted on the head by the accused person. She also deposed that she fell down, sustained injuries and taken to Tarime District Hospital for treatment. The prosecution did not tender the PF3 for the Court to consider the nature of injuries sustained by PW3.

Further, the distance from which PW3 identified the accused person was not stated. None of the prosecution witnesses who testified on the size or dimension of the house of PW3 where the killers entered. This fact was also not stated in the sketch map (Exhibit P1). During the trial, the prosecution did not lead the witness to identify the accused person in Court. Following the question by the lady assessor, PW3 was asked to identify the accused person in open Court. She told the Court that, she was short sighted. However, PW3 identified the accused person at the distance of one (1) pace after two different persons working in the judiciary had passed before her. It is not known as to whether the sight problem before or started after 10.2.2019. All in all, considering that, PW3 is at the 76 years, and thus the offence was committed last year, the prosecution was duty bound to tell the Court on the distance at which the witness identified the accused person, the size of the room and issues related to her sight.

Further, as stated herein, PW3 adduced that the assailant invaded her house at the time when she was having dinner with the deceased persons and she seated on the door. It is not clear as to whether she seated while facing outside the house or inside the house. According to her evidence, upon entering her house, the assailants ordered her to keep quit and assaulted her with panga on the head. Considering that she seated on the door, there was a need for the evidence to state whether she was

assaulted from the back or while face her assailant. If she was assaulted or attacked from the back, there is a possibility that, PW3 did not identify the accused as her assailant. Further, she did not testify as to whether the accused person's voice who ordered her to keep quit was familiar to her.

Another factor for consideration is whether PW3 named the accused person immediately after commission of the offence. It is trite law that the ability of the witness to name the offender at the earliest possible time is vital in assessing reliability of the witness. This position was stated in **Godfrey Gabinus @Ndimba and 2 Others** (*supra*) when the Court of Appeal cited with approval its decision in **Swaleh Kalonga and Another vs R**, Criminal Appeal No. 45 of 2001 that:.

> *"..the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his reliability."*

Also, in **Jaribu Adallah** (*supra*), the Court of Appeal observed that:

> *"The ability of the witness to name the offender at the earliest possible moment is a reassuring, though not a decisive factor."*

It was argued by Mr. Chuwa that, the accused person was named by PW3 in her statement before the police. However, in her evidence in chief, PW3 did not state whether she named the accused person to the police. It is during cross examination when she stated:

> *"I told the police that I saw Gaucho. Gaucho is the one who assaulted me."*

However, when cross examined further, she deposed as follows:

> *"....I didn't mention Gaucho because I was not feeling well. However, I stated that the assailants were two."*

PW3 was then re-examined by the learned State Attorney, and this is what transpired:

> *In my statement, I named Tanu Chacha. I don't know the strips. I recorded the statement when I was not feeling well. I was in a sorrow of losing my daughter and my daughter in law. I named Tanu and Gaucho (The Court has noted that she posed for a while before stating "and Gaucho").*

I understand that, PW4 testified that the accused person was named by PW3. However, it is my considered opinion, the above contradictions on the evidence of PW3 raise doubt on whether the accused person was named by PW3. It should be noted that, naming the offender is not necessary before the police. There is no other witness including those who responded to the alarm raised by one Regina called to state that the accused person was named by PW3 on the very night.

In the light of the above reasons, I am of the considered opinion that the prosecution did not prove beyond reasonable doubts whether the conditions were favourable for PW3 to identify the accused person in the circumstances of this case.

The remaining evidence which implicate the accused person is deduced from PW1 and PW2 who testified to have identified the accused person and Tanu Chacha when they entered into PW3's house. Both witnesses deposed that they used solar light which was clear and sufficient to identify the accused person. PW2 testified that each house in the compound had a solar tube light with 12W and having capacity of lighting up to 10 meters. He testified further that, the compound had 20 solar tube lights. This evidence was not contradicted by the defence during cross examination.

Hence, I have no flicker of doubt that the source of light was sufficient for PW1 and PW2 to identify the persons who entered inside the premises on the material night.

Further, there is evidence that PW1 and PW2 knew the accused person before the fateful day. He was a friend of Tanu Chacha who was PW1's uncle (*baba mdogo*) and PW2's brother in law. They testified that, the accused person used to go at their residence and that, he used to drive Tanu Chacha. Again, both PW1 and PW2 were not contradicted on the fact that the accused person was known to them. It is during the defence case, when the accused person denied to have met the PW1 and PW2. However, the fact that the accused person was known to the witness is not a decisive factor to eliminate possibility of mistaken identity.

This implies that the above stated factors or conditions should be considered by taking into account other factors and the circumstances of each case.

At this juncture, I wish to highlight evidence adduced by PW1 on how she identified the accused persons and other persons who invaded the residence of PW2. Evidence of PW1 was to the effect that, she identified the accused person and Tanu Chacha twice. At first, she identified them in the kitchen when they entered the premises through the kitchen's window. However, PW1 did not state the distance at which the accused person was identified. Further, the size of the kitchen was not stated. Nevertheless, even if it is considered that, the kitchen was small considering the village lifestyle, PW1 contradicted herself in her evidence as shown hereunder.

During examination in chief, she testified that the two persons who entered through the kitchen's window and the two persons who jumped the fence entered their premises at the same time. Her evidence was as follows:

> *"I saw people entering through the kitchen's window. They were two. At the same time, other people entered our compound or premises by jumping the fence. The two people who entered through the kitchen's window were Tanu Chacha and Gaucho..."*

When cross examined by Mr. Magwayega, PW1 deposed that, the persons who entered through the kitchen's window were not together and that, Tanu Chacha entered first followed by the accused person. She deposed further that, the persons who jumped the fence entered after one minute. This is what was stated by PW1 during cross-examination:

> *"I was in the kitchen when the two people entered through the kitchen's window. The first person to enter was Tanu. Then Gaucho followed. He was the second to enter. After one minute, the other two persons entered through the fence."*

Another contradiction is on the time under which the accused person remained under observation of PW1. It is depicted from her evidence in chief that, upon entering the kitchen, the accused person and Tanu Chacha ran after her. But, she went on to state that, she used two minutes to observe them before running to her father's house. Her evidence in chief was as follows:

> *"..In the kitchen, the tube light was on. Therefore it was easy to identify Gaucho and Tanu Chacha. Upon entering the house they ran after me...I used two minutes to identify the persons who entered*

through the kitchen's window. I ran to call my father who was in his house. I met him on my way to his house."

On the other hand, during cross examination, she deposed that she ran immediately to her father's house because she was terrified upon seeing the accused person and Tanu Chacha. She stated:

"...I was terrified when Tanu and Gaucho entered the kitchen. I ran immediately to my father's house. I ran while calling my father..."

Therefore, I find that PW1 was not consistent on how she identified the accused person in the kitchen. Should the Court consider that the accused person was under PW1's observation for two minutes before running to her father's house or that she immediately after seeing the persons who entered through the kitchen's window? Also, in her evidence, PW1 states that the accused person was the second to enter after Tanu Chacha. The time taken from when Tanu entered to the time when the accused person entered was not stated. Further, the said Tanu Chacha was armed with panga and iron (chuma). Did PW1 remain there for one or two minutes? If she was frightened to see him armed with the said weapons thereby running to her father's house, there is a possibility that she did not identify the person who entered after Tanu Chacha.

PW1 identified the accused person for the second time when she was in her father's room. She switched off the tube light therein and peeped through the window to see what was happening outside. From there, she claimed to have identified the two persons who were assaulting his father at the distance of 3 paces. According to her, the accused person was not among of the persons who were beating his father. She testified to have identified the accused person and Tanu Chacha when they were entering

PW3's house. The distance which PW1 identified the accused person and Tanu Chacha was not stated at all. It is not clear as to whether they were at the same area where his father was fighting with unknown persons. This issue could have been resolved by the Sketch Map (Exhibit P1). However, the said Exhibit P1 does not show location of Charles Wambura's house where PW1 was peeping through the window. Therefore, the distance from Charles Wambura's house to PW3's house was not shown and proved. It was essential to resolve this factor because according to PW2, the tube lights had the capacity of illuminating up to 10 meters.

Furthermore, as rightly argued by Mr. Magwayega, PW1 did not tell the court the size of the window and whether it was open or closed. It is common knowledge that a window can have wires (*nyavu*) and glasses or wires and timber or wires only. It was not sufficient for PW1 to state that, the window had "*nyavu and matundu makubwa*" without stating whether it has no timber or glasses at all. Since the above issues were not clarified, the Court is not in a position of making a finding on whether the circumstances of this matter were favourable for PW1 to identify the accused person from his father's room.

In view of the aforesaid, I am of the considered the prosecution did not prove on the required standard that, PW1 identified the accused person at the scene of crime.

The last prosecution witness who identified the accused person is PW2. He is an electric technician working with TANESCO Tarime. PW2 testified how he met four persons who invaded his premises by using the solar light. He deposed that his premise had 20 solar tube lights which were on thereby producing sufficient light. He adduced to have identified Tanu Chacha and

the accused person at the distance of 1 pace and that they remained under his observation for two minutes. PW2 maintained that, although he attacked and assaulted by two persons unknown to him, he was able to identify the accused person and Tanu Chacha. As stated herein, PW2 stated that that the accused person was a friend of his brother in law (Tanu Chacha) and that he used to drive the said Tanu Chacha. He deposed that he had known the accused person for one year.

Having considered the above evidence, I find that the conditions were favourable for PW2 to identify the accused person. His evidence was not contradicted during cross-examination.

The defence urged the Court to find PW2 unreliable witness on the ground that his statement before the police was different from the evidence adduced before the Court. However, the defence counsel did not show PW2 parts of his former statement before the police and contradict him as required under section 154 of the Evidence Act, Cap. 6, R.E. 2002. Also, PW2's former statement was not proved in order to impeach his credibility under section 164 of the Evidence Act. Furthermore, the defence was availed with original copy of statement of PW2, but the same was not tendered during the prosecution or defence case. Therefore, I find that this ground has no merit.

It follows that, only one witness (PW2) identified properly the accused person as among of the four persons who invaded his home premises. It is trite law that evidence of a single eye of witness has to be exercised with great care by the Court. In this regard, the trial court has to consider the credibility of PW2 as held in **Rahim Isaka and Another vs R.**, Criminal Appeal No. 229 of 2010, CAT at Iringa (unreported).

"Quite apart, in cases, such as the present, whose determination is essentially dependent on visual identification, it is not enough to merely look at the factors favouring or disfavouring an accurate identification. Equally important and decisive is the credibility of the identifying witness."

See also **Chacha Jeremiah Murimi and 3 Others** (*supra*).

I have stated shown herein, how the conditions were favourable for Charles Wambura (PW2) to identify the accused person. The Court finds PW2 a credible witness. The Court did not find anything in PW2 to decide otherwise. He explained the whole event to the end. His evidence was not contradicted or shaken during cross-examination. Also, PW2 testified that he named the accused person in his statement before the police. He only disputed to have told the police that he was fought with and assaulted by the accused person and Tanu Chacha. As stated herein, the witness's ability to name the accused person at the earliest possible time is an assurance that the witness is telling the truth as held in **Chacha Jeremiah Murimi and 3 Others** (*supra*).

Therefore, basing on the above reasons, I find that PW2 was credible, consistence and reliable witness.

I will now consider the defence of alibi adduced the accused person. Pursuant to section 194 (4) of the Criminal Procedure Act, an accused who intends to rely on the defence of alibi is required to give notice of intention to rely on such defence. The accused person complied with the law. He issued the required notice during the preliminary hearing. In his submission, Mr. Magwayega urged the Court to consider the defence of

alibi. His submission was based on the reasons that, identification of the accused person at the scene of crime was questionable and that, the accused person is not even required to prove the defence of alibi.

I agree with Mr. Magwayega that, the trial court has to consider the defence alibi even if no evidence adduced to support it. The accused person is only required to raise the defence alibi and then leave it to the prosecution to prove whether he is guilty of the charged offence. In the instance case, apart from giving notice to rely on the defence of alibi, the accused person adduced the evidence. His evidence and that of DW2 was to the effect that the offence was committed at the time when the accused person was watching football match at Mjata Pub. The Court noted contradiction's on the defence case on, the time when the accused person started to watch football and the location of Mjata Pub. While DW1 stated that, Mjata Pub is located at Kenyata road, DW2 stated that it is located at Anglican area or Serengeti area near Chris Bar and that it takes 10 minutes from Serengeti area to Kenyata road. Also, DW1 deposed that he started to watch football match at 08.30 pm. But in her evidence DW2 testified that the accused started to watch football match at 9.00pm and when cross-examined, she stated that the accused watched football match from 9.00pm. In my opinion, the contradiction especially, on the location of Mjata Pub casts doubts on reliability and credibility of the evidence by the defence.

However, the accused person cannot be convicted basing on the weakness of his defence because he is not charged with the duty to prove the defence of alibi or his innocence. Therefore, the issue is whether the defence of alibi has raised doubt on the prosecution's case. It is settled that, defence of alibi cannot stand if the accused person was identified at

the scene of crime. This position was also stated in the case **Edgar Kayumba** (supra) where the Court of Appeal cited with approval its decision in **Abdallah Hamis Salim @Simba vs R**, Criminal Appeal No. 68 of 2008 (unreported) where it stated:

> *"It follows that the trial High Court having believed PW1 and PW2 on the evidence of identification of the appellant, the defence of alibi died a natural death"*

Having believed that PW2 identified the accused person at the scene of crime, this Court finds the defence of alibi raised by the accused person does not introduce a reasonable doubt in the prosecution's case. This is when it is considered that the Court found PW2 as credible witness and no evidence was adduced to show that there was no grudges between the accused person and PW2.

The accused person told this Court that, the case against him was fabricated because he had grudges with PW4. He claimed to have caught PW4 with his second wife and reported him to the Regional Police Commander. However, PW4 appeared and testified before this Court. He was not questioned on that fact during cross-examination. The said fact was stated for the first time during the defence. Further, there was contradiction on this issue. DW1 stated that, the incident occurred in September, 2018. However, DW2 testified that it was in January, 2019. I therefore find that the defence that there was grudges between PW4 and the accused person was an afterthought and evidence to such effect is unreliable due to the noted contradiction.

The last issue for consideration is on common intention and principal offenders in criminal law. Pursuant to section 23 of the Penal Code, where

two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and that in the course executing that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. Also, section 22(1) of the Penal Code [Cap. 16 R. E. 2002] which provides for principal offenders as follows:

> *"22.-(l) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely,*
>
> *(a) every person who actually does the act or makes the omission which constitutes the offence*
>
> *(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*
>
> *(c) every person who aids or abets another person in committing the offence;*
>
> *(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counseling or procuring its commission."*

All persons listed in the above cited section are principal offenders. They can be charged and convicted separately or jointly. See **DPP vs ACP Abdallah Zombe and Others** (*supra).*

In the case at hand, it was deposed by PW3 that, she was also assaulted and wounded by the persons who entered in her house. And pursuant to

PW2, the accused person is among of the two person who entered PW3's house where the Bracia and Rhobi were found dead immediately when the accused person and his team left the house. Other bandits or assailant robbed PW2's mobile phone. Therefore, the accused person and his team had a common intention of committing the crime in the premises of PW2. Further, although other offenders are at large, the accused person is the principal offender either as the person who killed the deceased persons or aided other assailants to kill the deceased persons.

All ladies assessors were of unanimous opinion that the accused person was properly identified by PW1, PW2 and PW3. For the reasons stated herein, I beg to differ with the ladies assessors. It is my considered opinion that the accused person was properly identified by PW2 only and that the circumstances of this case were not favourable for PW1 and PW3 to identify him.

Furthermore, two ladies assessors were of the opinion that the accused person was guilty of two counts of murder while, one lady assessor opined that, the accused person was guilty of the first count of murder of one, Rhobi Mwita Mang'enyi. Her opinion was based on the evidence of PW3 who testified that Bracia Mahende was murdered by Tanu Chacha and not the accused person. In view of the evidence on record and the position of the law, I am in agreement with the two lady assessors that the accused person is guilty of both counts of murder as a principal offender.

For the reasons above, I find the accused person one, Mwita Cornel Philemon @ Gaucho guilty of two counts of offence of murder and I accordingly convict him of the said offences contrary to sections 196 and 197 of the Penal Code [Cap. 16, R.E. 2002].

DATED at TARIME this 3rd day of July, 2020.

E.S. Kisanya
JUDGE

SENTENCE

The accused person having been convicted of two counts of murder under sections 196 and 197 of the Penal Code [Cap. 16. R.E. 2002], I hereby sentence him to suffer death by hanging under section 197 of the Penal Code [Cap. 16. R.E. 2002] and section 322(2) of the Criminal Procedure Act [Cap. 20, R.E. 2002].

E. S. Kisanya
JUDGE
03/07/2020