

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

COURT
TANZLIIDECIDED
1 January 2022

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF APPEAL OF TANZANIA AT MUSOMA f CORAM: JUMA, C.J.. LEVIRA, J.A., And MASOUD, J J U CRIMINAL APPEAL NO. 154 OF 2022 KISIKA OMARY @ MGANYA.....1st APPELLANT JUMA MWEYA.....2nd APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the decision of the High Court of Tanzania at Musoma) f Mbagwa, J.^ dated the 28th day of February, 2022 in Criminal Sessions Case No. 62 of 2021 JUDGMENT OF THE COURT 10th & 14th March, 2025

LEVIRA, J.A.: In the High Court of Tanzania at Musoma (the High Court), the appellants, Kisika Omary @ Mganya and Juma Mweya were charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 (the Penal Code). The prosecution alleged in the particulars of the offence that, on 16th October, 2019 at Buturu Village within Butiama District in Mara Region, the appellants did murder one Shida Peter (the deceased). After a full trial, they were both convicted and sentenced each to suffer death by hanging. Dissatisfied, the appellants preferred the present appeal. A background of this matter relevant to the determination of this appeal reveals that, the deceased suffered unnatural death which was witnessed by Tumaini Peter Sambaganye (PW1) and Peter Shida (PW4). According to PW1, on 6th October, 2019 around 8:00 hours while at his farm near the deceased's house, he saw Bahati, Kisika Omary (the first appellant), Juma Mweya (the second appellant), Mabura and Juma Dinga approaching the said house while alleging that Bahati's cassavas were stolen. The deceased was around and thus allowed them to search his premises, but they found nothing. However, Bahati proposed that they should kill him for if they take him to court, he would be acquitted. The deceased ran into his house to hide himself. The second appellant broke the door of that house and entered together with Sadick Mweya and the first appellant. Having entered, they brought the deceased out of his house and the second appellant cut him at his chest by using a machette. Sadick cut him at his head and Mabura hit him with a pestle at the back of his head. The deceased fell down. They took him to the back of his house, collected dried grasses and covered him. Thereafter, the first appellant set fire on him. While burning, Juma Dinga took a mattress from the deceased's house and put it on the burning grasses which were burning the deceased. In the process, E 9989 D/Sgt Asukile (PW3) and his fellow police officers arrived at the scene of crime where they found a large crowd of people and the body of the deceased being burnt. However, PW3 managed to see the wound at the deceased's chest. In his investigation, PW3 got information that the deceased was beaten by a mob. The second appellant cut him with a machette on the chest, the first appellant was among the people

who were beating the deceased and the one who set fire. Since the first appellant was still at the scene of crime, they arrested him and took him to Butiama Police Station. Later, the second appellant was arrested, as well. F. 7760 D/Cpl. Lawrence (PW2) was involved in arresting the second appellant. In his defence, the first appellant (DW1) admitted to have been arrested at the scene of crime, where allegedly, was guarding his stolen cassavas found at the deceased's house. According to him, his cassavas were stolen from the farm and having discovered that, he raised an alarm and the villagers responded. They searched the house of the deceased where they found cassavas and other stolen properties from other people. The villagers attacked the deceased until he died. However, he denied to have been involved in attacking the deceased. His evidence was corroborated by the evidence of his wife one Bahati 3 Mang'ara Fwelefwele (DW2), who testified to be the first person to discover that their cassavas were stolen from the farm and thus informed her husband, the first appellant. Following that information, the first appellant raised an alarm, the villagers responded and ultimately attacked the deceased. Juma Mweya (DW3), the second appellant was among the people who gathered at the deceased's house on the material day. He testified to the effect that, upon arriving at the scene of crime, he found that the deceased had already been killed. The High Court weighed the evidence by both parties and came up with a finding that, the prosecution had proved its case against the appellants beyond reasonable doubt. As a result, it convicted and sentenced them as indicated above. It is noteworthy that initially, on 14th July, 2022, the appellants had filed in Court a memorandum of appeal comprising of nine (9) grounds of appeal. However, upon being assigned to represent the appellants, Mr. Cosmas Tuthuru, learned advocate filed a supplementary memorandum of appeal comprising of the following three grounds:

1. That, [the] trial Judge erred in law and fact to base its judgment on the testimony of PW1, Tumaini Peter Sambaganye and PW4 Peter Shida while their credibility was unreliable and questionable. 4
2. That, the learned trial Judge erred both in law and fact to convict the appellants on the information of murder while the death of the deceased Shida Peter was based on angry mob and mob justice whereby common intention was not established by prosecution witnesses.
3. That, there were misapprehension of the evidence on record by the trial court leading to a wrong conviction of the appellants. At the hearing of the appeal, Mr. Tuthuru appeared for the appellants, whereas the respondent Republic had the services of Ms. Shoshe Naiman and Mr. Charles Kagirwa, both learned Senior State Attorneys. At the outset, Mr. Tuthuru brought to our attention that the appellants agreed with him to abandon the grounds in the memorandum of appeal which they had earlier on filed. In lieu thereof, he argued together all the three grounds in the supplementary memorandum of appeal. Mr. Tuthuru faulted the High Court Judge for relying on the evidence of PW1 and PW4 to ground the appellants' convictions without considering that they were not credible witnesses. He expounded his argument by stating that those witnesses were relatives with interest in the case; hence, their evidence was not reliable. He added that, corroboration of the evidence of PW1 and

PW4 was necessary to clear doubt taking into consideration that both witnesses said they were in the farm at the time when the deceased was being attacked. Nonetheless, there was no one brought by the prosecution to substantiate their assertions that, indeed, they were in the farm together. It was his further argument that DW2 was the first person to discover that their cassavas were plucked but did not say that she saw anyone in the farm. He added that theft of cassavas was reported to the village chairman by DW2 but he was not called to testify, at least to clear doubt about who was at the farm. Mr. Tuthuru challenged the evidence of PW1 and PW4 for being contradictory when compared to the evidence of other witnesses. According to him, both PW1 and PW4 said that the deceased was attacked by the appellants and their fellows before the villagers could respond to the first appellant's alarm; while PW3 testified that, he was told that the villagers gathered after the alarm and they started beating the deceased. He condemned the High Court Judge for failure to assess the evidence properly and supported his argument with the case of *Michael John Kajelo v. Republic*, 2021 [TZCA] 487 (31 October 2024 TANZLI1). It was Mr. Tuthuru's contention that, PW1 and PW4 did not say whether they were in the same farm or different farms at the material time when the deceased was being attacked. In the circumstances, he insisted that there was a need of calling an independent witness to establish this fact. He urged us to draw an inference adverse to the prosecution for failure to call village chairman as an independent witness. Moreover, Mr. Tuthuru attacked the evidence of PW1 and PW4 in respect of the participation of each appellant in the commission of the offence they were charged with. He referred us to page 104 of the record of appeal where the High Court Judge made a finding that, the appellants did not cross examine PW1 and PW4 on the incriminating facts. According to him, failure to cross examine could not have some effect so long as the weaknesses of PW1 and PW4's evidence had already been shown. He urged us to make a finding that the first appellant conducted himself properly by sending his wife to the police to report the incident and remaining at the scene of crime guarding the stolen cassavas. In addition, he said, even the conduct of the second appellant was good as he responded to the alarm only to find that the deceased had already been killed. Since he was employed, the second appellant had to go back to work. Therefore, the appellants did not have malice aforethought. The deceased was killed by unknown people who were not properly identified, he insisted. He fortified his argument by the decision in *The Director of Public Prosecution v. Nyangeta Somba and 12 Others* [1993] T.L.R. 69. Finally, he urged us to allow the appeal, quash conviction, set aside the appellants' respective sentences and make an order releasing the appellants with an immediate effect. In reply, Ms. Naiman opposed the appeal. She argued that PW1 and PW4 were credible witnesses despite the fact that they are related. She referred us to page 44 of the record of appeal where PW1 testified that he saw Bahati, Kisika Omary, Juma Mweya, Mabura and Juma Dinga arriving at the deceased's home and Bahati claimed that her cassavas had been stolen and made a proposition that they should kill the deceased, which proposal was eventually, executed. Ms. Naiman added that, PW1 knew the appellants and his testimony which was corroborated by PW4's evidence was not shaken during cross-examination. According to Ms. Naiman, the evidence of PW1 and PW4 did not have any contradiction going to the root, as each of them explained the 8

participation of each appellant in attacking the deceased. As such, she said, the High Court tested the demeanor of those witnesses and found them to be trustworthy and their evidence was coherent. She cited the case of *Abel Orua Matiku & Others v. Republic*; 2020 [TZCA] 441 (21 February 2024 TANZLII). Regarding the complaint that PW1 and PW4 were relatives, Ms. Naiman argued that there is no law restricting relatives to testify and each witness deserves to be believed. She fortified her argument by the decision of the Court in *Goodluck Kyando v. Republic* [2006] T.L.R

363. In addition, she cited section 143 of the Evidence Act, Cap 6 while insisting that, it is not a number of witnesses which is required to prove a fact, but the weight of evidence. Based on that provision, she argued that, in the circumstances of the present case, there was no need of calling an independent witness because the witnesses paraded by the prosecution were credible and their evidence was sufficient to ground conviction. Ms. Naiman counter argued regarding the appellants' complaint that PW1 and PW4 did not state whether they were at the same farm or otherwise to the effect that, the record of appeal is very clear that they were in different farms. She referred us to page 44 of the record of appeal where PW1 stated that, he went to his farm and page 56 of the record where PW4 testified that, he was at the farm farming with his step mother @ mama Neema. The learned counsel stated that the evidence of those witnesses was not contradictory as each of them explained about where he was and what he saw. Besides, she said, their evidence was not shaken during cross-examination which means, it remained to be an established fact as decided in *Nyerere Nyague v. Republic*, 2010 [TZCA] 67 (21 May 2012 TANZUI). According to Ms. Naiman, the case of *Michael John Kajelo* cited by the counsel for the appellant is distinguishable from the circumstances of the present case because, the appellant in that case was not represented which is not the case in the present case. As such, she said, the counsel for the appellants ought to have cross-examined prosecution witnesses (PW1 and PW4). Regarding the claim that PW1 and PW2 said that the deceased died before the alarm, Ms. Naiman took this to be a minor contradiction as it did not go to the root of the matter. She cited the case of *Ex G. 2434 PC George v. Republic*, 2018 [TZCA] 8 (6 October 2022) in support of her argument. She insisted that, what was before the court was whether the deceased was killed and not when did people respond to the alarm. She urged us to make a finding that, minor contradictions in the prosecution case (if any) are due to lapse of time from when the 10 incident occurred (2019) to the time the prosecution witnesses were called to testify in 2022. The learned counsel supported the convictions of the appellants as she took the view that, mob justice is and has not been made a special circumstance to rescue a wrongdoer from liability. Her argument was backed up with the decision of the Court in *Enock Kipela v. Republic*, 1994 [TZCA] 150 (10 June 1999). According to Ms. Naiman, the appellants had common intention to kill the deceased as the second appellant cut the deceased on the chest with a machete and the first appellant set fire on him. Their actions proved that their intention was to kill him. The deceased died unnatural death. Looking at the circumstance of this case, she said, the part of the body where he was hit by machete, the force applied and the conducts of the appellants prove that they had malice aforethought. She recited the

case of Enock Kipela (supra). She urged us to make a similar finding as the High Court that, the charge against the appellants was proved beyond reasonable doubt and sustain their respective convictions and sentences. In a very brief rejoinder, Mr. Tuthuru submitted that the case of Enock Kipela (supra) cited by the counsel for the respondent is ii distinguishable from the present case. He reiterated that the appellants were not involved in killing the deceased. Having heard rival arguments by the counsel for the parties, considered the grounds of appeal and gone through the entire record of appeal, the main issues for our determination are; whether PW1 and PW4 were credible witnesses and whether the charge against the appellants was proved beyond reasonable doubt. In determining those issues, we shall be guided by the established principle that, in criminal law the burden of proof lies on the prosecution and it never shifts to the adverse party. Therefore, since the burden of proof was on the prosecution, assessment of credibility of prosecution witnesses, particularly of PW1 and PW4 is very vital. Being the first appellate Court in this case, we enjoy the luxury of evaluating the evidence in the form of rehearing. As intimated above, the appellants challenge credibility of prosecution witnesses. Before we go any further, we think, it is not insignificant to restate the law as regards credibility of witnesses. The law is settled that every witness is entitled to credence unless there are cogent reasons not to believe a witness - see: Goodluck Kyando's case (supra) cited to us by the counsel for the respondent. On appeal, like in the present case, the credibility of a witness can be gauged 12 through coherence and consistence of his testimony. In the case of Shabani Daudi v. Republic, 2000 [TZCA] 28 (11 March 2004) the Court dealt with an issue in relation to assessment of credibility of a witness and had this to say: "Credibility of a witness is the monopoly of the trial court but only in so far as demeanor is concerned. The credibility of the witness can also be determined in two other ways: One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses including that of the accused person." In a bid to prove the case against the present appellants, the prosecution paraded four witnesses including PW1 and PW4 whose evidence has been highly attacked by the appellants. We observe from page 106 of the record of appeal that the appellants challenged the evidence of PW1 and PW4 on account of the weapon used to attack the deceased. However, the trial High Court did not find any material contradictions. In the present appeal, the credibility of PW1 and PW4 has been challenged on account, first, that, PW1 and PW4 are relatives, so their evidence required corroboration from an independent witness. With IB respect, the relationship between witnesses is not among the criteria used to assess credibility of witnesses, but demeanor (as assessed by the trial court), coherence of his/her testimony and consideration of that testimony in relation to the evidence of other witnesses. Apart from that, there is no law in our jurisdiction which restricts relatives to testify. The law is settled on competence of witnesses to testify in court, that "every person is competent to testify" - see: section 127 of the Evidence Act, Cap. 6. As regards the argument that the evidence of PW1 and PW4 required corroboration from an independent witness, we wish to state that, corroboration of evidence is required to bridge a missing link in evidence. It has nothing to add to the doubted credibility of a witness. The question as to whether the evidence of PW1

and PW4 required corroboration from an independent witness should not consume much of our time. We thoroughly examined the record of appeal but did not find any missing link or material suggesting that PW1 and PW4 had agreed to testify against the appellants for whatever reason. We find that, the appellants' complaint in this respect, was a mere speculation which the Court cannot act upon. In the second contest, the counsel for the appellants claimed that the evidence of PW1 and PW4 was contradictory in the sense that those 14 witnesses testified that they were at the farm when the deceased was being attacked by the appellants, but did not state whether there were two different farms. Having perused the record of appeal, we agree with Ms. Naiman that the evidence of those two witnesses had nothing suggesting that they were working in the same farm. It should be noted that, the gist of the case was whether the appellants killed the deceased and not the location from which the observers observed the incident. With this common understanding, we still find that there was no material contradiction and / or uncertainty regarding the location from which the witnesses observed the incident. At page 44 of the record of appeal, PW1 testified as follows: "On 06/10/2019 it was Sunday around 06:00 hours I went to visit Shida Peter who was sick. Shida Peter was my brother; Having arrived at his home, I talked to Shida who told me that he was feeling pains in his legs, I stayed with him for a while and thereafter, I went to my nearby cassava farm. Around 08:00 hours, there came Bahati, Kisika Omary, Juma Mweya, Mabura and Juma Dinga. They came to Shida Peter's home." [Emphasis added]. At page 56 of the record of appeal PW4 testified to the effect that: 15 "My father died on day of October, 2019 around 09:00 hours. At that time we were farming in the shamba. I was farming with my step mother @ mama Neema/' [Emphasis added]. The excerpts above indicate clearly that each witness was in farm. Even if we take for the sake of argument that they were in the same shamba, nothing would hinder each of them to observe what he saw. With respect, we find the argument by the appellants' counsel weak and invalid. Another complaint by the appellants as presented by Mr. Tuthuru was that, the prosecution failed to prove that the appellants had common intention to kill the deceased. This argument was opposed by the counsel for the respondent. The record of appeal, particularly at pages 44 through 45 and 56 to 57 show the active participation of each appellant in attacking the deceased. Both of them searched the house of the deceased on allegation that, he stole cassavas; they dragged the deceased outside of his house after the first appellant had broken the door. While outside his house, the first appellant cut him with a machete on his chest. The second appellant set fire on the body of the deceased and he was burnt to death. Actions of the appellants, in our settled view, 16 showed that they had common intention to kill the deceased. This observation takes us to the last appellants' complaint that the prosecution case was not proved beyond reasonable doubt. As we intimated earlier, the appellants were charged with murder. Therefore, the prosecution was required to prove that the deceased suffered unnatural death and that the appellants were the ones who killed him with malice aforethought. There is no dispute between the parties that the deceased suffered unnatural death. The remaining questions are; whether the appellants were responsible for his death and whether they had malice aforethought in killing him. The question as to whether the

appellants killed the deceased was answered by the testimonies of PW1 and PW4, which we do not need to overemphasise. The question we are prepared to answer is whether the appellants killed the deceased with malice aforethought. Section 200 of the Penal Code provides for circumstances under which malice aforethought can be inferred. It reads: "200. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances- 17

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence/ ' Being guided by the provision of the law above and having considered the evidence on the record, we agree with the learned Judge of the High Court that, infliction of fatal blow by the second appellant and the ignition of fire on the deceased's body by the first appellant which led to the death of the deceased drew no other inference than malice aforethought of the appellants. The claim by the counsel for the appellants that the killing was executed under mob justice, in our view, does not hold water as the unlawful killing resulting from mob justice, may amount to murder where the intention to kill (as in the case at hand) is proved - see: Enock Kipela's case (supra). In the event, for the reasons stated, we dismiss the appeal in its entirety. DATED at MUSOMA this 14th day of March, 2025. I. H. JUMA CHIEF JUSTICE M. C. LEVIRA JUSTICE OF APPEAL B. S. MASOUD JUSTICE OF APPEAL The Judgment delivered this 14th day of March, 2025 in the presence of the 1st and 2nd Appellants in person - linked Via Video Conference from Musoma District Prison and Mr. Jonas Samwel Kivuyo, learned State Attorney for the respondent/Republic is hereby certified the original. SENIOR DEPUTY REGISTRAR COURT OF APPEAL 19

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/335019/source_file/39e2aedef2a80e6b/CRIMINAL_APPEAL_NO._154_OF_2022_KISIKA_OMARY__MGANYA__ANOTHER_VS_REPUBLIC.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/kisika-omary-mganya-v-the-republic-murder-tanzlii-2022--6a3ea52b3b1caa912982483d

Prepared on 13 October 2026 · Esheria