

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

**(CORAM: MWANDAMBO, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)**

**CRIMINAL APPEAL No. 397 OF 2020**

**TIPAI KILUSU LENDINI .....1<sup>ST</sup> APPELLANT**  
**PERIA MOLLEL TAYAI .....2<sup>ND</sup> APPELLANT**  
**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**(Appeal from the decision of the Resident Magistrate's Court of Moshi  
at Moshi)**

**(Massati, Ext Jur. J)**

**dated the 19<sup>th</sup> day of August, 2020**

**in**

**Extended Criminal Sessions Case No. 43 of 2019**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

15<sup>th</sup> & 20<sup>th</sup> March, 2024.

**MAIGE, J.A.:**

The appellants were tried by the resident magistrate court of Moshi with extended jurisdiction on an offence of murder contrary to section 196 of the Penal Code. It was asserted in the information that, on 5<sup>th</sup> January, 2015 at Chemka village within Hai District in Kilimanjaro Region, the appellants together with three other persons not parties to this appeal, murdered Mwengeti Rometi @ Laizer. At the end, they were convicted and sentenced to death by hanging each. Aggrieved, they have preferred this appeal.

The evidence on which the appellants were convicted came from John Romet Laizer (PW1), the deceased's half-brother, John Samwel Mwanasita (PW2), the rider of the deceased's motor cycle, E. 5519 D/C Rehani (PW3), the police officer who investigated the crime and Dr. Isaria Maruchu (PW4), the pathologist who examined the dead body of the deceased.

PW1 testified that the incident happened at Ngulu Juu village at a milling machine near the church. Soon before the incident, PW1 was at a grocery which was hardly 15 meters away from the scene of crime. While there, he saw the appellants and other three persons disembarking from a motorcycle (boda boda) and heading to the scene of crime where they assaulted the deceased using stones and clubs on different parts of his body until he fell down and lost consciousness. They also assaulted one Makoloo Serenda who attempted to rescue the deceased and disappeared.

PW2 testified that on the fateful day, he was asked by the deceased to drive him home on a motorcycle. As they reached at the scene of crime, he stopped to allow the deceased to collect some items from his friend. Having found his friend absent, he came back where the motorcycle was to proceed with the journey. Suddenly, Lutema appeared

and told the deceased "wewe unajifanya mjanja" meaning, "you pretend yourself to be clever" and eventually hit him with a club on his head. As the deceased was trying to defend himself, the first appellant came and assaulted him with a stick. Then came Morokotai who assaulted him with a stone on his head. Soon thereafter, some business ladies gathered at the scene of crime. They raised an alarm and a good number of people came. The deceased was rushed to hospital by Kaulo Lataro and Moono Laizer who were not called as witnesses. On the same day, the deceased passed away while at KCMC hospital. His dead body was examined by PW4 and it was established as per exhibit P2 that the cause of his death was *"acute respiratory arrest secondary to severe brain injury"*. PW3 went at the scene of crime the next day and upon investigation, he drew sketch map of the scene of crime (exhibit. P1).

In his defence, the first appellant denied commission of the offence. He said, he was arrested in November, 2016 at Mererani where he was incarcerated for two weeks on allegation that he was involved in minerals theft. He was subsequently conveyed to the Hai Police Station where he was linked with the murder in question.

Just as the first appellant, the second appellant disassociated himself with the murder in question. He said, on 28<sup>th</sup> December, 2014 he was informed by his younger brother that one of his cows was missing. On the same day, he went to the bush to search for his missing cow. It was not until on 8<sup>th</sup> January, 2015 when he recovered the same. On the same day and while he was still in the bush, he received another call from his younger brother informing him that the police were looking for him on accusation that he was involved in the murder of the deceased. He said, as he was innocent, he surrendered himself to the police on 10<sup>th</sup> January, 2015 where he was remanded and subsequently, charged with the offence.

In the memorandum of appeal, the appellants have enumerated nine grounds which in effect fault the trial court in holding that the case against them was proved beyond reasonable doubt.

The appeal was jointly prosecuted by a team of three learned advocates namely; Ms. Patricia Eric, Ms. Faygrace Sadallah and Ms. Lilian Didas. The respondent Republic enjoyed the services of Ms. Sabina Silayo, learned Senior State Attorney and Ms. Neema Moshi, learned State Attorney. They supported the appeal, however.

In her submission, Ms. Eric questioned the credibility of the prosecution evidence in the first place for being contradictory in material respects. She pinpointed three areas of contradictions in the evidence of PW1 and PW2. **First**, it is not consistent if the suspects were five or three. **Second**, the village in which the scene of crime is located is not the same in their evidence. **Third**, their evidence is inconsistent on whether there were people around the scene of crime. She submitted therefore that, as the said contradictions were not resolved by the trial court despite being material, they should be taken to have affected the credibility of the prosecution case. To cement her contention, she referred us to the case of **Noel Samwel v. R**, Criminal Appeal No. 418 of 2020 [2023] TZCA 17518 (TANZLII).

In the second place, Ms. Eric questioned the credibility of the prosecution case for failure to call materials witnesses. She mentioned the said materials witnesses as to include: Makoloo Sarenda who attempted to rescue the deceased; Moono Laizer and Mwingeti Laizer who took the deceased to hospital. Citing the case of **Kassim Arim @ Mbawala v. R**, Criminal Appeal No. 607 of 2021 [2022] TZCA 645 (TANZLII), she urged us to draw adverse inference against the prosecution for such failure.

In the third place, she criticised the trial magistrate for not resolving the unreasonable delay of the prosecution to arrest the appellants. She submitted that, while the incident happened on 5<sup>th</sup> January, 2015, the second appellant was arrested on 9<sup>th</sup> November, 2016. There was an interval of one year in between and it was not justified in evidence. She submitted therefore that, such unexplainable delay casts a reasonable doubt if the appellants were arrested on the basis of the alleged recognition by PW1 and PW2. She, therefore, urged us to hold that the case was not proved beyond reasonable doubt and, therefore, set the appellants free.

On her part, Ms. Silayo was in agreement with the appellants and their counsel that, in view of the apparent contradictions in the prosecution case and failure to call material witnesses, the case was not proved beyond reasonable doubt and, the appellants ought to have been acquitted. She conceded that the case was improperly investigated and that is why the prosecution case is silent on the date the incident was reported, when the appellants were arrested and by whom were they arrested. She prayed, therefore that, the appeal should be allowed.

Having appraised the evidence in its totality and attentive to the concurrent submissions by the counsel, we are in agreement with them that the case was not proved beyond reasonable doubt. We proceed hereinafter to justify our decision.

Our starting point is the evidence of PW1 and PW2 who were eye-witnesses. Both of them were close relatives of the deceased. PW1 was his half-brother whereas PW2 his servant. PW2 was with the deceased when the incident was happening and PW1 was just 15 meters from the scene of crime. Their evidence suggests that when the deceased was being assaulted, they were there just watching what was going on. It was after some business ladies had raised alarms that they, together with other members of the public, rushed to the scene of crime. PW1 was cross examined on this and said at page 61 of the record, "*when I heard the scream from the women, I run to rescue but the group of people caught me.*" It is not known in evidence why did the people decide to hold him while he was not connected with the incident. In view of their close relationship with the deceased, it leaves, in our view, much to be desired how possible would the two stand watching their relative being murdered and come in for assistance after an alarm had been raised by some strangers.

That aside, as submitted for the appellants, their evidence was also not consistent. It is not clear whether the suspects were three as per the evidence of PW2 or six as per the evidence of PW2. Besides, whereas in accordance with the evidence of PW1 appearing at page 59 of the record, there were many people around the area when the incident was happening, PW2 says at page 66 of the record:

*"There was nobody else around the area. By that time, there were no people at the machine , the person from the machine left and came after the fight".*

There is also a discrepancy as to the location of the scene of the crime. The information at page 48 of the record asserts that it was Chemka village. Conversely, neither of two witnesses gave evidence to that effect. PW1 claims at page 58 of the record that it was Ngulu Juu village whereas PW2 suggests that it was Tindigani village. There was no evidential clarification of the discrepancy. That aside, no attempt was made by the trial magistrate to address and resolve the same. Yet, she believed the evidence to be credible. With respect, she was not correct. Before jumping to such a conclusion, she was obliged to address the existing contradictions and satisfy herself if they did not affect the substantial credibility of the prosecution case. This position was stated in



the case of **Mohamed Said Matula v. R** [1995] T.L.R. 3 and restated in, among others, the case of **Noel Samwel v. R** (supra) relied upon by the counsel for the appellants in the following words:

*"It is trite law that, where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the discrepancies and try to resolve them and where possible decide whether the inconsistencies and contradictions are minor or whether they go to the root of the matter".*

Applying the above principle and having satisfied ourselves that the contradictions were not immaterial, we are of the view that they have affected the credibility of the prosecution.

We now consider the issue of failure to produce material witnesses. The position of the law on that aspect is settled. It is to the effect that such failure unless justified, may lead to an adverse inference being drawn against the prosecution case. For instance, in **Aziz Abdallah v. R.** [1991] T.L.R. 71, it was stated:

*"The general and well-known rule is that the prosecutor is under prima facie duty to call those witnesses who from their connection with the transaction in question are able to testify on*

*materials facts. If such witnesses are within the reach but are not called without sufficient reason, the court may draw an inference adverse to the prosecution”.*

In his evidence, PW2 names a young person called Makoloo Serenda to have attempted to rescue the deceased after the business ladies had raised alarms. We wonder such a key witness was, for undisclosed reasons, not called. The two persons who took the deceased from the scene of the crime to hospital namely; Kaula Lataro and Moono Laizer were also material witnesses. Again, for undisclosed reasons, they were not called as witnesses. We agree with both counsel that, had the trial magistrate carefully examined the evidence, she would have drawn an inference adverse to the prosecution evidence for such failure.

We proceed with the issue of the delay to arrest the appellants. The law in that respect is that, unexplainable delay to arrest a known suspect casts doubt on the prosecution case. See for instance, **Ibrahim Shabani and Shabani Ally Kalulu v. R**, Criminal Appeal No. 110 of 2002, **Athuman @ Buyongera v. R**, Criminal Appeal No. 222 of 1994 and **Juma Shabani @ Juma v. R**, Criminal Appeal No. 168 of 2004 (all unreported). Indeed, in the latter case, the Court observed:

*"In this case the issue pertaining to unexplainable delay in arresting the appellant was not addressed by the trial magistrate and the learned judge on appeal as well. It is an important aspect which if not resolved casts doubt on the veracity of the witnesses".*

In this case, the prosecution evidence is completely silent on the date of the arrest of the appellants. It does not speak as to who arrested them and whether their arrest was related to any earlier disclosure of their names as suspects. Their dates of arrest can only be found in their evidence in defence. The evidence of the second appellant for instance, suggests that he was arrested after a lapse of a year. No explanations from the prosecution for such unusual delay. Surprisingly, the trial magistrate believed the evidence of PW1 and PW2 without saying even a word on the delay. In our view, if she had applied the principle in the case just referred, we have no doubt that, she would not, as she did, arrived to the conclusion that the case was proved beyond reasonable doubt.

In our view, the gaps above highlighted, in their totality, cast a reasonable doubt on the prosecution case which should have been applied to the benefit of the appellants.

In the final result and for the foregoing reasons, the appeal is allowed, conviction quashed and sentence set aside. The appellants are to be set at liberty forthwith, unless otherwise lawfully held.

**DATED at MOSHI** this 20<sup>th</sup> day of March, 2024

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

The Judgment delivered this 20<sup>th</sup> day of March, 2024 in the presence of appellants in person, Ms. Lilian Didas Mushi, learned advocate for the appellants and Ms. Bertina Tarimo, learned State Attorney for the respondent - Republic, is hereby certified as a true copy of the original.



W. A. HAMZA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**