

IN THE HIGH COURT OF TANZANIA

AT MOROGORO

CRIMINAL SESSION CASE NO. 9 OF 2001

REPUBLIC

VERSUS

JUMA HEMED ABDALLAH

JUDGEMENT

SHANGALI, J.

The accused in this case Juma Hemedi Abdallah stands charged with the offence of murder contrary to section 196 of the Penal Code. It has been alleged by the Republic that on or about 3rd day of May, 1999 along Madizini Road at Lusanga area, Turiani Division in Morogoro District and Region did murder one Hadija Mohamed.

The Accused categorically denied the truth of the offence. In its endeavour to prove its case against the accused, the Republic, advocated by the Learned State Attorney, Mr. Kameya called seven witnesses and produced two statements of the witnesses who were unable to be traced and a good number of exhibits. The defence side was marshalled by the Learned Advocate Mr. Mbezi, who elected to give a sworn defence by the accused with no additional witness to call.

At the Preliminary Hearing conducted on 25.4.2001 it was agreed as matters not in dispute by both parties that, the deceased in this case Hadija Mohamed is actually dead; and that she died unnatural death. Also it was resolved that the accused who is the ex-husband of the deceased was arrested as a suspect in connection with the death of the deceased. At the same preliminary hearing the sketch plan of the scene of crime was admitted as exhibit P1 while the Post Mortem Report was admitted as exhibit P2. Other matters which became apparent during the trial include the fact that the accused and deceased were husband and wife since 1998, living at Lusanga until early 1999 when their marriage climbed rocks and came to end. The accused finalized that end of the marriage when he issued a 'talak' to the deceased and escorted her to her parents at Dihanda Village. During that short period of their cohabitation as husband and wife they were not blessed with any sibling. It is not irrelevant to mention here that the accused was a polygamist with three wives.

It is also common that even after the breakdown of their marriage, the relationship between the accused's family and deceased family continued to be cordial.

During the trial it was also not in dispute that on 7.5.99 the body of the deceased was discovered in the sugar plantation by the owner of the farm along Madizini Road. Accordingly he reported the matter at police station and among the first official people to visit the scene of crime were PW6, Detective Station Sergeant Rajabu and PW4, the doctor who performed autopsy and prepared a post mortem report.

On that date several villagers were already gathered at the scene to witness the body and among them were Rehema Mohamed; the physical sister of the deceased and one Ngeti the husband of Rehema. Rehema Mohamed was able to identify the body of the deceased. Apparently, the prosecution was not able to trace Rehema Mohamed to testify in Court and instead they produced her

statement under section 34(A) of the Evidence Act 1967. The same was marked exhibit P7.

In the investigation several relatives of the deceased and villagers were questioned about the movement of the deceased. The evidence of PW1, the mother of the deceased and the statement of Rehema Mohamedi (exhibit P7) revealed that the relationship between the accused and deceased did not come to end following the divorce. The accused continued to visit and talk to the deceased while on his way to his farm at 'Kwankusu'.

The basic issue in this case is whether it is the accused who killed the deceased. It is common ground again that there was no body who saw the tragic incident. The prosecution is depending wholly on circumstantial evidence beginning with the last person to be seen with the deceased embedded with other incriminating factors. Was the accused person the last to be seen with the deceased? Let us see the evidence.

PW1 testified that on the material day the accused visited their homestead in the evening from his farm at about 5.30 pm wearing a trouser and a shirt. Then he (accused) called the deceased aside and had a talk with her for a while. Thereafter the deceased inform PW1 and those who were present at home that she has decided to revive her marriage with accused and live together again. Therefore accused was taking her to Madizini B Village to rent her a room. PW1 testified that, there and then deceased left with accused riding on the accused's bicycle. PW1 further stated that at that material time Rehema Mohamed was not present at home but busy in her hotel situated within the village but along the road to Turiani.

PW1 deponed that after several days she received information that there was a dead body of a woman discovered in the sugar plantation at Madizini area. She stated that she was not worried with the rumours because she was sure that her daughter, the deceased had gone away with the accused. However she later decided to send her daughter Rehema Mohamed and one Twaha Ngeti to go and witness the body. PW1 said that when they returned she was informed that it was the dead body of her daughter Hadija Mohamed.

In her statement, Rehema Mohamed, the physical sister of the deceased stated that she was at home on 3.5.99 and that the accused visited their homestead in the morning and found the deceased in her daily chores, to wit backing cakes. Then the accused called the deceased aside and as usual had a short talk. After that the accused went away. Rehema stated that deceased informed her that they (deceased and accused) have agreed to go to Lusanga to arrange for the revival of their marriage and a place to reside together thereafter. Rehema in her statement indicate that at about 3 pm on the sameday the deceased went to Lusanga and reached there safely because she (deceased) was able to visit their sister called Tabia who is married at Lusanga and that, deceased promised Tabia that she would visit their aunt called Mandalo before going to meet the accused.

Rehema stated that on 7.5.1999, following rumours that there was a dead body of a woman discovered in the sugar plantation she was requested by her mother PW1 to go and witness the body. Rehema stated that on reaching at the scene she discovered that it was the body of her sister Hadija Mohamed. Rehema was able to identify the body to the police officer (PW6) and the doctor (PW4). Also she was able to identify traditional waist beads, a purple under wear and a red underskirt, Exhibit P4 as her sister's belongings. She also identified one red sandal Exhibit P5 which was found at the scene of crime as the property of the accused person.

The testimony of the PW2, who is the neighbour to the accused person at Lusanga is to the effect that in the night of 3.5.99 at about 11.00pm the wife of the accused namely Mwajuma Hatibu visited him and informed him that the accused has been seriously injured by the bandits. Immediately PW2 proceeded to see the accused and found him seriously injured and in agony. The accused was able to explain to PW2 how he was attacked by bandits who were attempting to steal timber from the shamba. PW2 testified that at that time the accused was very dirty with black mud all over his body and was wearing a big short and a shirt. That, the accused had fresh wounds on the chest, hand and at the back. PW2 stated that he then, reported the matter to the village chairman PW5 who also visited the accused in the same night. On seeing the condition of the accused PW5 decided to prepare an introductory letter to the police station to enable the accused to get pF3. PW2 testified that the accused refused to go to hospital and opted to use his own medicine. Since it was in the night PW2 and PW5 retired to their houses to sleep.

However, in the far night at about 2.00 am, the wife of the accused called again at the house of PW2 and informed him that the condition of the accused was deteriorating. Without much ado, PW2 rushed again to the house of the accused and on seeing his situation he proceeded again to the Chairman PW5. Obvious, PW5 was not happy with the situation because it was the accused who refused to go to the hospital. Therefore PW5 told PW2 to take the accused to his house. PW2 complied and took the accused to the house of the chairman. The chairman issued an introductory letter to the Lukenge Police Station – Mtibwa. PW2 testified that in the same night he escorted the accused and his wife to the police station but on the way the accused opted to report at Turiani Police Station instead of Lukenge Police Station. At the police station the accused was duly issued with PF3 and went to Bwagala Mission Hospital.

The evidence of PW5 is not far from the evidence of PW2. The witness narrated how PW2 visited him in that night and eventually issued an introductory letter to the Lukengo Police Station, Mtibwa. He stated that the accused was seriously wounded and he was bleeding. PW5 testified that he questioned the accused and accused complained that he was attacked by the bandits who overpowered him and managed to go away with his bicycle; and that he was not able to identify the bandits. Witness deponed that the accused refused to go to the hospital in the first instance claiming that he would use his medicine because he had a small medicine shop. PW5 stated that in the following morning he went to see the accused and find him already treated.

The other portion of the evidence relates to the discovery of the body and events thereafter. As I have pointed out above, the body of the deceased was discovered by one Isaack Mboya, in his sugar plantation on 7.5.99. Accordingly, he rushed to the police station and led PW6, Detective Station Sergeant Rajabu and Doctor Kiwonyi to the scene of crime. PW6 testified that on reaching at the scene they found a decomposed body of the deceased with a big stab wound on her abdomen. The body was naked with only underwear and traditional beads around the waist. Beside the body were one red underskirt; one red sandal (lapa) and two unused condoms. PW6 stated that the environment of the area indicated that there was a big struggle or fight before the death of the deceased.

At that time among the people already at the scene was Rehema who identified the body, exhibit P4 and P5.

The post mortem report prepared by PW4 was duly adopted during the Preliminary hearing as an issue not in dispute. However, in his testimony P4 stated that according to his examination on the body of the deceased. There was no clue that the deceased was raped or sexually assaulted. He went

further and said that the condoms which were beside the body of the deceased were unused.

Another testimony in this case is that of PW7. Private Constable Abdul, who testified that on 7.5.99 he arrested the accused while nursing his wounds at his home in the presence of his village chairman, PW5. He testified that in further investigation on 13.5.99 they went to the house of the accused with the accused to search for the clothes which he was wearing on 3.5.99. PW5 stated that when they questioned the accused at the police station about his clothes, the accused told them that the clothes were in his house. PW7 stated that on reaching at the village PW5 was called to witness the search and present was also the wife of the accused Mwajuma Hatibu. PW5 stated that after a thorough search the clothes, a short, whitish in colour and a shirt, maroon in colour were discovered slotted in the latrine pit. Then they were retrieved from therein and since they were very dirty with urine and faeces they (PW7 and others) decided to wash them hence exhibit P8. In the cross – examination the witness said that the clothes must have been slotted in the latrine pit between 3.5.99 and 13.5.99. He also admitted that the accused was in custody since 7.5.99 when he was arrested.

Then we have the evidence of PW3 a clinical officer from Turiani Dispensary. She testified to the effect that on 19.5.99 she was requested by the police to examine the accused person on two issues namely, one whether the accused was sane and two, whether he had wounds on his body and what were the causes of those wounds. PW3 stated that she discovered that the accused had several wounds on his left and right side of the chest and arm caused by human teeth bites. She stated that they were round teeth formula bite marks inflicted by human being. In a vervely cross examination by Mr. Mbezi, Counsel for defence side PW3 admitted that some marks on the body of the accused were bruises and scratches (michubuko). When the witness was shown the

chest of the accused in Court in order to pin point the wounds or marks she replied that there were none because they have disappeared due to the lapse of time. However, PW3 admitted that she was talking about the scars and not wounds. She also admitted that on the chest of the accused there are other scars which were not inflicted by human teeth because they are big. Eventually she admitted that the scars appearing on the chest and the hand of the accused have been caused by a knife or any other sharp instrument. PW3 also conceded that according to the police request in PF3 (exhibit P3) she was supposed to examine the accused on all wounds and scars on his body but instead she dealt only with teeth bite marks.

Before we evaluate the evidence in its totality, let us see what was the accused's defence. In his sworn defence the accused stated that on 3.5.99 in the morning he was at his house at Lusanga. Then he loaded his maize flour and beans on his bicycle for his shamba workers at Dihimba Masimbani or Kwenkusu area. He stated that on that date he was wearing a big khaki short, a maroon shirt and sports shoes (raba). Accused stated that he stayed in his shamba until 6.00pm and then started his journey back home riding on his bicycle. When he reached at Lusungulu area he was ambushed by three bandits. The accused stated that he tried to fight them but the bandits stabbed him with a knife on his chest, overpowered him and disappeared in the sugar plantation with his bicycle. Accused testified that he was seriously injured on his chest and left hand. Then he decided to go straight home and after informing his wife on what had happened to him, he directed her to rush and call their neighbour PW2. Accused testified that when PW2 arrived he narrated to him on what happened and showed him all the wounds and after that he requested him (PW2) to approach the village chairman (PW5) for an introductory letter to police station in order to get PF3. Accused deposed that later PW5 arrived with PW2 and he told him what happened and requested for an introductory letter to police. Accused further deposed that since he divorced the deceased he has never visited her

and that the evidence of PW1 and Rehema Mohamed contradicts each other because they were not telling the truth.

It was also the defence of the accused that the red sandal found at the scene of crime does not belong to him because his sandals are yellow in colour and on the alleged day he was not wearing sandals. Accused stated that when he was arrested he was sure that his clothes were in his house and probably already washed by his wife. He categorically denied exhibit P8 to be his clothes. He stated that his clothes were almost new; the shirt colour was shining and the short had no patches. The accused denied to have ever slotted clothes in the latrine pit.

In the cross examination the accused stated that part of reasons for the breakdown of their marriage was the habit of the deceased of using contraceptives and being fond of leisure life without working.

In a nutshell, that is the evidence of the prosecution and defence. Before I proceeded I must point out here that during the trial the prosecution prayed to produce a statement of one witness, Mwajuma Hatibu who was not able to be traced under S.34 A of the Evidence Act 1967. That application was granted. However during the defence it was apparent that the said Mwajuma Hatibu is still a lawful wife of the accused. In that situation I directed both counsels to address the court in their final submissions on the propriety or/and admissibility of that statement in view of section 130 of the Evidence Act; In their submissions both counsels admitted that according to the stance of the law the wife is a competent witness but not compellable witness. I agree with the counsels and for the same reasons I refrain myself from using exhibit P6 in the determination of this case.

As I have said, this is a case depending wholly on circumstantial evidence and as we know the circumstantial evidence is the evidence which when interpreted or looked upon does not suggest or create two or more reasonable conclusions. Its interpretation must conclude or lead within the same chain of events to one point that the accused is guilty. Now, from the evidence we have on the record can we say, with certainty that there is enough circumstantial evidence to convict the accused person as charged. When I was summing – up the case to the ladies assessors I reminded them about that requirements of law. After my summing – up the ladies assessors unanimously supported the prosecution case and opined that the accused is guilty as charged. Let us now discuss and evaluate the evidence with the assistance from the Counsels submissions.

Mr. Mbezi, the Learned Advocate for the accused submitted that PW1's evidence was purporting to build the case that since the last person to be seen with deceased is the accused and since the accused sandal was found at the scene of crime, then it was the accused who killed the deceased. Mr. Mbezi submitted that, leave along the contradictions in the evidence of PW1 and Rehema Mohamed, any person could acquire or own such a sandal even if it is red or repaired. He stated that when he cross-examined PW6 on the same sandal, the witness admitted that any person may own such a sandal. On the same evidence of PW1 the counsel submitted that on that day the accused was wearing a short and a shirt and not trouser as claimed by PW1. Mr. Mbezi submitted that in her statement, Rehema stated clearly that the deceased left home and went to Lusanga at 3.00 pm and in actual of fact she was able to reach Lusanga safely because she was able to contact her sister Tabia and her aunt Mandalo. On the otherside Mr. Kameya, the Learned State Attorney submitted that there is evidence to show that the accused had a habit of visiting the deceased as shown by PW1 and the statement of Rehema and that on the material day accused visited the deceased and left with her. Mr. Kameya, half

heartedly admitted that there are contradictions in the testimonies of PW1 and Rehema but insisted that they are minor contradictions.

With due respect to the Learned State Attorney the contradictions in the testimonies of PW1 and Rehema are serious for a case depending on circumstantial evidence. They are contradictions which goes to the roots of the facts to be proved. For instance, while PW1 said the accused visited them in the evening; Rehema said it was in the morning. While PW1 said the accused left with the deceased at 5.30 pm in the evening Rehema said the deceased left alone at 3.00pm and while PW1 said the accused was wearing a trouser, and a shirt, Rehema said he was wearing a short and shirt. The question is between these two witnesses, a mother and a daughter, who saw what? Such material discrepancies and contradictions must be resolved in favour of the accused's story that he never visited the homestead of the PW1 on the alleged day.

Another question is whether the sandal (exhibit 5) found at the scene of crime belongs to the accused person. Mr. Kameya, the Learned State Attorney submitted that taking into consideration the good relationship between the accused and his in-law particularly PW1 there was no reason for PW1 and Rehema to insist that the sandal belongs to the accused. The question is whether that one red sandal is the only red sandal of its description in Lusanga and Dihinda Villages. Good relations notwithstanding, it is not sufficient for PW1 and Rehema, the close relatives of the deceased to say the sandal belong to the accused without cogent proof. When that sandal was produced as exhibit, PW6, correctly admitted that any other person could own such a sandal. It means therefore the evidence on the ownership of the sandal has more than two explanations hence unsafe to rely in building circumstantial evidence.

Another interesting aspect in this case is the issue of two unused condoms found at the scene of crime. Mr. Kameya, the Learned State Attorney submitted

that the unused condoms found close to the body of the deceased could have been planted by the accused in order to mislead people and investigators that the deceased was raped or sexually abused. With due respect, I find this inference to be a bit far fetched. There is no scintilla of evidence to show that the two condoms belonged to the accused or the accused was seen at the scene of crime. Mr. Mbezi correctly submitted that the two condoms may belong to either the deceased or her assailants. In addition PW4 testified that the deceased was not raped or sexually assaulted and the two condoms were unused. Fine, but how can we rule out a possibility of attempted rape which failed due to the stoutness and braveness of the deceased and the assailants end up with severally stabbing her on her abdomen.

On another issue, PW2 and PW5 testified that the introductory letter was addressed to Lukenge Police Station at Mtibwa, but the accused decided to go to Turiani Police station where he was duly issued with PF3 and went for treatment at Bwagala Mission Hospital. Mr. Kameya, the Learned State Attorney submitted that the accused decided to go to Turiani Police Station which is far because he was dodging the road to Lukenge Police which passes at the scene of crime within Madizini Village. Mr. Mbezi, the Learned Advocate contended that it is not true that the road to Mtibwa cross Madizini B Village; and even if that road cross Madizini Village, the body of the deceased was not found on the road. He submitted that if the body of the deceased was on the road or beside the road, the roadusers could have discovered it earlier. Instead the body of deceased was discovered inside the sugar plantation by the owner of the farm already decomposed. I agree with Mr. Mbezi's submission and may add that there was no evidence adduced to verify the distance between Lusanga and Mtibwa or Turiani Police Stations. In his defence the accused stated that his introductory letter was not addressed to any particular police station, otherwise the prosecution would have produced it as exhibit to prove that fact.

Another intriguing issue in this case is that of clothes found slotted in the latrine pit. We have been told by PW7 and PW2 that the clothes of the accused were found slotted in the latrine pit. The question is whether it was the accused who slotted the clothes in the latrine pit in his bid to conceal the evidence. In his submission, Mr. Kameya, the Learned State Attorney submitted that it was the accused who slotted his clothes in the latrine pit to conceal evidence, and that even if they were slotted therein by the accused's wife, the fact remains the same that she was doing so in order to cover-up her husband.

Mr. Mbezi, the Learned Advocate submitted that the clothes could have been slotted in the latrine by anybody else than the accused because the accused was in custody since 7.5.99 and PW7 admitted that the clothes could have been slotted in the latrine between 3.5.99 and 13.5.99. He said, the accused was pretty sure that his clothes were at home and that is why he led the police. Mr. Mbezi stated that there is a possibility that it was the accused's wife who slotted the clothes in the latrine pit out of panic after realizing upon rumours in the village that her husband was in trouble for murder. However, Mr. Mbezi contended that the accused's wife panic after and conducts does not prove that it was the accused who killed the deceased.

On the other hand there was another issue of the identification of the said clothes. When the accused was shown the clothes in court exhibit P8 he denied them to be his exact clothes which he had left at his house. Even the prosecution witness (PW5) who witnessed the fishing of the clothes from the latrine pit identified exhibit P8 with much hesitation by saying;

"The shirt resembles but it seems very old.
The short has several patches and I am not
Sure these clothes to be exact, but they
Resemble"

All in all, whether the clothes which were fished from the latrine pit were that of the accused or not, the point remain the same that some clothes and possibly exhibit p8 was fished from the Latrine pit. I have carefully considered the evidence and submissions from counsels and I am convinced that there was a possibility for the wife of the accused to slot the clothes in the latrine out of sheer stupidity thinking that she was covering her husband from the consequences of killing a person following the rumours and events in their village. Mr. Mbezi, correctly said that such conducts of the wife of the accused does not prove that the accused killed the deceased. I am aware this issue of slotting clothes in the latrine pit, in the absence of clear explanations could raise suspicion, but it has been emphasized in the case laws, time and again that suspicion alone, however grave it may be, cannot be a ground for conviction- see *Benedict Ajetu v R.* (1983) TLR 190.

Let me now embark on the issue of human teeth bite marks said to have been found on the body of the accused by PW3, the clinical officer. From this evidence the prosecution was purporting to show that the accused was severely bitten by the deceased during their encounter. However, when PW3 was cross examined by the defence counsel on her examination and report, the witness scrambled and fumbled. She was shown the chest of the accused in order to pin point the scars or marks caused by human teeth but end up saying the scars has disappeared because of lapse of time. In her report she failed to show other big and obvious scars on the chest and the left hand of the accused which she admitted to have been caused by knife or any other sharp instrument. Even PW2 who claimed to have seen such teeth marks on the body of the accused ended up saying he was telling about teeth marks because everybody else was talking about it.

Mr. Mbezi, the learned advocate for the accused, correctly criticized the evidence and report of PW3 for being unprofessional, biased and untruthful. The accused denied categorically to have been bitten by anyone and instead that his injuries were caused by the bandits who robbed him.

At this point let me say something about the defence of the accused person. To say the least the defence of the accused is impressive. The accused person informed the village authorities and the police that he was attacked and robbed his bicycle by the bandits. Surprisingly, his case was never investigated to establish the truth of that incident. When PW6, Detective Station Sergeant, Rajabu was questioned on why they failed or neglected to investigate the accused's incident he replied that the accused failed to mention his assailants. But, is it true that the police conducts investigation only in the cases where the victims have been able to identify their assailants? In my careful examination of the defence case I have found it somehow to outweigh the prosecution case. All the pieces of circumstantial evidence intended to build a prosecution case has several explanations and has no proper linkage between the events to conclude that the accused committed the offence. In other words the accused story sounds reasonably probable in all the circumstances surrounding the case.

In the final analysis I concur with Mr. Mbezi when he submitted that in general there is no sufficient circumstantial evidence to prove to the required standard that the accused committed the alleged offence. The counsel, correctly cited the case of Ally Bakari and Pilly Bakari Vs. R. (1992) TLR – 10 where it was held by the Court of Appeal of Tanzania that:

"Where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly

connected with that facts from which the inference is to be inferred”.

Pertinent to the requirements of the law, circumstantial evidence must irresistibly point to the guilty of the accused; be incapable of any other explanation and on top there should not be coexisted factors to weaken or destroy that inference of guilty. The prosecution evidence in this case has failed to meet that standard.

It is on the basis of the foregoing that I respectfully part company with the opinion of the ladies assessors. I am satisfied that the prosecution side has failed to prove its case beyond reasonable doubts that it is the accused person who killed the deceased. In the final analysis, I hereby acquit the accused. He is to be released and set free forthwith, unless otherwise lawfully held.

It is so ordered.

M.S. SHANGALI

JUDGE

21.5.04

Court: Right of appeal explained.

M.S. SHANGALI

JUDGE

21.5.04

Judgement delivered in the presence of Mr. Mapinduzi State Attorney and Mr. Mbezi, Learned Advocate for the accused today 21st May 2004.

M.S. SHANGALI

JUDGE

21.5.04

Court: Ladies assessors thanks and discharged.



M.S. SHANGALI

JUDGE

21.5.04