

IN THE HIGH COURT OF TANZANIA
AT MWARA.
ORIGINAL JURISDICTION
CRIMINAL SESSION CASE NO. 28/2005

THE REPUBLIC
VERSUS
MUSSA KAMFUMA

DATE OF LAST ORDER: 11/10/2006

DATE OF RULING: 20/10/2006

RULING

SHANGILI, J.

The accused in this case, namely MUSSA KAMFUMA, a young man of 31 years now stand charged with the offence of Murder contrary to Section 196 of the Penal Code. It has been alleged that on or about 9th September, 2003 at MITENE, Tandahimba District did murder one HAMISI HASSAN MNETE. The accused has categorically denied the charge laid at his door.

During the preliminary hearing conducted on 15th May 2006, the following matters were agreed by the prosecution and defence sides as matters not in dispute.

1. That the deceased Hamisi Hassan Mnete is dead.
2. That the cause of death was not natural.
3. That the Death was as shown in the exhibit P2, the postmortem examination report.
4. That the accused was arrested and charged for murder.
5. The accused deny all other facts.

The trial of the case commenced on 10 October 2006 and the prosecution side led by Ms. Shio, Learned State Attorney managed to call four prosecution witnesses to establish and prove their case. After reception of their evidence on the same date the Learned State Attorney closed the prosecution

case. Mr. Mlanzi, Learned Advocate for the defence requested the court to make submission under section 293 (1) of the Criminal Procedure Act, 1985 to establish that there was no sufficient evidence against the accused to warrant him to make his defence on the charge laid against him or any other offence as provided under the said section.

Therefore this ruling is on the determination of the submission made by the Learned counsels under section 293(1) of the Criminal Procedure Act, 1985 as amended by Act No. 13 of 1988.

To put the matter abreast, let me, albeit briefly recapitulate the available prosecution evidence starting with PW1, YAHAYA SAIDI PAYA, who was the village Executive Officer (VEO) during the incident. According to his evidence on 9/9/2003 he received a letter from his fellow VEO of a neighbouring Diluma village. That letter was brought by one YUSUFU ALLY MARTINI. The letter requested him (PW1) to investigate and inquire within his jurisdiction about the stolen sheep belonging to the bearer^{of} the letter YUSUFU ALLY MARTINI. The said sheep was stolen at Diluma village.

While PW1 was conducting his investigation Yusufu Ally Martini, the complainant approached him at around 7 pm on the same date and demanded for his letter claiming to have decided to return it back to the VEO-Diluma. He was given the letter. According to the evidence of PW1, later on, one ISSA NALINGA and his son MAMLO ISSA visited him (PW1) and informed him that his son-in-law HAMISI MNETE (deceased) has been arrested and taken away by youth from Diluma village and that one of the youth who arrested him was Yusufu Ally Martini. PW1 was also informed that the person who witnessed the arrest is the wife of the deceased (PW2). Then PW1 summoned PW2 and questioned her about the incidence. PW2 narrated the whole story saying that her husband was arrested and taken away by a group of five youths whom she could identify. She also claimed that her ten cell leader called HAMISI ISSA CHILOWE is able to know the youths because prior to the incidence the said youths were at his house. PW1 decided to summon the said HAMISI ISSA CHILOWE and questioned him. PW1 claimed that HAMISI ISSA CHILOWE revealed to him that the deceased was abducted by five youths from Diluma village namely; YUSUFU ALLY MARTINI, ALLY MAKOVU, CHIHEKENGE,

Then PW1 inquired on whether the deceased was taken to the Police Station at Mahuta and discovered that the deceased was not taken to the Police Station and was nowhere to be traced. On the second day 10/9/2003 the ^{search} of the deceased continued and PW1 issued a letter with the names of the suspects (mentioned by Chilowe) to the village militiamen in order to arrest them. On the same day the accused Mussa Kamfuma was arrested at Diluma village and taken to Minete village where he was identified by PW2 as one of the youths who arrested the deceased. The accused was taken to the Police Station at Mahuta.

PW1 informed this court that later in the day the body of the deceased was discovered in the farm of one SEIF BAKARI by the searching party. On 11/9/2003 the Police started investigation and Postmortem examination was conducted.

According to the evidence of PW2, HALIMA ISSA NALINGA, on 9/9/2003 at about 6.00 pm she was at home, at their house verandor with her husband; the deceased. It was raining. Suddenlly she saw a certain youth running towards their house. The youth approached them and greeted her and there and then the other four youths advanced and joined the first youth and told the deceased that he was under arrest for stealing a sheep. PW2 complained that the youths started to beat-up the deceased while the first youth questioned her on whether the deceased went out of the house in the previous night. Then the youths dragged the deceased away while beating him. PW2 informed the court that it was her first time to see those youths. She admitted that on that day it was not very dark. She also complained that when the deceased was being beaten and dragged away by the thungs there were people watching from the house of the ten cell leader CHILOWE without giving any assistance, seeing that situation PW2 rushed to inform her father ISSA NALINGA and later the matter was reported to the VEO (PW1).

PW2 informed the court that when the accused was later arrested she was able to identify him at the Office of VEO despite of the fact that there were a lot of people at the Office of PW1. She stated:

that after the identification the accused was taken to the Police station and later the body of the deceased was discovered in the farm/ on 10/9/2003.

PW3, ABDALLAH MNETE, the deceased's uncle testified to the effect that he received the report of the abduction of the deceased on 10/9/2003 and that he was one of the villagers who proceeded to Diluma village to arrest the alleged youths. He claimed that when he reached at the Office of the VEO-Diluma the names of the youths were mentioned out and the search ensued. He stated that they were able to arrest the accused person only and took him to the Office of VEO-Minete where he was identified by PW2 and taken to the Police station. PW3 stated that later the body of the deceased was discovered in the bush.

PW4, Juma Mpuya was the Police Officer who investigated the case. In his testimony he narrated how he received the information and conducted the investigation by taking the statements of the witnesses and visiting the scene of crime. He claimed that the accused person admitted in his cautioned statement that on the material day he was with the other youths who arrested the deceased and decided to take him to "Jumbe Ngwitu" which meaning to teach him a lesson, but he denied to have participated in killing the deceased.

Mr. Mlanzi, Learned Advocate for the deceased has submitted to the effect that the available prosecution evidence from PW1, PW2, PW3 and PW4 does not connect the accused person with the alleged offence or any other offence to require him to make his defence. He contended that there is no case to answer against the accused person.

Mr. Mlanzi, submitted that the first crucial question is whether the accused was properly identified arguing that there is only the evidence of PW2 and allegations from one HAMISI ISSA CHILOWE who was not even called as a witness. The defence counsel contended that the identification claimed by PW2 was not proper in law because the circumstances were not conducive for proper identification and secondly PW2 contradicted herself in her testimony on the way she identified the accused during the abduction. In support of his proposition, the defence

counsel invited this court to be guided by the decision in the case of WAZIRI AMANI Vs. R (1980) TLR 250 where the guidelines for proper identification were propounded.

Mr. Mlanzi submitted that visual identification requires details particulars and descriptions of the person identified immediately after the incident and before the witness acquires another chance of seeing the person identified for the second time. He argued that PW2 : alleged to have identified the accused among the group of people at the Office of FWI; but she completely failed to account on how she managed to identify the accused and totally failed to give description or details which made her identify the accused; like the type of clothes, appearance or any peculiar mark of the body.

The defence counsel further submitted that the second crucial issue is the way the list of the names of the suspects including the accused person which led to his arrest was obtained. He argue that at the moment there is only allegation and hearsay evidence of FWI that he was given the names by the ten-call-leader one HAMISI ISSA CHILOWE who was not called as a witness before the Court to divulge and disclose before this court how he got the said names and particularly that of the accused person.

Mr. Mlanzi informed this court that the evidence of PW4 regarding to the alleged accused's caution statement have no evidencial value to be considered because the said statement was not produced in Court as exhibit. On those grounds the defence counsel principally submitted to the effect that the prosecution has not make up a case to warrant the accused to make his defence as required by the law.

Ms. Shio, Learned State Attorney submitted that there is enough prosecution evidence against the accused and that he should be called to make his defence. She re-visited the whole evidence of prosecution witnesses and obviously realized the problems thwartening the prosecution case but yet and suprising to me insisted that there is enough prosecution evidence to require the accused person to make his defence.

All in all, I am definitely in support of Mr. Manzi submission that there is no sufficient prosecution evidence to require the accused person to make his defence.

On the first issue of identification we have only the evidence of PW2 of which credibility is at stake. In the first place PW2 fumbled during the cross-examination when she was questioned about time of incident and availability of light which enabled her to identify the accused person. At first she claimed that she was able to identify the accused because it was not too dark and that it was 6.00 pm. Later she stated that she knew it was 6.00 pm by looking at the position of the sun as it was sunset. At the sametime she categorically admitted that on the material day and time it was raining and there were clouds in the sky. The question is, if it was cloudy and raining how could she use the sun light or sunset light to identify or use the same to determine the time to be 6.00 pm. Such self contradiction renders her whole testimony questionable.

In the case of WAZIRI AMANI (Supra) the Court of Appeal of Tanzania laid down the guidelines which a Court should take into consideration when resolving questions of identify. The Court observed;

"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us, that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would for example, expect to find on record questions such as the following posed and resolved by him; the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, whether it was day or night-time and further whether the witness knew or had seen the accused before or not."

The available evidence especially that of PW2 not qualify the above test. There is no evidence to show how long PW2 had observed the accused; there is no evidence as regard duration of their encounter; The conditions for identification were not favorable as it was evening time cloudy and raining; the circumstances of arrest or abduction was engulfed with common and beatings of the deceased which could render PW2 in a panic state incapable to identify the accused person let alone all the suspects and the fact that it was the first time for PW2 to see the accused persons. It is for these reasons which caused PW2 to fumble and contradict her self on how she managed to identify the accused person.

I: also join hands with Mr. Mlanzi that in virtual identification the witness ought to have given a detailed description of the accused person to the first ^{person} she or he first reported the incident before she/he had a chance of seeing the accused for the second time or after arrest. Therefore when PW2 rushed to her father ISSA NALINGA or when she narrated the ordeal to PW1 for the first time, she was expected to give and disclose some details and description of the accused person stating things like the general appearance, attire, height, colour or any other distinct description features of the accused. That requirement is much so where, like in the present case, it was the first time for the PW2 to see the accused person. The belated claims by the PW2 during the cross-examination by the defence counsel that she identified the accused due to his protruding eyes which appears like myopic (Makengeza) is nothing but an afterthought. The witness was required to point out such appearances or peculiar marks immediately to the first person she reported about the incident. See the cases of BUSHIRI AMIRI VS. R (1992) TLR 62 (HC) and IBRAHIM SONGORO Vs. R. APP. No. 298 of 1993, HC-Mwanza, (unreported).

In general the whole identification evidence is extremely scanty and unreliable.

On the issue of cautioned statement of the accused person mentioned by PW4, I am of the view that since the statement was not tendered and admitted as exhibit in this case, it remains unexisting and valueless document.

It is on the basis of the foregoing reasons that I am principally persuaded that there is no sufficient prosecution evidence to connect the accused with the alleged offence or any other offence to the extent of requiring him to make his defence.

I therefore find the accused not guilty and hereby acquit him. The accused person is to be released from custody forthwith unless he is lawfully detained on another matter.

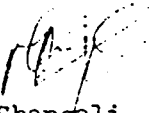
It is so ordered.


M.S. Shangali

JUDGE

20/10/2006

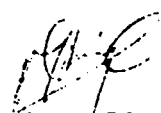
Ruling delivered todate 20/10/2006 in the presence of Ms. Shio, Learned State Attorney for the Republic and in absence of Mr. Mianzi, Learned Advocate representing the accused person. Accused person present in person.


M.S. Shangali

JUDGE

20/10/2006

Court: Assessors thanked and excused.


M.S. Shangali

JUDGE

20/10/2006.

