IN THE HIGH COURT OF TANZANIA
MTWARA DISTRICT REGISTRY
AT LINDI
ORIGINAL JURISDICTION
CRIMINAL SESSION CASE NO. 9 OF 2013
REPUBLIC
VERSUS
SAID MSHANGAMA @ SENGA

JUDGMENT

4th October 2013 & 9th October 2013

MZUNA J.:

Said Mshançama @ Senga stands charged with Murder of one Said @ Mzarama. The offence which is alleged to have been committed on the 23rd day of August, 2011 at Mbwemkuru Village within Nachingwea District in Lindi Region. The charge is preferred under Section 196 of the Penal Code, Cap 16 R.E. 2002.

M/s Mwahija Ahmed the learned State Attorneys called in three witnesses to prove the charge. Mr. Yudathadei advocated for the accused and had one defence witness.

Briefly stated the facts are that: PW1 Mfaume Hassani Salumu who is the accused's neighbour said on the material date at about 3.00 AM, heard the shouting voice which went on repeatedly twice that ***"Nakufa***

Mama nakufa Senga ananiua (or) unaniua". PW1 who was by then awake went to his neighbor PW.3 Iman Hussein Mniwako @ Oppa, otherwise known as Katibu. He narrated to him what he heard. The shouting voice never recurred.

They went to the accused's house. It was a total black out. They met the accused's wife outside and got hold of her child at her back. The door was open. She was asked the whereabouts of the accused and she said he had gone to his work place. This raised an alarm as according to PW1 (his work mate) normally they used to report at work at about 7.00 or 7.30 AM. They asked her whether it was his normal routine. No explanation was given. The next question which was asked is who was shouting that *"Senga unaniua"*? There was no plausible answer which was given. She started to cry.

It was mutually agreed that they should not leave that place until at dawn. When it was so, they saw some pulling marks *"mburuzo"* from about 15 footsteps away from the accused's house (at the back). It led to the mining ditches otherwise known as *"Magolani"* where the deceased body was also found (about 50 meters away from the accused's house). There were some traces of blood all along. He had many big cut wounds.

PW3 decided to confirm if the accused was at his work place as alleged. He went there and indeed was seen. Within a short time the accused's wife was seen at the gate where the accused works. She said went there to collect her fare back home. The accused was put under

arrest and PW3 went to report to the police station where PW2 No. D. 5097 Sgt Ally works. They went to the scene with the Doctor who conducted the Postmortem examination report in their presence.

During the search which was conducted inside the accused's house they saw an axe (Exhibit P2) soaked with blood. The record of search (Exhibit P3) was prepared.

In his defence case, Said Mshangama Bakari (DW1) said on the material date he slept with his wife at home. He waked up at about 5.00 AM and left at about 5.40 AM using the company motor vehicle and reported at his work place at 6.00 AM as usual. While at his work place, saw PW3 and Hamad Kalungu together with other watchmen and was put under arrest allegedly that he committed murder. He was then taken to the Police station.

He denies seeing the alleged dead body while at his home let alone to have heard the alleged shouting voice of the deceased at night. He denied possessing the alleged axe which was tendered in court. He doubted as to why he was not asked to send his representative to witness during the alleged search. He admitted however that he had no grudge with PW1 and PW2 prior. He denied the charge.

There are matters not disputed like the names of the accused and that of the deceased and that both were residents of Mbwemkuru Village. Equally not disputed is the Postmortem Examination Report (Exhibit P1)

which shows cause of death was due to *"cardio respiratory failure due to heavy bleeding"* caused by *"multiple cut wound on the head, cut wound right ankle joint and cut wound left thigh"*.

The first issue is whether Said @ Mzarama is dead if so whether his death was unnatural?

According to the Post mortem examination report the dead body of the deceased Said was identified to the Doctor by Imani Husein Mniwako (Oppa) and Mzee Mbettu in the presence of No. D5097 CPL Ally on 23rd August 2011. That it had cut wounds as detailed above. Given the above story, I find that indeed the said Said @ Mzarama is dead and that his death was unnatural.

The second issue is whether the accused is responsible for the commission of this offence?

The Republic says their witnesses are credible and reliable and were firm. That PW1 heard the shouting voice mentioning the accused as the culprit. That it was not necessary to bring more witnesses because even a single witness if believed can prove a fact. She also said there was no other person in the locality called Senga. That the search was conducted in his house where an axe soaked with blood was recoverred and there were some pulling marks at the back of the accused's house with traces of blood leading the trench.

The defence on the other hand submitted that the alleged axe (Exhibit P2) was never taken to confirm the finger prints and if the blood allegedly found on it was that of human blood and determine even the DNA despite the fact that police had all means necessary for its implementation. That it (axe) was taken in the absence of the accused who could have confirmed if it was his or not. Above all nobody who everred to have found blood on the accused's clothes.

In fine. It is not disputed that the prosecution evidence of PW1, PW2 and PW3 link the accused based on circumstantial evidence. The offence was committed at night with visual identification by the said deceased and whose shouting voice of *"Mama nakufa Senga unaniua",* a dying declaration so to speak is only of honest belief which does not necessarily show "correctness" and therefore needs corroboration (See: **Afrika Mwambogo vs. Republic** 1984 TLR 240 (CA) at Page 244)

Are there such independent corroborating evidence whether direct or circumstantial? Also, connected to it is whether the circumstantial evidence irresistibly point to the accused guilty?

In view of the decision in the case of ***Simoni Musoke vs. R*** [1958] E.A 715 the court must be satisfied that *"the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty".*

To do so, I will try to answer some basic question as laid down by Ratanlal and Dhirajlal in the text book ***The Law of Evidence*** (21st

Edition, Reprint 2007). The learned authors give at page 12, four "tests" in cases where there is no direct evidence, that:

> *"a) The circumstances from which an inference of guilt is sought to be drawn be cogently and firmly established;*
>
> *b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*
>
> *c) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.*
>
> *d) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence".*
>
> How does the above test apply to the case under consideration?

Starting with paragraph (a), there was a shouting voice which named the accused as the suspect. Though it was a dying declaration still was corroborated by the fact that his house, the last of all houses, was found open. His wife and child (who ordinarily was expected to be sleeping in bed) were all awake at that late hours of the night. They saw pulling marks and blood stains.

In paragraph (b) the deceased was found with a big cut wounds at the vulnerable part of the body which was the major cause of his death; The post mortem report shows there was cut wounds which must be linked with an axe (exhibit P3) found in the accused's room soaked with blood.

In paragraph (c) the accused though denies knowledge of the shouting voice for alarm yet gave false story to the police that he heard the shouting voice of thief, thief. Above all never gave any explanation for an axe which was found inside his room soaked with blood. That axe though its blood was never taken to determine the blood group, finger prints or DNA had a peculiar mark. The accused gave no explanation while it was so found inside his room. I am aware as it was held in the case of **Nuhu Selemani vs. Republic** (1984) TLR 93 at page 94-95 that as of right the accused ought to have been brought during the search and confirm if it was his axe. All the same the nature or the circumstances at the material time never warranted such possibility as there was a threat by the assembled irate villagers to kill him (according to the evidence of PW3).

In paragraph (d) there was a pulling mark associated with blood which led to where the deceased was found dead only 15 meters away from the accused's house, at the back. Though the accused was near the path but the fact that it was close to his house suggest no other person could have killed the deceased without his knowledge.

All these (a), (b), (c) and (d) form unbroken chain which irresistibly link the accused to murder. The above tests having been fully tested, leads to the conclusion that it is the accused and not any other person who killed him.

It was held in the case of **Kibwana Salehe vs. R** (1968) H.C.D NO. 391 Georges, C. J (as he then was) that:

> *"Whenever a witness is proved to have made a statement on oath inconsistent with a statement previously made by him, the credibility of that witness is completely destroyed, unless he can give an acceptable explanation for the inconsistency."*

The accused gave no explanation.

In a similar case of **Mohamed Ahamadi Chali vs. R** (2006) TLR 313, the court (at page 316) took into consideration the accused false statement that the deceased had travelled from the village and when the deceased's body was fished out from the latrine he admitted to be that of his guest. The decease's body was found only 35 meters away from his house. He also said the blood found inside the house including on the bed and clothes was that of a girl who had broken her hymen.

The Court of Appeal dismissed his appeal among others for the reason that there was no need for him to lie while he was a free agent.

In the present case DW1 was asked the circumstances under which that statement was made. He said:

"The policeman who recorded my statement is Mr. Logato. I was threatened once but when he recorded my statement he never threatened me. I was not beaten."

I would under the above circumstances invoke the same observation as that one said in the case of **Mohamed Ahamadi Chali** (supra).

The third issue whether PW1 and PW3 are witnesses of truth? Whether they are reliable and credible witness?

The argument by M/s Mwahija the learned State Attorney is that normally the dying fellow must have raised an alarm. That they are witnesses of truth otherwise PW3 could have said he heard the shouting voice as claimed by PW1 but that was not the case. That the dissimilarities on the evidence between PW1 and PW3 is only minor which touches on individual opinion and never touched on the root of the matter.

Mr. Yudathadei, the learned defence counsel on the other hand said the prosecution witnesses gave contradicting statements especially on the issue of scarcity of water while they come from the same place. That the evidence is based on one witness (PW.1) who averred to have heard the shouting voice which is hearsay and therefore needs corroboration. That it is very surprising that the police never bothered to inquire its correctness. That there is no evidence showing that the accused's clothes were found with blood stains.

He doubted as to why there is no other witness who averred to have heard those words while there were other neighbours who could have heard it. That, the shouting voice was at a high tone and was heard at 40 meters. He doubted as to why he went to Katibu (PW3) instead of going straight to the scene.

This court has the following observation. PW1 said decided to go to PW3 to look for someone to accompany him as it was at night. It is on record that actually their houses are facing one another. That he failed to go to the scene straight alone because his associate a lady had gone to the well to fetch some water. That story of water shortage/scarcity was categorically disputed by PW3 who said there was no such water shortage that could awaken somebody go so early for fear of a queue as it is obtainable from the wells at the distance of about 20 footsteps.

One of the Honourable Assessor found no difficult to solve such conflicting versions. He said since PW1 was a Militiaman, he had to go to his leader PW3 whose title was the same as the Village Executive officer.

I partly respectfully agree with that opinion but PW1 said is not the watchman to the Village office but to the Europeans/*Wazungu* where even the accused works. Does it mean there was something he was hiding? Is it individual opinion as the learned State Attorney would make us believe?

I should say from the looking PW1 has some cleaver looking face with the habit of answering questions fast. I take it that possibly never expected such a question. One thing which is evident is that PW3 is his very close neighbor and since it was at the total black out where there was threat of death **"unaniua"** definitely being accompanied by a man than a woman supplied some sort of a shield. It cemented such strength (as noted by the Honourable Assessor) by going with a leader. I would have found to the contrary if he went for somebody far leaving his close neighbor. That was not the case. So, the conflicting versions never have any connection with the "root of the matter" but only minor.

Another raised point is that why the whole scenario is of PW1 and PW3 from hearing the voice, going to the accused, searching and signing the search order not other two old men.

PW3 answered that question that they signed because he was a leader while PW1 was a witness who first heard the shouting voice. Personally I have no reason to disagree given the convincing nature of his deaminor PW3 shown. There is no way one can doubt his credibility just like that of PW1. None of the two could frame up the case.

They were speaking nothing but the truth. The Honourable Assessors expressed same views and I have no reason to defer. I have tested their evidence to determine their deaminor as well stated in the case of **Juma Kilimo vs. R,** Criminal Appeal No. 70 of 2012, CAT, (unreported) Rutakangwa, J.A. It was held that:

"An impression as to demeanour of a witness ought not to be adopted without testing it against the whole of the evidence of the witness in question, and we may add, ***the entire evidence on record and to ordinary human conduct"*** (Emphasis mine).

I should say though briefly as an answer to the raised question by the defence. They doubted as to why is it that others (including other close neighbours to the accused) never heard the shouting voice. This I would say is opinion evidence while the court's finding is based on direct evidence. Unless we knew the nature of their daily work then we can say possibly they were inside their houses. In any case, does the learned defence counsel want to make us believe that at 3.00 AM all people must be awake? I am not prepared to buy his story even assuming that the shouting voice was at a high tone. That concludes issue No. 3

The Fourth issue is whether the accused should be found guilty or not?

The Republic asserts that there is an unbroken chain to found a conviction against the accused and that the charge was proved beyond all reasonable doubt. She therefore said the accused should be convicted as charged.

The defence counsel says that the prosecution case lacks chain to link the accused. That there is no strong case against the accused and should therefore be acquitted.

The Honourable Ladies and Gentleman Assessors were accordingly addressed during the summing up that in their opinion, they should (if they find any) pinpoint what they think forms the chain and whether it is unbroken one.

All three Honourable three Assessors pinpointed the chain linking the accused and unanimously advised me that the accused should be found guilty. As of interest, I take the reader through their comment.

The Honourable **First Assessor** said:

"My lord, the accused failed to summon his wife who they were together during that night...they stay in the same village and have no existing grudges...PW1 heard the shouting voice "Nakufa, nakufa Senga ananiua". The accused is the only person bearing that name in that village."

The Honourable **Second Assessor** said that:

"... the accused never disputed that on the material night he was at home sleeping with his wife and therefore his wife was a material witness...from that chain of events which led to the discovery of an axe in the accused's house, it means and show that the accused person did commit this offence."

The Honourable **Third Assessor** said that:

"...the said traces of blood and the pulling marks are important...I say so because in that village there is no person who keeps cows or goats. The

only person who had cut wounds was the deceased and we were told his blood was still fresh."

Further that *"failure for the accused's wife to come in court or at remand to see the accused shows that she knew the offence which the accused committed. The accused was at home and the distance to his house is very close.*

*The accused was taken to the police station he made his statement freely. He disputed his own statement. It means he knew what he had committed."*She concluded that he should be found guilty for this savage Murder ***"mauaji ya kikatili"***

I should express my gratitude to these wiseman and wise women Assessors. I agree entirely with what they have opined. I am fully aware that their opinion are only persuasive not binding. I should add as concluding remarks that, the incriminating evidence against the accused are:

First there is no prior existing grudge that could make PW1 and PW3 (who he admitted secured a job for him) give such implicating evidence against him (their village mate) for this serious offence.

Secondly, as well pointed out by the Honourable Assessors the accused was expected to summon his wife whom he said spent a night together yet never bothered to call as his witness. It should be noted she is the very person who when asked about who was shouting *Senga unaniua*, started to cry. PW3 said "*alianza kuangua kilio".* No doubt the

accused knew if she was summoned could have disclosed the whole story and implicate him. It is quite imaginable as argued by the accused that he could not secure her attendance because he does not know where his wife is at present, what a fallacy!

Thirdly, the axe (which even if we rule out it has no human blood) was found inside his house but never gave plausible answer while it is a "fact within his knowledge" (See; Section 114 (1) of the Tanzania Evidence Act, CAP 6 RE 2002). Such evidence has inculpatory effect in view of what was held in the case of **Simon Msoke (**supra).

Fourthly, he made a statement at the police but denied what he said that he heard the shouting voice of "thief, thief", his denial was aimed to distance himself against the commission of this offence. That statement was a true account as he admitted was a free agent.

Fifthly, the accused said on that night was at home, the pulling marks near his home and the blood stains which must have a connection with the deceased' cut wounds led to where the deceased was found, inside the trench.

We find that it is no other person than the accused who committed this offence. We have weighed his defence evidence and we find have not cased doubt on the prosecution case. Though he was not arrested at the scene of crime but the circumstantial evidence leads us to an unbroken chain that indeed he committed this offence. His defence was only an afterthought. The absence of the blood stains on his clothes

goes to show that if at all the prosecution witnesses wanted to incriminate him could have done so, but that was not the case meaning they are witnesses of truth. PW1 said he can not lie to have seen the clothes in the accused's house soaked with blood. Even if it was found still he could have said it was not taken to the Government chemist for analysis. That is only normal for a drowning fellow to look for anything at his disposal so as to save his life as was so said by the second Honourable Assessor that ***"Mfa maji hakosi kutapatapa".***

The *final* question is does the evidence show the existence of *malice aforethought?*

The Honourable assessors were accordingly addressed what is all about malice aforethought and under what circumstances it exists. They came out with the same answer that indeed it existed. A lethal weapon (axe) was used, it was aimed at the most vulnerable part of the body (head) and many deep cut wounds all pointed to the fact that the accused had intended at the least to cause Grievous harm and at most and as indeed it happened, death/Murder. These are the all elements of malice aforethought as spelt out under section 200 (a) of the Penal code, Cap 16 RE 2002. Even the conduct of the accused to pull the deceased's body and place it in the trench (magolani) had the intention of hiding the possibility of tracing the responsible culprit but as the swahili saying goes, ***"siku za mwizi ni arobaini"*** meaning the days for the thief are numbered, one day he will be netted and normally not more than the 40th day.

Although the prosecution says their case is based on two important witnesses, the defence counsel said it is based on PW1. So, assuming the defence is right though we are of the different view, the law requires need to warn myself. I so have to warn myself and do find that I see no danger to convict the appellant based on the evidence of PW1. I am satisfied that he was telling nothing but the truth.

I should express our gratitude for the tireless endeavors done by M/s Mwahija Ahmed the learned State Attorney and Mr. Yudathadei, the learned defence counsel. Their painstaking submissions have simplified our work dearly. They should maintain that spirit in future.

I should say that the Republic have discharged their burden of proof which is beyond reasonable doubt. Such proof does not necessarily be beyond the shadow of doubt. Similar view was expressed in the case of **Magendo Paulo vs. R** (1993) T.L.R 220 where Mnzavas J.A (as he then was), cited with approval the holding by Lord Denning in the case of **Miller v. Minister of Pensions** [1947] 2 All ER 372 where he said:

> *"The law would fall to protect the community if it admitted fanciful possibilities to deflect the Court of Justices. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable", the case is proved beyond reasonable doubt."*

We are satisfied beyond reasonable doubt that Said Mshangama @ Senga with malice aforethought unlawfully killed Said @ Mzarama, a normal labourer who had gone to the mining to earn his living. He terminated his life for no apparent reason. I accordingly find him guilty of Murder as charged and do hereby convict him under Section 196 of the Penal code, Cap 16 RE 2002.

M G MZUNA,

JUDGE.

9/10/2013

AT LINDI

DATE: 9TH OCTOBER 2013

Court: Judgment delivered.

Court: Judgment delivered this 9th day of October 2013.

M G MZUNA,

JUDGE.

9/10/2013