

IN THE HIGH COURT OF TANZANIA

AT KOROGWE

CRIMINAL SESSION CASE NO. 9 OF 2013

REPUBLIC

VERSUS

OMARI KHALFAN

JUDGMENT

U. MSUYA, J.

Omary Khalfani is accused of murdering Nurdin Rajabu contrary to section 196 of the Penal Code [Cap, 16 R. E. 2002]. As alleged, the incident happened in October, 2011 at Michungwani Kwachuma within Handeni District in Tanga Region where the accused and the deceased were casual labourers in the farm of Rodgers Batwel Mnyili PW1. The accused pleaded not guilty.

The prosecution called six witnesses to prove the case. They tendered two exhibits namely Post Mortem Examination Report, Exhibit P1 and sketch map, exhibit P2. Briefly, Rodgers Batwel Mnyili (PW1), the owner of the farm where the incident was committed testified that on

replied that he could not have removed the deceased's body as it was heavy. The witness calmly handled the accused in a manner which the accused believed that he supported him, and later on he went to Michungwani where he told the accused that he was going to charge his phone and fetch water.

PW1 went directly to Michungwani police station where he reported the incident. PW-5 Bakari Semeni, a militiaman and PW6- Emmanuel went to the scene of crime and arrested the accused person and another boy who was released later. PW6 called PW4- Nuru Shaban Kikingo, a cell leader of Kwachuma to witness a search. In the course of search, the witnesses informed the accused person that they were searching for "bhang" for the purpose of discovering the truth. PW6 ordered the accused person to remove the heap of maize stalk suspecting something hidden there and the accused complied. After the removal of the heap of maize stalk, the accused person was ordered to dig the place with a hoe.

The human body was retrieved and was identified by PW3- Fatuma Rajabu, a sister of the deceased as a body of Nurdin Rajabu. A doctor was called to examine the body of the deceased and a post mortem examination report, exhibit P1 to that effect revealed that the cause of death was due to cardiopulmonary arrest which was caused by brain injury. The sketch map was drawn and tendered as exhibit P2 indicating the scene of crime. The accused was charged and arraigned in court to answer the charge of murder.

PW2 Lilian Mhina who supported the evidence of PW1 regarding the issue of going to the farm, on 2/11/2011 asked for the deceased and was told that he was sacked, because of Tshs. 2,000/= the accused owed the deceased. This witness as well testified about demolition of the fence for keeping harvested maize but she did not ask the accused. Further that the accused asked her if she has ever seen a corpse and she ignored as she thought the accused was joking. She as well confirmed that before PW1 went to his farm, he passed by her house to get information about the farm as PW2 was there on 2/10/2011. She said she told PW1 no. She finally was informed that Nurdin Rajabu was dead. She went to Michungwani and saw where the deceased was buried. That is where there was a heap of maize stalk.

After the prosecution case was closed, the accused was found with a case to answer and he was called upon to enter his defence. In his affirmed defence, the accused adduced that on 30.09.2011 he was in the farm, the property of PW1. PW1 came to plant maize. PW1 told the accused person to go to Kwachuma and call Nurdin Rajabu, the deceased and that DW1-the accused responded positively, found Nurdin at Kwachuma and brought him to the farm. The accused testified further that when they reached in the farm, PW1 sent him to go to Michungwani and buy a soft drink for him. The accused responded positively. That when the accused returned to the farm, he did not see the deceased and saw PW1 behind a hut and he was demolishing the fence and collecting the fencing material. The witness testified further that PW1 ordered him to put woods used in

constructing the fence aside. The accused also confirmed that on 3.10.2011, PW1 came in the farm and left with the view of going to charge his phone at Michungwani.

That when PW1 left, the accused went to Michungwani to drink tea. The accused adduced that on the way he saw PW6-F4113 DSGT Emmanuel coming to the farm. That when he returned he was arrested by PW5-Bakari Simeni and PW6-4113 DSGT Emmanuel and was told that he was smoking "bhang'i" but the accused refused. The witness also stated that PW1-Rodger led PW5 and PW6 to the place where the heap of maize stalks were collected. That PW6 asked him what was covered at that place, they looked for a hoe and started to dig. And later on the body of the deceased was found. That PW1 was arrested in connection with the offence but later on he was released. In his testimony the accused denied to have informed PW1 that is the one who killed the deceased. Finally, the accused protested his innocence and that is not responsible for the killing of Nurdin Rajabu.

Against that background, no one saw the accused killing the deceased. In that regard, the adduced testimony is purely circumstantial evidence. Now, the issue to be determined in this case is whether the circumstantial evidence adduced lead irresistibly to an inference of accused's guilty.

Addressing the issue in their final submissions, Mr. Mfinanga assisted by Mr. Magumbo both Learned State Attorneys contended that the testimonies of PW1-Rodgers Batwel and PW2-Lilian Mhina indicates that the accused informed them that he expelled the

deceased from employment. That the evidence that on 2.10.2011 the accused asked PW2 if she had ever seen a corpse demonstrate that the accused is responsible for the offence. The Learned State Attorneys also pointed out that the accused led the witnesses to recover the body of the deceased Nurdin Rajabu. They also stated that the behaviors of the accused of giving false response about the whereabouts of the deceased shows that the accused had ill motive against the deceased. The Learned State Attorneys referred this court to the provisions of section 200 of the Penal Code [Cap. 16 R. E. 2002] and the case of **Moses @ Tall V. R. (1994) T. L. R. 195** to the effect that the conduct of the accused may be indicative of malice aforethought.

Further to that, the Learned State Attorneys pointed out that the accused concealed and lied on the whereabouts of the deceased. In view of the decision in the case of **Paschal Mwita and 2 Others V. R. (1993) T. L. R. 295**, the prosecution urged the court to consider the lies of accused person and hold him responsible for murder. Finally, the prosecution stated that all evidence adduced proves that nobody else caused the death of the deceased but the accused.

In rebuttal, Mr. Akaro Learned Counsel for the accused contended that the evidence of PW1-Rodgers Batwel is not reliable on account that PW1 had an interest to serve. According to Mr. Akaro the deceased body was found in the farm of PW1 and the accused was his labourers. The Learned counsel referred this court to the decision in the case of **DPP V. Elias Laurent and Mkobe and Another**

(1990) T. L. R. 115 and the case of Paul Mrimu v. R. (1997) T. L. R. 115 to the effect that normally a witness with an interest to serve tells anything for purpose of exonerating himself from liability and his evidence should be corroborated. The Learned Counsel added that the evidence of PW1-Rodger cannot be corroborated with the evidence of PW2-Lilian on the ground that Lilian Mhina was a close friend of PW1 and she could have therefore fabricated lies against the accused person due to their relationship with PW1. Mr. Akaro contended further that the evidence that the accused informed PW2-Lilian that he expelled the deceased and asked her if she has ever seen a corpse was just to add salt and that the evidence of PW2 and PW4 demonstrates that PW6-E4113 Emmanuel is the one who directed the accused where to dig and therefore the accused did not lead the discovery of the body.

As regards to lies, Mr. Akaro submitted that lies cannot be the basis of conviction. He supported his stance by referring this court to the case of **Rex V. Mbologa Nueshema EACA (1947) 120** and the case of **Longinus Komba V. R. (1973) L.R.T 39**. Mr. Akaro contended that the case was manouved by PW1 to implicate the accused and therefore there is no justification that the accused killed the deceased. Finally, Mr. Akaro urged the court to find the accused not guilty of the offence.

This case was tried with the aid of three assessors, namely. Julius Mbelwa, Ibrahim Mohamed and Sauda Munga. These assessors gave diverged opinion. The first and third assessors concurred that the

evidence in record proves that the accused is the one who killed the deceased but Mr. Ibrahim Mohamed was of the view that the accused is not guilty of the offence on account that PW1 was the one who suspected the absence of the deceased and that had the accused committed the offence he would have not remained in the farm.

As earlier indicated, the evidence against the accused person is purely circumstantial. The law on circumstantial evidence is settled that in a case depending solely on circumstantial evidence, the court must before basing a conviction on that evidence, it must be satisfied that inculpatory facts are inconsistent with the innocence of the accused and incapable of an explanation upon any other reasonable hypothesis, than that of guilty. This principle was reiterated in the cases of *Taper V. R. (1952) A.C. 48*, *Elisha Ndatange V. R, C.A.T Criminal Appeal No. 51 of 1999*, *Mathias Bunda la V. R, C.A. T Criminal Appeal No. 62 of 2004 (both unreported)* and *Abdul Muganyizi V. R. (1980) T. L. R. 263*.

Moreover, the general rules regarding circumstantial evidence were elucidated in the case of *Sadiki Ally Mkindi V. The DPP, Criminal Appeal No. 207 of 2009, CAT al Arusha (unreported)*. These rules are:-

1. That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances

relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilty.

2. That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilty of any other person and incapable of explanation upon any other hypothesis than that of his guilty, otherwise the accused must be given the benefit of doubt.
3. That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.
4. Where circumstances are susceptible of two equally possible inferences the inference favouring the accused rather than the prosecution should be accepted.
5. There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion there from consistent with the innocence of the accused, and the chain must be such human probability that the act must have been done by the accused.
6. Where a series of circumstances are depending on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

7. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.
8. If combined effect of all the proved facts taken together is conclusive in establishing guilty of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive.

Now, from the above guiding rules let me analyse the established circumstances in the case before us:-

- (a) That there is no dispute that the accused person was employed by Rodgers Batwel (PW1) as a casual labourer in his farm. Such employment started in November, 2010.
- (b) That it is not in dispute that the accused was living or residing at the farm of PW1 where there are two huts and fenced area for preserving maize after harvesting.
- (c) That it is undisputed, that the deceased Nurdin Rajabu was employed in the farm as a casual labourer but was just working and leaving the farm.
- (d) That there is no dispute that the body of the deceased Nurdin was found buried in the farm of PW1, where he accused was residing and working as a casual labourer.
- (e) That it is undisputed that the body was examined and the post mortem examination report to that effect reveals that the

cause of death was due to cardiopulmonary arrest which was caused by brain injury.

- (f) That it is not in dispute that the accused was charged in court for the offence of murder.

The following facts are disputed.

- i. That on 02.10.2011 and 03.10.2011, the accused person informed Rodgers Batwel (PW1) and Lilian Mhina (PW2) that he expelled the deceased from service because the deceased stole chicks and eggs from the farm.
- ii. That on 03.10.2011 when PW1 was in the farm, ordered the accused to remove maize stalks of demolished fence so that they could plant maize the whole area, the accused refused and restrained PW1 not to dig the area on account that he had killed the deceased, Nurdin Rajabu and buried him at that place.
- iii. That the accused person led PW1, PW4 -Nuru Shabani Kikingo, PW5 -Bakari Simeni and PW6 -E4113 DSGT Emmanuel to retrieve the body of deceased, Nurdin Rajabu from the place where the accused restrained PW1 not to dig.

According to the testimony as agreed by both parties, the evidence against the accused is purely circumstantial.

Now looking at the facts as deposed by the prosecution witnesses, the issue is whether the circumstances proved, irresistably point to one conclusion that the accused is guilty of the offence charged.

Although there is no direct evidence to prove when the deceased was killed, in an undisputed evidence of PW1 and the accused the deceased was alive on the 30/9/2011, when PW1 went to the farm and when the accused is alleging to have been sent to call the deceased Nurdin Rajabu, in his defence.

It is testified by both PW1 Rodgers Batwel and PW2 Lilian Mhina that when they both went to the farm on 2/10/2011 and 3/10/2011 respectively, they did not see the deceased. Each asked about the whereabouts of the deceased who responded that he has expelled him. The reason explained to PW1 is that because he stole his chicks and eggs and he told PW2, the reason being that he has been disturbing him with the demand of Tshs. 2,000/= he owed the deceased. Further it is alleged by PW1 that on 3/10/2011 when he went to the farm he found the fence for keeping harvested maize demolished. That he asked for the reason the accused responded that he will rebuild it. But when he wanted the accused to remove a heap of maize stalk placed where he wanted to plant maize the accused refused for the reason that he has an issue there, that he killed the deceased Nurdin Rajabu and that was when the accused was arrested and the body was exhumed.


That the witnesses who were present when the body was exhumed stated that it was the accused who dug and the body of the deceased was exhumed. He as well directed where the head was that is PW1 Rodgers Batwel, PW4 Nuru Shaban Kikingo, PW5 Bakari Simeni and PW6 E. 4113 DSGT Emmanuel.

To determine the issue of the killer I went through the statement of the accused person as recorded at the police when his mind was fresh. What I noted is that the accused did not mention that on 30/9/2011, PW1 sent him to call the accused, when he came with the accused he was sent to buy soft drink, and when he come back the fence was demolished, met PW1 behind the hut collecting maize stalks and ordered him to collect pieces of woods used to install the fence. This evidence in court as such contradicts the statement previously made at the police as such in terms of section 164 (1) (c) of the Law of Evidence Act [Cap. 6 R. E. 2002] this evidence is incredible. I consider this piece of evidence is an afterthought. I am mindful of the fact that lies in evidence of the accused cannot be the basis of conviction. The accused duty is just to raise doubt. All in all the accused could not impeach the credibility of any of the witnesses in his defence and even the cross-examination.

PW1 and PW2 are challenged that they have an interest to serve, PW1 being the owner of the farm so he fabricated lies against the accused and PW2 being a friend she supported him, so her evidence cannot corroborate the evidence of PW1. The question is why?

For the reasons that the accused is the one who was residing in the farm. Absence of evidence to prove that he is not the one who committed the offence but PW1, the fact that according to him the period he left the farm is when he was sent by the PW1 to buy soft drink, and he left the deceased with PW1 and that was when the deceased was killed do not shake the credibility of the prosecution. Mainly considering the fact that the killing as suggested by the accused was effected in broad daylight because in the evidence of PW1, which is unchallenged he left at 5.00 pm on 30/9/2011. This is impossible because as testified by the witnesses the farm is just beside the road. PW1 could not have committed such a serious offence in broad daylight.

From the above analysis I beg to differ with the Gentlemen Assessor Ibrahim Mohamed who opined that the accused was not guilty. I concur with the lady Sauda Munga and Gentlemen Assessor Julius Mbelwa that the evidence adduced in court considered as a whole irresistibly prove that the accused is guilty. As such the accused is found guilty as charged. He is accordingly convicted for the offence of murder.


**U. MSUYA,
JUDGE.
20/6/2014**

Mr. Akaro: I know that it is the principle that in the offences of murder the only penalty is death but the Court of Appeal some minority Judges have preferred a punishment of life imprisonment other than death by hanging. In the case of PAULO JOACHIM SAMBWE VR Appeal No. 132 of 2013. The Court of Appeal in Tanga the majority decided that the accused should proceed with the death sentence, but Hon. Kileo, J. dissented. She quoted the case of Appeal in the case of MBUSHUMO DOMINIC NYANGE AND ANOTHER VR 1995 TLR 97... Where the Court of Appeal,

“That the penalty of death is apparently in human and degrading punishment and it is also so in its execution and it affects Article 13 (6) (d) and (c) of the constitution of the United Republic of Tanzania”.

Although the court founds the punishment agreed that though it is unconstitutional, but the proper sentence is murder.

Hon. Kileo, J. said the death punishment, is cruel, in human and degrading punishment. It violates the right to life end proclaimed in the Universal declaration of human right as well as right to life which is protected in our constitution article 14 of the constitution. She said further to that I am a the humble view also that this we did not give life we have no right to take it no matter what the other person has done. It is only God who gives life and it is him alone who should take it finally she concluded that my opinion life imprisonment would be more appropriate in the circumstances of the case and it is the one I would have imposed.

It is my humble submission that due to the fact that a few Court of Appeal Judges have opined that life imprisonment is better than death by hanging. I pray that in considering the sentence your court sentence the accused to life imprisonment instead of life sentence.

Sgd: U. MSUYA, J.
20/6/2014

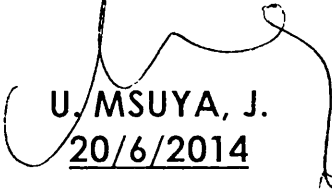
State Attorney: According to Tanzanian Law for a person who has committed the offence of murder is death by hanging under section 197 of the Penal Code. [Cap. 16 R. E. 2002] the life imprisonment is still a debated issue and it is not there in law. Therefore I pray to your court referring to the authority of Paulo Joachim Sambwe hold the view of the accused according to the law.

Sgd: U. MSUYA, J.
20/6/2014

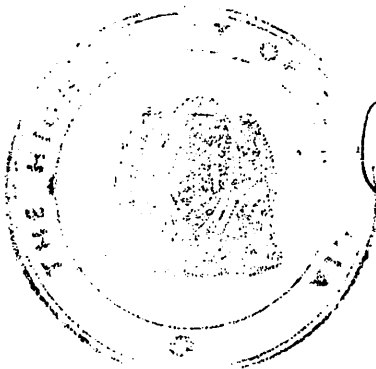
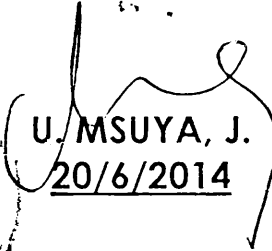
Sentence:

I have considered the submission by the Learned Counsel of the Accused and the case of Paulo Joachim Sambwe and the dissenting Judgment of Hon. Kileo, J. regarding sentence. While I totally agree with her that the death penalty is cruel in human and degrading and it violets the principles of human right, as held by the majority Justices of

the Court of Appeal it is the law of this country. The accused is sentenced to death by hanging.


U. MSUYA, J.
20/6/2014

Order: Judgment is delivered on the 20th day of June 2014 in the presence of the Learned State Attorney Mr. Mfinanga and Mr. Akaro Learned Advocate for the Accused and Accused.



U. MSUYA, J.
20/6/2014