

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT BABATI

CRIMINAL SESSIONS NO: 84 OF 2016

***(Originating from Resident Magistrate's Court of Babati at
Manyara PI. No.26/2015)***

THE REPUBLIC

VERSUS

YONA S/O EMMANUEL BASORO @ TULWAY EMMANUEL

JUDGEMENT

Date of Last Order: 20/07/2018

Date of Ruling: 24/07/2018

BFORE: S.C. Moshi, J

The accused person, Yona s/o Emmanuel Basoro @ Tulway Emmanuel is charged with murder c/s 196 of the Penal Code Cap.16 R.E 2002. The particulars of the offence are that, Yona s/o Emmanuel Basoro @ Tluway Emmanuel, on 2nd day of October 2015 at Sangaiwe village, within Babati District in Manyara region did murder one Emmanuel S/O Bassoro.

The accused person pleaded not guilty to the charge. Hence the case proceeded to a full trial, whereby the prosecution side had a total of nine (9) witnesses. On the other side, the defence had two witnesses.

There is no dispute that the deceased, Emmanuel Basoro died unnatural death. The death was due to severe bleeding that was caused by big wounds which were inflicted upon him with a sharp object. The issue is whether the accused murdered the deceased. The duty to prove this fact lies on the prosecution. In this respect section 3 (2) (a) of **The Evidence Act**, Cap. 6 R.E. 2002 is relevant, and it reads thus *"In criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;"* During the hearing the prosecution was represented by Mr. Lameck Mugeta, S/A; he was assisted by Mr. Petro Ngassa, S/A whereas the accused was represented by Mr. William Ernest.

For the prosecution, the evidence is as shown here under:-

PW1: CHIZUA TABU MBIJIMA, stated among other things that, he is an assistant Medical officer (A.M.O); he works at Magugu Health Center since April, 2011 up to date.

On 3/10/2015 in the evening at 5.00 p.m. while he was on duty he was approached by CPL Evarest, No. F.1077. CPL Evarest who asked him to conduct a post mortem examination of the deceased's body. The clothes and hair had clotted blood. He made the examination. He saw a big wound on the left side on the head; c.m. 7 x 5, the Skull bone was damaged. There was a wound on the neck. It was a massive wound. Its depth was 6

cm; the arteries were cut. He detected that the deceased had severe bleeding because the arteries were cut.

PW2 Anjela Andrew stated among other things that, she lives at Nakwa. She lives with her husband January Omary; whom she married him in 2016. She knows Yona Emmanuel (accused); she cohabited with him for two weeks he then deserted her.

On 3/10/2015 at 11.00 a.m. she was at Nakwa; at Yona parent's home. Yona phoned her and he told her that his father was attacked by an exe. The accused told her that he was told so by neighbors. He did not tell her the phone number of the phone that called him. Her father in law was at Magugu, Sangaiwe; he had gone to Magugu Sangaiwe to look after the livestock's.

She conveyed the news to Yona's uncle (baba mkubwa) who is called Bahi. Bayi was at his home. She went to inform him about the news. Bayi asked her to go to the scene with his elder son; one Mathayo Bayi. They left around at 11.00 a.m.; they went to Magugu, Sangaiwe. They got at Sangaiwe at 1.00 p.m. when they got there they saw Zakayo who is Yona's brother. Zakayo was standing at the cattle's kraal entrance. They saw a kitchen that they usually rest during the day. The kitchen had no door and they do not cook in that kitchen. They saw a turubai (canvas) spread on the ground; the deceased's body was on the "turubai". There was an axe nearby. They saw a mobile phone on deceased's chest. The body had wounds on the neck and at the head. She saw Zakayo at the crime scene. Mathayo asked Zakayo who had killed the deceased? Zakayo

said that it was Yona (the accused); Zakayo did not know the time when the offence was committed.

They raised an alarm. Neighbours came. The neighbours called the police. The police came, and they took the body to Hospital.

The deceased had not quarreled with the deceased. The deceased had no grudges with other people. The accused had stolen one bag and three tins (gallon) of pigeon peas and one maize bag from his father. After stealing, the accused escaped to Dareda. His father followed him; he beat him, tied him with a rope and brought him to Nakwa. He wanted to take him to police. However, the accused told his father that he had given T.shs.200,000/= to his mother. His father (deceased) searched accused's pocket. He saw Tshs.32,000/=. In the morning the deceased and accused went to accused's mother, at Magugu Sangaiwe. When they got at Magugu bus stand, his father called her and told her that the accused had escaped. The accused had said that he would kill his father. The deceased went to magugu, Sangaiwe to ask accused's mother if the accused had given her any money. Accused's mother said that she wasn't given any money. The deceased came back home on the following day. The deceased continued to look for Yona but Yona was not seen. They heard that Yona (The accused) was at Dareda. The deceased went to magugu. That day the accused went to magugu and his mother had come to Nakwa. On that day Yona was seen at Nakwa by Ngamuu and Safari. They expected that the accused would come home but he did not come. On the following day; they were told that the deceased was cut by an axe.

PW3: JOHN ANDREA, stated among other things that, he is a brother to PW2, ANjela and brother in law to the accused. He lives at Dudie. Anjela married the accused on 20/7/2015; she went to live with Yona (accused) at Nakwa.

He was at Saayo; while there he met Yona (accused). Accused was nervous; he asked him why he was so nervous. The accused told him to wait; he told him that he wanted to talk to his wife first, his wife is Anjela. He talked to his wife. Then the accused called him aside. He told him that he had killed his father by cutting him with an axe. He wanted to call the chairman but the accused escaped. The accused didn't tell him the reason for the murder. Her sister phoned him and she told him that she was coming with the police. When police, came, he called the accused. He asked him where he was. The accused told him that he was at Malisa's place at Dareda Kati. The accused wanted him to help him escape. They went with the police to the place where the accused was. They found him at Malisa's Guest House. The police asked him to go first; he went to the room and knocked the door. Immediately the police came and arrested him.

PW4: ZAKAYO, was disqualified from testifying under S.127 (1) of the evidence Act, Cap.6 R.E. 2002 as he failed to understand the questions that were put to him. He has also failed to give rational answer to those questions.

PW5: MATHAYO BAH, testified among other things as follows, he lives at Nakwa. On 3/10/2015 at 11.00 a.m. he was at home. While home

Anjela came and she asked him to go with her go to see the deceased at Magugu; she told him that the deceased was attacked and his neck was cut.

They both went to the deceased's home at Magugu Neneto. They got there at 2.00 p.m. When they got at deceased's home, they saw Mathayo. Mathayo was just sitting there. They saw the decease lying in the kitchen. He was covered with a blanket. The deceased was covered but you could see the neck; he was lying on a Canvas (Turubai). They went closer; they saw that he was cut on the head near the ear and at the neck. He looked for the chairman and they went to the police station with the chairman.

They asked Zakayo, what did he do to his father. He said that it was Yona who cut the deceased with an axe. They reported the murder. The police went to the crime scene. The body was taken to Magugu Mortuary.

PW6: BARNABA PATRICK, is a Chairperson of Neneto hamlet. On 3/10/2015, at 1.00 p.m. he was at his home. While home, at 1.00.p.m. Ramadhan called him and asked him to go to Emmanuel Basoro. He went to Emmanuel, there he saw many people. He asked them what was happening. They told him that a person was murdered. He entered inside. He saw the body lying on the ground. The body was covered with a sheet; there was a lot of blood. They uncovered the body; the body had two wounds on the head and at the neck. He went to report the incident to Magugu police station; he went to the police together with the deceased's niece.

Mzee Immanuel (deceased) was living there with his son who is mentally retarded and epileptic. The accused used to go there but he wasn't staying there permanently.

PW7: RAMADHAN AMINI, he resides at Neneto at Sangaiwe village. He is deceased's neighbor. On 3/10/2015 at 2.00 p.m. he was informed of the incident of murder; at Neneto. From his home to the deceased's home; the distance is about 80 paces. The deceased was living there with Zakayo. He went to the crime scene, he saw the deceased lying. Deceased's body had wounds on the head.

PW8: PAULO QWARAY, said that, he lives at Nakwa and at Magugu. He is a peasant. On 3/10/2015 he was at Nakwa. They were having elder's ordinary meeting. While there Bayi Basoro told him that the deceased had passed away. The deceased is his neighbour. He is a ten cell leader of their area at Nakwa. Bayi told him that the deceased was murdered. They hired a car and they drove to Magugu. While on the way they met a police car before getting to the scene. They reversed their car and went with the police to Magugu Health Center. At the Mortuary he witnessed the post mortem examination. The doctor said that the wounds were caused by a sharp object. There were rumors that it was the accused who committed the murder. They asked his brother-in-law where the accused was; his brother in law told them that the accused was at Dareda, at a bar. They found the accused at the bar drinking beer. They phoned the police. The police arrested the accused.

The deceased had complained that the accused stole the deceased's pigeon peas. He again complained that the accused has stolen some maize. He informed the chairman about this.

PW9: NO.F.1077 D/CPL. EVAREST, stated among other things that, he is the investigator of this case. On 3/10/2015 at 3.00 p.m. he was on duty at Magugu Police Station. While there, the OCS Inspector Shayo told him that they had to go to Neneto, Sangaiwe village to visit a crime scene. They went to Neneto to Emmanuel Basoro's home. There they found out that Mzee Emmanuel Basoro was murdered; he was cut on the head and at the neck with a sharp object.

The body was in a small house, it was lying on a canvas and it was covered with a Blanket. They also saw an axe that was used to kill the deceased. The axe was covered with blood. The axe was near the door, near the place where they saw the body. He drew a sketch map of the crime scene [Exh. P.2] and he interrogated some witnesses. The deceased was living there with Zakayo Emmanuel. Yona Emmanuel went to the deceased's home a day before the murder; the three of them slept together i.e the deceased, Yona Emmanuel and Zakayo. At 10.00 p.m. Zakayo woke up. He saw Yona Zakayo killing the deceased. Later on the deceased escaped.

He thereafter took the deceased's body to Magugu Health Center. The doctor conducted a Post Mortem Examination. The doctor certified that the cause of death was severe bleeding. After the examination he handed the body to the deceased's relatives for burial.

The deceased had a fight with the accused. The accused stole deceased's pigeon peas and maize. The deceased reported the incident to Nakwa Hamlet chairman one Paulo Qwaray.

He interviewed Anjelina Andrea, John Andrea, Maria Himidi; Zakayo Emmanuel and others, including Paulo Qwaray.

On 5/10/2015 at 9.45 a.m. while in office he interrogated the deceased's wife; Maria, said that Zakayo is mentally well and he understands what is asked; although people think that he's disabled.

He interrogated Zakayo Emmanuel he interrogated him on 12/10/2015 at 8.10 a.m.; he interviewed him in presence of Maria Himidi and Mathayo Bayi. Zakayo told him that on 2/10/2015 he was at Neneto, Sangaiwe. Zakayo said that, Yona came there from Nakwa. Yona prepared some dinner. They had dinner together and slept together. At 10.00 p.m. Zakayo was disrupted when Yona moved him (Zakayo) aside, Yona took an axe, and attacked the deceased with an axe on the head and at the neck. The accused escaped and flee away. It was not easy for the witness to give his statement. He learned that his mother had warned him not to say anything regarding the incident. His mother was not cooperative. He approached Bayi, Bayi talked to Zakayo's mother.

That was the end of prosecutions case.

DW1: YONA EMMANUEL, stated among other things that, he is staying at Nakwa and he was doing farm works at Dareda. He was arrested on 3/10/2015 at Dareda Center. He was arrested in a room; in a Guest

House. He went to Dareda to do his farm activities. He went to Dareda on 29/9/2015.

He does not know Anjela Andrea. His fiancée is called Paskalina not Anjela. He does not know the woman who testified in court; the woman said she is his wife but he does not know her. It is not true that he told Anjela that he intended to kill his father. It is not true that he phoned Anjela informing her that his father was murdered. It is not true that he stole pigeon peas and maize from the deceased.

He never talked to John Andrea; he doesn't know him. John didn't call him; he doesn't have a phone. on 29/9/2015; he went to Dareda to clear his farm.

The police told him that he committed murder on 2/10/2015. He did not tell Anjela Zakayo and Mathayo that he committed the murder. Zakayo is his elder brother. Zakayo is mentally retarded. His parents told him that Zakayo is mentally retarded. He knew Zakayo's mental status since his childhood. It is not true that he had quarreled with the deceased. It is not true that he was stealing deceased's produce.

DW2: DANIEL GESTI, stated among other things that, he lives at Dareda Center. He is an attendant at Malisa Guest House. He knows Yona Emmanuel. On 1/10/2015 Yona came to their guest house and he wanted to hire a room. The guest house was fully booked. Yona didn't get a room so he went away. Yona came again on 2/10/2013. He hired a room. He stayed there up to 3rd, night time at 10.00 p.m., the police arrested him and

took him to Babati. When they were arresting him, they said that he had a murder case.

That was the end of defense case.

As indicated earlier, the question that has to be decided by this court is whether the accused committed the offence.

There is no direct evidence incriminating the accused person. The evidence is purely circumstantial. It is established principle that before the court can find a conviction entirely on circumstantial evidence, the court must find that the exculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilty; see the case of **JOHN MAGULA NDOGO V. THE REPUBLIC, CRIMINAL APPEAL NO 18 OF 2004, COURT OF APPEAL** and the case of **HASSANI FADHILI v REPUBLIC (1994) TLR 89 (CA)**.

There is evidence of PW2 Anjela Andrew who suspected that the accused committed the murder because he had phoned her informing of the murder and he did not tell her the source of information. However, the prosecution did not produce the evidence of the details of the phone call that Anjela received from the accused. The accused insisted in his defense that he does not own a phone hence the details of the call that Anjela received were necessary in order to clear the doubt.

Also Anjela suspected the accused because the accused had told her that he would kill his father (the deceased) upon the deceased learning that the accused had stolen some pigeon peas and maize from the

deceased. It is my view that Anjela's evidence is based on suspicions. Suspicions however strong cannot be the basis of conviction. See the case of **Aidan Mwamlenga V. R**, Criminal Appeal No. 207 of 2006, Court of Appeal of Tanzania, sitting at Dodoma. In this case the court held among other things that, *"Indeed, the prosecution's evidence was mere suspicion. The prosecution has a duty to prove the charge against the accused beyond all reasonable doubt."*

It is also evident that PW2 and PW3 are siblings. There is prosecution's evidence to the effect that the accused had deserted PW2 after two weeks of their marriage and currently PW2 is married to another man. The relationship between PW2 and the accused was not good. It is my view that, in the circumstances their evidence needed corroboration.

Another piece of evidence is mere hearsay. PW3 said that, the accused told him that he had killed his father. The investigator, PW2, PW5 and PW9 said that they were told by Zakayo that the accused murdered the accused. However Zakayo did not support this evidence. Zakayo failed to testify in court. Therefore the evidence of these witnesses is rendered to hearsay evidence. Oral evidence must, in all cases whatever, be direct; see section 62 of the **Evidence Act**, Cap.6 R.E. 2002.

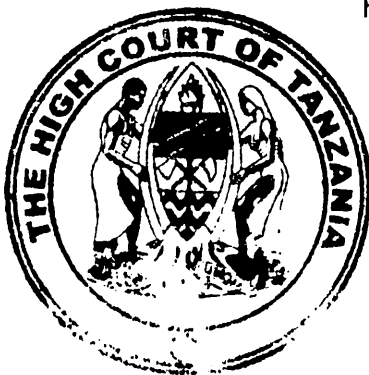
Furthermore there is evidence to the effect that Zakayo was seen at the crime scene at around 1.00 p.m. Zakayo was at the premises where murder was committed; he did nothing. There is evidence to the effect that the deceased was living with Zakayo. There is evidence to the effect that Zakayo was mentally retarded and epileptic. Zakayo had been with the

deceased at the time of murder but there is no evidence to show that Zakayo took any action; for example he could have raised an alarm or Zakayo could even have reported the murder, it is questionable if Zakayo was able to tell PW9 the details of the person who committed the offence. It is obvious that if Zakayo knew what took place and he was in his good senses, he would have at least asked for help or reported the matter instead of just staying there with the body of a murdered person from 10.00 p.m. (night) up to 1.00. p.m.; in the afternoon, on the next day. All in all I find this piece evidence doubtful.

It is prosecution's duty to prove the case; see the case of **JONAS NKIZE V REPUBLIC (1992) TLR** page 213-214 (HC) where it was held that, the general rule in Criminal Prosecution the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution.....". Having discussed as I did, it is my view that the prosecution has failed to prove the case on the standard that is required, that is, beyond any reasonable doubt.

I therefore agree with lady assessors and gentleman assessor, I find the accused not guilty of the offence. Consequently I acquit the accused person accordingly.

Right of Appeal is Explained.




S.C. MOSHI
JUDGE

24/07/2018