

**IN THE HIGH COURT OF THE UNITED REPUBLIC
OF TANZANIA**

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT BABATI

CRIMINAL SESSIONS NO: 91 OF 2016

***(Originating from Resident Magistrates' Court of Babati at
Manyara PI. No.33/2015)***

THE REPUBLIC

VERSUS

1. ADINARDI S/O IDDY SALIM

2. JOSEPH S/O EVARIST @ MSOMA

JUDGMENT

Date of Last Order: 06/07/2018

Date of Judgment: 13/07/2018

BEFORE: MOSHI, J.

This case involves premeditated killing. The deceased met an unnatural death. The evidence reveals that, the deceased was cut with a machete as a result he sustained big wounds which led to severe bleeding. The prosecution case depends on a dying declaration of the deceased person, the second accused caution

statement in which the second accused admitted to have been at the Crime Scene and the fact that the first accused person had a motive to harm the deceased because he believed that his wife was having an affair with the deceased. The only direct piece of evidence is the testimony of PW1, Selemani Hassan; the deceased's house mate who in the mid of invasion, he heard the deceased saying, "Aradinadi ananiua" when the attackers were about to leave the house, he heard the person who was attacking the deceased saying, "Jose twende." There is also the 2nd accused caution statement in which the second accused admitted to have been at the crime scene.

The issue that faces the court is whether or not the accused persons committed the offence they stand charged with. The accused persons are charged with Murder Contrary to Section 196 of the Penal Code [Cap.16 R.E.2002]. The particulars of the offence are that, both accused persons on the 8th day of December, 2015 at Magugu village, within Babati District in Manyara Region, did murder one Abdalah S/O Athumani. Both accused persons pleaded not guilty to the charge. Therefore, the case proceeded to a full trial, whereby the prosecution side had a total of six witnesses. However, the fifth witness was disqualified from testifying in view of the fact that he was not among the witnesses who were listed during committal proceedings and the prosecution did not adhere to the procedures as stipulated under section 289 (1) and (2) of the Criminal procedure Act. On the other side, the defense had two witnesses, the accused persons.

During the trial, I sat with three assessors, Maulid Mngido, Aziza Iddi and Sophia Joseph.

The Republic was represented by Miss Luciana Shabani, State Attorney, Mr. Lameck Mugeta, State Attorney and Mr. Petro Ngassa, State Attorney whereas, Miss Rachel Mwainyekule, advocate represented the first accused person and Miss Mariana Michael, advocate represented the Second accused.

For the prosecution the evidence was as follows:

PW1: SELEMAN HASSAN, stated *inter alia* that, he lives at Magugu Township. In 2015 he was sharing a house with his friend, Abdalah Athuman who is now deceased. The house had two bedrooms; it has one sitting room and two bedrooms. Each of them was sleeping in his own room. On 8/12/2015 at midnight between 12.00 – 2.00 am he was sleeping in his room. The deceased was sleeping in his own room. While sleeping he heard a sound of the door being broken. The sitting room door was broken which was the only outlet door. The other rooms had doors but there were no door panels. He called out and asked, "Abdalah kuna nini?" Abdalah did no answer. He saw people coming to his room and they were flashing torch lights on him. They told him "Tulia hapo hapo." They put him under arrest. One of them said, "siyo huyu" some of them kept watch over him and others went to the other room. He heard a sound like people were struggling, fighting and pushing each other down. He heard a voice of Abdalah Athuman saying "Adinardi unaniua".

Adinardi got out and said "Jose twende". Jose kept watch over him. Thereafter the attackers got out and ran away. He went into the deceased's room. He saw the deceased wounded at the ribs, the intestine was outside, and he was also wounded at the head. He got out and raised an alarm. He asked for help. Neighbors came. He called a motorcycle rider "Boda Boda" who was passing there and asked him to go to call the deceased's father. Deceased's father looked for a car and took the deceased to hospital.

During cross examination by Miss Rachel he said among other things as follows, on the fateful date he went to sleep at 10.30 p.m. Abdalah went to sleep first. It was night; the intruders flashed a torch on him. He didn't know the number of people who came there. He did not see them nor did he identify their voice.

When he entered to sleep, he called Abdalah but Abdallah did not respond. Abdalah was sleeping. He flashed a torch, he saw the deceased, by then he was alive and he was breathing.

PW2: ATHUMAN JUMANNE, stated among other things that, he lives at Magugu. The deceased was his first born child. The deceased was also living at Magugu. The deceased was living in his own house, with Seleman Hassan (PW1).

On 8/12/2015 at mid night he was at home sleeping. While sleeping he heard a sound of a motorcycle outside his house. Then a person knocked at the door. He got out. That person told him that

Abdalah was attacked with pangas (Machetes). He went to Abdalah's home. He saw Abdalah, he was covered with blood and he was lying on the floor. He asked him what was wrong. He said, "Adinardi and his colleagues have attacked him". He saw a big wound on the head, the intestine was out and another wound was below the armpit. He went with the youth that was riding the bodaboda (motorcycle) to look for a car. He got a car, they put the deceased in the car and they went to the police. They were told by police to go to Hospital; they took the deceased to Magugu Health Center. The doctor's referred the deceased to Babati District Hospital. They started to attend the deceased; however, he died at around 5.00 a.m. They took the body to the mortuary. He witnessed the Post-mortem-examination at around 10.00 a.m. They were given the body for burial. The cause of death was severe bleeding.

When they were on the way to hospital he asked the deceased many questions. The deceased told him that he was attacked by Adinardi and Jose.

Upon cross examination by Miss Rachel the witness stated among other things that, he knew that it was Adinardi who committed the offence as the accused and deceased had quarreled over accused's wife.

He was awakened up after 12.00 mid night. The information was brought by a "Bodaboda" boy. It was night after mid night. He did not know the time that he got at Abdalah. The deceased was cut

with a panga. At the crime scene he found a panga (Machete), the panga was taken to police. They went to the police. The police started to interrogate the deceased but his condition was deteriorating. He told the police to let him go to the hospital. The deceased was still talking even when they were at the hospital. The deceased passed away while in hospital between 4.am to 5 a.m.

During cross examination by Mariana he said among other things that, the deceased told him that Adinardi had phoned him and alleged that the deceased was having an affair with his (accused's) wife. The deceased said that Adinardi had attacked him as he had alleged that he was having an affair with his wife.

PW3: No. G.334 DC Tibe, stated among other things that, he is a police officer stationed at Magugu police station. He has been working at Magugu police station since 2014.

On 8/12/2015 at night, while he was at Magugu police station, he received Abdalah Athuman; he had wounds; on the head, stomach and on the left side ribs. The deceased reported that he was attacked. He needed a P.F.3. He interrogated him (the deceased) and recorded his statement, he said that he was attacked by Adinardi and his colleagues. Abdalah signed his statement. He (PW3) also signed on the statement (Exhibit P1). He gave the deceased a P.F. 3 so he could go for medical treatment.

When he was cross examined by Rachel he stated among other things that, the deceased was badly wounded. He was complaining that he was hurt on the stomach and he was severely bleeding. The deceased indicated the attacker to be Adinardi. He told him that he was attacked by three people but he identified only one of them. He could not ask the victim how he identified the attackers due to the fact that the victim was in bad condition.

On cross examination by Miss Mariana he said among other things that, the deceased said that he was attacked at night, on 8th. The deceased did not state the intensity of light. He did not know how the deceased had identified the attackers. He said that he was cut with machetes. The machete was not brought to him.

PW4: MARIAMU NGALAWA, is 1st accused's wife. The witness was addressed in terms of S.130 (1) and (3) of the Evidence Act, Cap. 6. R.E 2002; she opted to give her evidence. She among other things testified that, she was married to the first accused in 2009. They were blessed with two children; they are twins; Husna Adinardi and Hussein Adinardi. She lived with the first accused under one roof up to 2014. They separated because her husband alleged that she was cheating on him.

They were reconciled by their parents. On 22/11/2015 parents called them and the parents reconciled them. They settled their differences. She thereafter joined her husband at his place; at Arusha Kwa Mrombo; on 23/11/2015.

On 5/12/2015 at 7.00 a.m. her husband told her that he was going to work at Bhakresa factory. Later, on that day her husband phoned the land lord at 9.00 p.m.; he told him that he had gone to TPC Sugar factory so he would not come back.

Her husband came back from work on 08/12/2015. He left on 5/12/2015 and came back on 8/12/2015. When he left he had been wearing a T-shirt and a coat but when he came back he wasn't wearing a coat. He told her that he left it at his place of work.

On 9/12/2015 at night she was at home. She was with the land lord and land lady watching a Television. Her husband was inside their home sleeping. The policemen came and arrested her husband.

She went to police central station at Arusha on 10/12/2015 at 9.00 a.m. She was informed that her husband was taken to Babati. At 11.00 a.m. her friend phoned her and told her that Abdalah Athuman was killed; she said that he was cut by machetes. She knew the deceased as she was working in deceased's father farm.

On 11/12/2015, at 11.00 a.m. she was at Magugu police station. While at the police, she was told that her husband was involved in attacking the deceased with a panga.

The fifth witness (PW5) was No. E.1112 D/CPL JOHN, as indicated earlier, his evidence was rejected.

PW6: G.6894 DETECTIVE NDULA, works with Criminal Investigation Department (CID) Kiteto police. Before moving to Kiteto

he was working at Magugu police station, investigation office. He moved to Kiteto in 2017. On 8/12/2015, he entered the Investigation Office at 7.30 a.m. While in the office he received a file from the head of investigation. The file involved murder case. He was directed to continue with investigation. The deceased was Abdalah Athuman.

By then the suspects were not yet arrested. He first went to visit the crime scene and drew the sketch map (Exhibit P.2). He inspected the house; it had three rooms. It had two bedrooms and a sitting room. The other room was occupied by another youth.

He saw the crime scene. There was blood all over the room. He did not see any murder weapon. The blood was spattered all over the room; it seems the deceased was struggling.

He thereafter went to the mortuary at Mlala Hospital, Babati District Hospital with the deceased's relatives. He went to witness the post mortem examination. The time was 11.00 a.m. The body had wounds, on the stomach, the intestine was out and there was a wound at the head and in the left ribs, near the armpit. The doctor said that the cause of death was severe bleeding and injury of internal organs. The doctor filled the Post mortem examination Report (Exhibit P.3) and handed it to him.

On 10/12/2015 at 10.00 p.m. he was at the police station at Magugu. While there, he was called by one person at Maweni village. He informed him that Joseph Evarist was arrested at Maweni and a

mob of angry people wanted to kill him. They said that they have arrested him in connection with the murder that took place at Magugu. They went to the village, they got there are around 11.30 p.m. While on the way going to the police at around 1.00 p.m, they received a call from Arusha police station. They told him that Adinardi Iddi was arrested at Arusha and one police was already there. He was given a car. He started a journey to Arusha, at around 1.00 a.m., he got at Arusha at 3.00 a.m. There, he saw the accused, he was with No. E. 1112 CPL John. They took the suspect and returned with him to Babati central police station. By then Joseph Evarist was at Magugu Police Station. They arrived at Babati Police Station at 5.45 a.m. He thereafter went back to Magugu.

Joseph Evarist (2nd accused) was brought to Magugu Police Station at around 4.45 a.m. on 11th December 2015.

He came back to Magugu Police Station. He recorded the statement of Joseph Evarist statement at around 7.45 a.m. He found him in the lock-up. He took the second accused out of lock-up for interrogations; he interviewed him in the investigation room. The accused gave his statement under caution (The statement was received in court as Exhibit P.4).

During cross examination by Miss Mariana he stated that, the statement (Exhibit P.4) was issued by 2nd accused, Joseph said that he was at the scene with Adinardi (1st accused) and Fadhili.

That was the end of prosecution's case.

The court found that the accused persons had a case to answer. Hence they were called to defense. DW1: ADINANI IDDY SALIM (the first accused) stated among other things that; his name is Adinani. He re-located to Magugu in 2008. He met his wife, Mariam in 2009. They were married in the same year, 2009.

Their family life was peaceful. He was a Porter (mbeba magunia). He married her and she was satisfied with his income. He was carrying bags at Magugu bus stand. He moved to Arusha in 2003. He didn't go to Magugu since then. He re-located to Arusha with his wife.

He does not know Abdalah Athuman. He never heard of the death of Abdalah Athuman. He never heard that Abdalah was cut by pangas.

He was arrested on 9/12/2015. They suspected that he committed the murder.

They arrested him at Kwa Mworombo Arusha. They took him to central police station. They beat him and tortured him so that he could confess. He told them that he knew nothing. The murder was committed at Manyara. They asked him if he knew the deceased. He told them that he did not know him. The police tortured him until he fainted. They then brought him to Babati Central Police Station. After a while they took him for interview. He was hurt all over the body.

They beat him all over the body the head, legs, every part of the body. They were forcing him to sign the statement which they had written. They even tied up his testicles and his hands. They then took him to Hospital; he was in very bad condition.

He does not know Abdalah Athuman. He wasn't informed of his death because he does not know him. He also does not know Joseph Evarist.

During cross examination by the prosecution he stated that, Mariam Ngalawa is his wife. He lived with Mariam at Magugu. He doesn't know if his wife had worked at deceased's father farm. He never separated with his wife; they were living together and they moved together to Arusha.

DW2: JOSEPH EVARIST, stated among other things that, he is a peasant and he lives at Magugu. On 10/12/2015 in the morning he was going to the farm. On the way he was arrested by the police.

He did not know the reason for his arrest. The police took him to the police station. They started to beat him. He asked the police the reason for beating him. The police asked him, "What do you remember?" They hit him from 7.00 a.m. to 10.00 a.m. He did not know the police who beat him. He told them that he knew nothing.

They put him into lock-up till 11th. On 11th Ndula and his fellow policemen took him out from the lock-up and took him to

investigation room. The police made him rubber stamp a statement which he did not know its contents. He thumb printed on the statement.

He doesn't know how to read and write. He could not identify the statement that they forced him to sign. He could not identify the thumb print. He does not know Ardinani. He does not know Abdalah Athuman. He doesn't know anything regarding the death of Abdalah Athuman. He does not know Fadhili.

Upon cross examination by the Prosecution he said among other things that, he does not know where the police got his personal details. After the arrest he was beaten. He identified the faces of those who beat him. He told his advocate that he was beaten; he told her about it on the day he was testifying in court.

That is the end of defense case.

I have considered the evidence as a whole and the final submissions that were made by both parties. The first piece of evidence is a dying declaration. As stated at the beginning, none of the witnesses saw the accused persons committing the murder but there are witnesses who testified that they heard the deceased indicating the name of the first accused. The witnesses who heard the deceased saying that the first accused attacked him are PW1, PW2 and PW3. PW3 also recorded a dying declaration. As shown

above, the dying declaration points at the first accused to be the killer.

The piece of evidence that points at the 2nd accused is the evidence of PW1 which is to the effect that he heard the person who was attacking the deceased saying, Jose lets go and there is also the 2nd accused person's caution statement.

As observed above, one of the crucial pieces of evidence which the prosecution relies upon is the dying declaration. The deceased indicated the first accused when he was being attacked, in a statement at the police and he also told his father that he was attacked by the first accused. The question that arose is the question of identification. The defense counsels argued that the dying declaration does not show how the deceased identified the first accused. In this respect they cited the case of **Waziri Amani V. R. [1980] TLR 250**. They argued that, the deceased did not elaborate the nature, the intensity of the light, the brightness of the light and how he was able to identify the first accused; like his distinctive clothes that he was wearing.

I have considered the issue of identification. The deceased did not explain how he identified the first accused among the attackers. The offence was committed at mid night. Therefore the circumstances for identification were not favorable. It is known that, visual identification evidence is of the weakest kind, especially if the conditions of identification are unfavorable. So no court can base a

conviction on such evidence unless, the evidence is absolutely water tight; see the case of **Mussa Hassan Barie and Albert Peter @ John v. R**, Criminal Appeal No. 292 of 2011 **and the case of Waziri Amani (Supra)**. The deceased in his dying declaration that he made before the police, he said that he lighted his torch, but he did not say the brightness, the intensity and how he generally identified the attacker. However, there are many other factors that have to be taken into account. Generally the evidence shows that the deceased knew the first accused before the event took place; so the attacker was known to the deceased before the attack. Therefore it was an issue of recognition rather than identifying a strange person. In this respect, there is the testimony by PW2, the father of the deceased and PW4, the wife of the deceased who testified to the effect that the deceased and first accused knew each other. There is evidence to the effect that the first accused used to work as a casual laborer at deceased's father farms. It is the position of the law that it is easy to identify a person whom you recognize than to identify a total stranger. The deceased said he flashed a torch and he identified one of the attackers to be the first accused. The deceased suffered stab wounds; it is obvious that the attacker was so close to the deceased when the culprits were attacking him. At the spot lamented, "Ardinadi unaniua." These words were heard by PW1. The deceased also told PW2 that he was attacked by Ardinadi. Another factor is that the evidence reveals that the deceased struggled for a while with the attacker. PW1 heard sounds of people struggling and pushing each

other down. So the deceased was at a very close range with the assailant. It is my view that in the circumstances of this case the deceased was able to correctly recognize and identify the first accused. It is my view that a dying declaration establishes that the first accused murdered the deceased.

Another piece of evidence is the second accused's caution statement. In the statement [exhibit P.4] the 2nd accused explained in detail how he, the first accused and one Fadhil planned to go to rob the deceased. They intended to rob off T. shs. 2,000,000/-. However the robbery went wrong as he came to understand later that the first accused's intention was to kill the deceased.

The issue that arises here is whether the 2nd accused had intention to kill. A predetermination to commit an act without legal justification or excuse it is an intent at the time of killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life: but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed.

Section 200 of the Penal Code (Cap. 16 R.E. 2002) provides that malice aforethought shall be deemed to be established by evidence proving any one or more of the four circumstances (a – d) enumerated there under:

“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to same person, whether that person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a person with that it may not be caused;

(c) An intent to commit an offence punishable with a penalty which is graver than imprisonment for three years....”

In this respect see also, the case of **Enock Kipela Vs Republic**, Criminal Appeal No. 150 of 1994 (Unreported) where the court held that various factors should be considered to prove malice aforethought;

- (1) The type and size of the weapon, if any used in the attack;*
- (2) the amount of force applied in the assault;*
- (3) the part or parts of the body the blow were directed at or inflicted on;*
- (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose;*
- (5) the kind of injuries inflicted;*
- (6) the attackers utterances, if any, made before, during or after the killing;*
- and (7) the conduct of the attacker before and after the killing.*

I have considered the fact that the second accused intended to commit robbery with violence the act whose outcome could result to grievous harm or death as it did in this case. The autopsy report (Exhibit P.3) indicates that the deceased suffered huge wounds. Likewise the prosecution witnesses saw big wounds and the intestine

came out. From these facts there is no question that the 2nd accused had malice afore thought to kill the deceased. See the case of **Director of Public Prosecutions Vs. Abdallah Zombe and others**, Criminal Appeal No. 358 of 2013, court of Appeal of Tanzania (Unreported) where the court held that, when the accused planned to commit one offence and later on one commits another offence it is presumed that all of them had common intention. In this respect the court held that:

"On the other hand S. 23 of the code creates another scenario all together vis – a – vis S. 22 of the code in that the parties to the crime must have first intended to commit an offence. But in the execution of that plan they committed another offence which was in the ordinary cause of events was a probable result, then in such situation the parties are taken to have a common intention. For example, A and B had decided to steal by force using a gun. In the process of stealing, A who had a gun killed C. In terms of S. 23 of the Code, B is deemed to have common intention of killing C."

The confession made by the second accused can also be used against the first accused. The court may base a conviction on the co- accused person's confession to find a conviction if the confession is corroborated by other independent evidence; see section 33 (1) and (2) of the Evidence Act, Cap.6 R.E. 2002. Also see the case of **Bushiri Amiri V. R.** [1992] T.L.R 65, where it was held that, *"The evidence of the co-accused is one on the same footing as of an accomplice, that it is admissible but must be treated with caution*

and, as a matter of prudence, would require corroboration'. Also in the case of **Adam Umbe and Another V. R.**, Criminal Appeal No. 45/2003, HC, Dar es salaam, discussing the co-accused evidence the court held among other things that, the law permits such evidence so long as the same is corroborated pursuant to the provisions of SECTION 33 (1) and (2) of the Law of Evidence Act.

There is evidence of PW1, who heard the culprit who was attacking the deceased saying, "Jose twende." The culprit was calling the person who was keeping watch over PW1. Upon being called this person left and ran away with the others who were attacking the deceased. It is obvious that, the person who kept watch over PW1 was Jose; as when he was called by the person who was attacking the deceased, he immediately heeded to the person who was attacking the deceased and fled away with him. This evidence materially supports the confession that was made by the second accused who indicated that his name is Joseph.

Having discussed as I did, I am satisfied that the prosecution has successfully proved its case against both accused persons.

I have considered the defense evidence. First, the first accused disputed the first name; he said that his name is Adinani and not Adinardi as indicated in the charge sheet. However I think that this is just an afterthought as the accused did not dispute his name during the preliminary Hearing. Regarding the other parts of his defense, the first accused said that he had moved from Magugu to Arusha since

2003 and that he never came back. However, he did not give any notice; the law puts a requirement of notifying the court of the defence of alibi under S. 194(4) of the CPA which reads thus;

"(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case"

And sub section 5 reads thus:

"(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed."

There are also contradictions on the dates that he left Magugu, in examination in chief he said that he left Magugu in 2003 whereas on cross examination he said that he relocated to Arusha in the year 2013. Also his wife PW4 said that the 1st accused was not in Arusha from 5th December to 8th December. All in all I find his alibi wanting and it cannot cast any reasonable doubt on the prosecution's evidence.

The second accused was arrested by a group of people. He also conceded so. He was immediately taken to the police where he confessed to have been at the crime scene. His defense was to the effect that he knew nothing of the offence. In his defense he said that he was forced to put a thumb on the statement. However the

allegation of being forced to sign the caution statement came up during the defense stage. The 2nd accused did not object to the admission of the statement. Furthermore, the 2nd accused also told the court that he did not tell his advocate of the fact that he was beaten by the police who were forcing him to thumb print the caution statement; he informed his advocate on the day that he was testifying in court. I thus hold that his defense is just an afterthought.

All in all, I find that the defense does not raise any reasonable doubt on the prosecution's evidence.

I therefore basing on the aforesaid, find that the prosecution has proved its case beyond any reasonable doubt against the accused persons. I agree with gentlemen assessors; I find both accused persons guilty of the offence of murder. Consequently I convict both accused persons of Murder contrary to section 196 of the Penal Code, Cap.16 R.E. 2002.

Right of Appeal is Explained.




S.C.MOSHI

JUDGE

13/07/2018