

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

**(IN THE DISTRICT REGISTRY OF ARUSHA)**

**AT BABATI**

**CRIMINAL SESSIONS NO: 77 OF 2016**

***(Originating from District Court of Babati at Manyara***

***PI. No.10/2015)***

**THE REPUBLIC**

***VERSUS***

**ALFAN S/O MUSTAPHA @NGASA**

**JUDGMENT**

Date of Last Order: 03/07/2018

Date of Judgment: 13/07/2018

**BEFORE: S. C. MOSHI, J**

The accused person, Alfana s/o Mustafa @ Ngasa is charged with Murder Contrary to Section 196 of the Penal Code [Cap. 16 R.E. 2002]. The particulars of the offence are that, Alfana s/o Mustapha @ Ngasa on the 20<sup>th</sup> of February, 2015 at Kiru Six village,

within Babati District in Manyara region did unlawfully kill one Martha d/o Michael. The accused person pleaded not guilty to the charge. Hence the case proceeded to a full trial.

In this case I sat with three Lady Assessors; Amina Bea, Fatuma Juma and Farida Diagwa.

During the trial, Ms. Luciana Shabani State Attorney, Mr. Lameck Mugeta State Attorney and Mr. Petro Ngasa State Attorney represented the Republic whereas Mr. Daudi Haraka, advocate represented the accused person.

The prosecution side had a total of five (5) witnesses and one witnesses' statement was admitted in court as Exhibit P.5 under s. 34 B (1) and (2) (a) of the Evidence Act, Cap.6 R.E. 2002. On the other side, the defense had one witness, the accused person.

There is no dispute that Martha D/O Michael (The deceased) was murdered. The question in dispute is whether the accused murdered the deceased.

The prosecution evidence is as follows; PW1 PETER LANGIDARE testified on oath *inter alia* as follows, he lives at Kiru Six, Pimbi 'A' Hamlet and he has been Chairman of Pimbi 'A' Hamlet since 2015.

On 20/2/2015 at 7.00 a.m. while at his home; he was called by Nyangusi Bernad. Nyangusi told him that Alfian Mustapha was surrounded by people and that the people suspected Alfian Mustapha (Accused) because he looked nervous and he was covered with blood around his legs. Following that information; he went to Alfian's home. The distance from his home to Alfian's home is about 210 meters. When he got there he saw people surrounding him. They had stopped the accused as he (the accused) wanted to go to 'Kijiweni'. The people forced him to return to his home.

He asked Alfian what was the problem. Alfian said that there was no problem. He looked at Alfian, Alfian looked suspicious. He ordered Alfian to open the door of his house as the door was closed. Alfian opened the door. By then he had called a militiaman who is called Fule Rashid. They entered in the house. They saw the deceased's body on the bed. The deceased was laying on the bed and she was lying on her back. The bed was at the sitting room. He identified the body to be that of the deceased after the police came. The accused person was taken to the police station.

The police uncovered the body. The body had wounds on the head and around the legs. Thereafter the police continued with their investigation.

The accused person's house has two rooms; a bed room and a sitting room. The body had stab wounds.

They then informed the relatives of the deceased of the incident.

At the scene; they saw a stick under the bed. It was a stick with 'V' shape at the end (Mambo). It was like fire wood. When the police came, they said that the stick had blood stains.

PW2: SOPHIA ABDALLAH, testified that, she lives at Kiru Six village; at Pimbi 'A' hamlet; and she is a peasant.

On 20/2/2015 at 6.45 a.m. while on her way to Kijiweni she met the accused talking and crying. He was saying "nimemaliza kazi" (I have finished the job). He asked Benard Nyangusi, who was also passing there, to ask the accused what went wrong.

She left Nyangusi Benard and the accused; she went back home. They called the chairman. She joined them when the chairman came, they together went to accused's home. When they got there the chairman opened the door. They saw the deceased. She was shocked by the scene hence she didn't enter the house.

The distance from her home to accused's home is 200 meters.

PW3: Nyangusi Benard, testified among other things that; he lives at Kiru 'Six village, Pimbi 'B' Hamlet. He is a peasant. On 20/2/2015 at 7.00 a.m. he was at the Kiru six village; he was going to Kijiweni. While on the way, he was called by Sophia @ Mama Saidati. She asked him to ask the accused what went wrong as the accused was uttering strange words. Alfan was saying,

“nimemaliza”. He observed that the accused was acting normal. He had covered himself with a sheet. He called the hamlet chairman Peter Longidare. He asked the chairman to come to Kijiweni as there was an incident that had happened. The hamlet chairman came after a short while. They asked the accused to go back to his home. When they got there, they asked the accused to open the door of his house. The accused did not open the door, the door was opened by the chairman.

When they entered the house, at the sitting room; they saw a person lying on the bed and was covered with a bed sheet. The chairman uncovered the sheet at the head. He saw some bruises on the head and around the legs.

He identified the person who was lying there to be Martha or Mama Emmanuel. She was cohabiting with the accused as husband and wife.

PW4, DR. AFITWA AYO, is a doctor and he works at Dareda Mission Hospital. On 20/2/2015 at 4.00 a.m. he was asked to conduct a post mortem examination of the deceased body. The deceased upper jaw was broken. Her clothes on the chest had blood. When he removed the cloth that had covered her, he saw many wounds on the chest. Clotted blood was still coming out. He examined the wounds with fingers. He detected that the deceased died due to severe hemorrhage. The chest had wounds; these caused bleeding. She had small injuries on the head and around

legs. The wounds could have been caused with a sharp object. The injury on the jaw could have been caused by a blunt object, like stick, stone or anything like that. He prepared an Autopsy report (Exhibit P.1.) and handed it to the police.

PW5: D 7540 S.SGT MASOUD, is a police officer based at Babati; he is the exhibit keeper. On 25/2/2015 at 9.30 a.m. he received exhibit from G.1877 DC Prosper. It was a stick (Exhibit P.2) that was in relation to file Number Babati IR 534 of 2015. He entered it in exhibit Register. He thereafter filled the Chain of Custody Form (Exhibit P.3).

The investigator; No.G.1877 DC Prosper could not be found as he was dismissed from the police force. His where about was not known hence his statement was received under S.34b(1) & 2(a) of the Evidence Act and it was marked as exhibit P. 5 and the sketch map of the crime scene was admitted as exhibit P.4.

Exhibit P.5, the statement of the investigator, narrates that he was directed by A/insp. George the OCS of Kiru Police station to go to Kiru Six to investigate a crime at Accused's home. He stated that he went to the crime scene where he met the hamlet chairman. They opened the door and he saw the deceased's body lying on the bed and it had wounds, by then the accused was already arrested and was taken to Babati police station. He also saw a stick covered with blood under the bed. He suspected it to be a murder weapon; hence he collected it as an exhibit. He recorded witness statements.

He witnessed the post mortem examination. The cause of death was severe Hemorrhage.

That was the end of prosecution's case.

For defence the case was as follows, DW1 ALFAN MUSTAPHA, raised a defense of alibi. Briefly the accused person's evidence is to the effect that he was not at home at the time when the offence was committed; he said that, he was arrested at Kijiweni when he was coming from irrigating the farm.

He *inter alia* said that, on the particular time when the offence was occasioned he was at the farm. He was not at the crime scene; he did not know what had taken place. He was watering the plants from 10 pm to 6.00 am; that was 20<sup>th</sup> February, 2015.

When he was coming from the farm, he got at Kijiweni, he was at Lembris' shop. While there he saw Mama Saidat who's also known as Sophia Abdallah at another shop. He then saw Sophia (PW2) calling Nyangusi Benard (PW3) and talking to him. He was near to them. He overheard Nyangusi calling the chairman. He didn't know the chairman who was speaking to Benard. After about 15 minutes the Pimbi 'A' Hamlet chairman came. The chairman told him (the accused) that there is a problem at his home (accused's home). The accused told the chairman that there was a woman (His wife) at home. The chairman told him that they have a problem at his home. They left the three of them; him, Nyangusi and the

chairman. By then Mama Saidati had left. Mama Saidati came again with Petro Rashid, Hamis Athuman, Juma and other youths who live at her home. When they got at his home they found the door closed. He asked the chairman what was wrong. The door had no padlock. The chairman opened the door. He saw a person lying on a bed in the sitting room. The person was covered with a sheet, the chairman uncovered the sheet. He saw his wife. He held the chairman's shirt. He asked him what had happened. The chairman said that there was no problem. They will explain at the police. By then many people had gathered there. He was taken by Petro Rashidi, a militia man. They started to beat him. He was taken to Kiru police station. He stayed there for two hours. Thereafter they took him to Babati police station.

DW1 testified further that, PW2, Sophia Abdalla's evidence does not touch him. She has not adduced any evidence against him. She says that he was nervous; how could he kill and stay there.

She says that they met near Kijiweni while she met him at Kijiweni. The distance from his home to kijiweni is about 140 paces. PW3 told the court that he was at Kijiweni. That's where they arrested him. PW1 said that he found him near his home, and people surrounded him, the truth is that, he was arrested at Kijiweni.



None of the witness saw him killing the deceased. All the exhibits do no connect him with the murder. The exhibit was seen there, but there is no evidence to show the person who used it.

PW1 told him that there is a problem at home. He has neighbors however the neighbors were not involved during the incident.

There were no other people who surrounded him at Kijiweni. He had no grudges against his wife. He did not committed the offence.

Briefly that was the evidence of both sides. Thereafter I received a final submission from the defense counsel, Iam grateful for his submission. I finally received assessors' opinion which I have taken into consideration.

The duty of proving the case is upon the prosecution, 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 that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution....."

As pointed out at the outset, there is no dispute that the deceased was murdered. The question is whether the murder was committed by the accused person. The fact that the deceased met unnatural death was witnessed by PW1, Pw2, PW3, PW4 and PW5. All these witnesses saw the body of the deceased having stab

wounds. PW4, the doctor confirmed that death was caused by severe hemorrhage due to the wounds which were inflicted upon the deceased.

However none of the witness witnessed the accused killing deceased.

The available evidence is purely circumstantial. Circumstantial evidence may be relied upon to find a conviction. However to ground a conviction on circumstantial evidence, the circumstantial evidence must be incapable of more than one interpretation, see the case of **HASSANI FADHILI v REPUBLIC (1994) TLR 89 (CA)**.

In our case at hand, the prosecution's evidence tries to establish the suspicious conduct of the accused after the fact and to show that the accused was with the deceased before she met her tragic death. However, the evidence is wanting. The most important witnesses for the prosecution are PW1, PW2, and PW3. According to PW2 the accused was suspected to have committed the offence because he was nervous and he had blood around his right leg. According to PW2's testimony, the accused was shouting, crying and saying some strange words. However, PW3 who also met the accused at the same time saw that the accused was acting normal and he did not note anything unusual. PW3 stated further that, he told PW1 that there was as an incident, basing on what he was informed by PW2. It is my view this is quite a major contradiction.

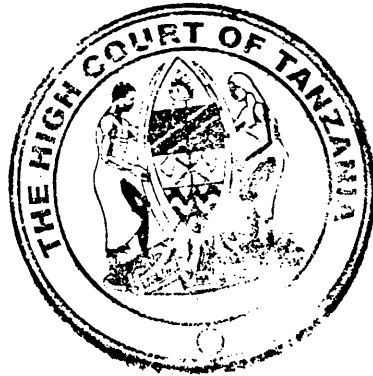
In this respect see the case of **Mohamed Said V. R [1995] TLR 03** where the Court of Appeal held *inter alia* that, "*where the testimonies by the witness contain inconsistencies and contradictions, the court had a duty to address the inconsistencies and try to resolve them where possible; else the court had to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter*".

Likewise there are contradictions in respect of the place of accused person's arrest. PW3 said he was arrested at Kijiweni. PW2 said that he was arrested near Kijiweni. While PW1 said that he was arrested at his (Accused's home) home.

It is my view that there are a lot left to be desired in the prosecution's evidence; hence there are doubts which have not been cleared. The benefit of doubt always goes to the accused person; 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.*" In this respect the Court quoted the case of **Christian s/o Kaale and Rwekiza s/o Bernard Vs R [1992] TLR 302** where the court held that an accused ought to be convicted on the strength of the prosecution case.

Basing on what I said above, I find that the Prosecution has failed to prove the case beyond all doubts. I join with the gentlemen assessors, I find the accused person not guilty of the charged offence. Consequently I acquit the accused accordingly.

Right of Appeal is Explained.



  
**S.C.MOSHI**  
**JUDGE**  
**13/07/2018**