

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

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

**AT BABATI**

**CRIMINAL SESSIONS NO. 102 OF 2016**

***(Originating from Resident Magistrate's Court of Babati at  
Manyara PI. No.17/2015)***

**THE REPUBLIC**

***VERSUS***

**TINGATINGA S/O KITIKO TINGANGA**

**RULING**

Date of Last Order: 09/07/2018

Date of Ruling: 10/07/2018

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

This ruling is made in compliance with S. 293 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (The C.P.A.). The court has to decide whether the accused person has a case to answer; then the court will

invite the accused to enter his defense or if he has no case to answer the court will record a finding of not guilty. Upon closure of the prosecution's case, the defense counsel, Miss Lilian Joel made a submission that the accused person has no case to answer; that there is no evidence that the accused committed the offence that he is charged with.

The evidence for the prosecution was as follows; PW1 AUGUSTINO S/O MPUKI KUBERA stated among other things that, he lives at Vilima Vitatu Village. He had three children. Their names were; Kelvin Augustino @ Maderi Kubera, he was aged 13 years (the deceased); Paulina |Augustino Rusu, and Regina Agustino Swai. Kelvin Augustino Maderi died in 2015.

On 6/5/2015 at 6.00 p.m. he was at home, at Chem Hamlet at Vilima vitatu village. His child Kelvin Augustino Maderi Kubera had gone to graze goats. The deceased had gone to the grazing field alone. Kelvin (deceased) did not come back home up to 7.00 p.m. He, with his wife and young brother went to look for Kelvin at the place where Kelvin was grazing goats. They flashed their torch and saw the goat's eyes. They followed the goats; they were on top of the hill. They took the goats down the hill. They were surprised when they found out that Kelvin was not there, they did not know where Kelvin had gone. The deceased had left the goats unattended. He thought that the deceased was afraid to come home because he had told him not to take the goats to the hills during rainy season.

They went back home. They thought that he had gone to neighbors or to his grand-parent. He thought that the deceased was afraid of being punished. In the same night, at 9.00 p.m. , it was announced that all the people whose land would be over passed by the electricity wires should wake up at 6.00 am and go to the farms for estimates exercise.

He went to the farm on 7<sup>th</sup> in the morning. He asked his wife that when Kelvin comes he should take out the goats for grazing. He came back home at 4.00 pm. His wife told him that she hadn't seen the deceased up to that time.

He mobilized the neighbors and other youths. They went to look for the deceased at the grazing area. They were about six or seven of them. They looked for the deceased around the area where they had found the goats. However night fell; they didn't see him. They decided to report the matter to vilima vitatu village office. The chairman ordered that an alarm should be raised. It was ordered that they should meet in the following day at the grazing area.

On 8<sup>th</sup> at 6.00 am, many people came out. They went to the fields. They scattered into different directions. They looked for the deceased. The people saw the body of Kelvin (deceased) near the hill. The body was in a bush at the hill side. The deceased's neck was cut with a sharp object. The body and neck were almost cut apart; what remained was a small bone whose size was like a finger. They informed the village office that they had seen the body of the deceased. They informed the police. The police came and took the body to the mortuary.

A police officer asked him if he had suspected any person who could have committed the crime. He remembered that Tinga Tinga (Accused) was accusing him that he was bewitching him (the accused). The accused was saying those words when he was drunk, so he was not taking him seriously. He thought that the accused was confused.

The accused had been accusing him to be bewitching him several times and for quite a long time. They had once quarreled and the accused told him, "wewe utaniona tu". Tinga Tinga is his niece.

The police looked for accused. He was not in the village. He had gone to Mdori hamlet. They had not seen the accused since the incident happened.

PW2: E. 8171 D/CPL STEPHEN, stated among other things that, he works with police at Minjingu. He works with investigation department

On 8/5/2015 at 11.00 a.m. he was at the office, at Minjingu Police Station; while in the office the executive officer of the Ward phoned him and told him that murder was committed at Vilima vitatu, at Mdori.

He went to the crime scene with S/SGT Zuberi. There they saw many people. They joined the people to look for the body; the boy was on the sides of the hill; there were farms below the hill. They saw the body laid down beside a stone; at the hill side. The neck was cut; only a very small part of the neck remained. They removed the body and put it in the vehicle. He drew a crime scene sketch map (exhibit P.2).

Thereafter they took the deceased to mortuary at Babati Hospital. The doctor examined the body; on the same day on 8<sup>th</sup>. The doctor said the cause of death was due to severe bleeding – Hemorrhagic shock and brain hypoxia which was caused by a cut that was caused with a sharp object (The post mortem report was admitted and marked as Exhibit P1). They arrested the accused after getting people's help. They learned that the accused was hiding in the huts. The people arrested the accused. They brought him to Minjingu Police Station by a car, at around 1.00 p.m. to 2.00 p.m.

PW3: D.6261 D.SGT BURHANI, works with C.I.D. department in Manyara region. He recorded the accused person's caution statement (The statement was not admitted because it was obtained contrary to S.50 (1) (a) and S.57 (2) (e) of the C.P.A).

PW4: LAURIAN FAUSTIN MWASI testified *inter alia* that, he lives at vilima vitatu, Nchemu hamlet. He is a peasant and he is also the village chairman. On 4/5/2015 at 2.00 p.m. he called a meeting to settle a dispute between Tinga Tinga Kitiko (accused) and some women who are members of his hamlet; Nchemu hamlet. Tinga Tinga was insulting the women; he was saying 'kuma', "Kuma mama Zenu". The accused (Tinga Tinga) said that he was not alone. He was sacrificed by Augustino Mpuki Kubera. He asked that accused can he confirm what he was saying? He told the accused to stop those allegations. The accused said that, "Hataniweza mtu anatembea huku anakohoa." He warned him to stop the insult. The accused promised to beg for pardon from the women.

After two days, the diseased disappeared. His parents said that he had gone to the grazing fields. They reported his disappearance on 7<sup>th</sup>.

They raised an alarm on 7<sup>th</sup>; they all went to look for the deceased. They were not successful. They found the deceased on 8<sup>th</sup>, he was already dead. The child had a wound on the neck; it seems that the wound was inflicted by a panga; only small part of the neck was left.

He suspected that it was the accused who committed the murder because he did not join them to look for the deceased at night and in the morning. Another thing that made them suspect him because he had said, "huyu nitamkomesha."

PW5: EVALINA MPUKI BLAGEDA, stated among other things as follows, she lives at Vilima vitatu village; at Mdori. She is a sister of PW1 and the accused is her niece.

On 3/5/2015 at 10.00 p.m. she was at home. She owns a grocery which is situated at her home. She heard noises that were coming from the grocery. She was told that Tinga Tinga Kitiko (the accused) was refusing to pay money for the beer that he had consumed. Tinga Tinga refused to pay and started to insult them. He then hit her table and the table broke down. She told the maid to lock him in and he would pay for all the items that he had broken in the morning. However the accused paid for the drinks when she got out. The accused chewed a T.shs.30,000/= and spit it out. He started to insult them. The accused was saying you are big witches, tell Kubela (her brother), "nampa siku tatu kile nitakachomfanya hatahau". After saying those words he left.

The accused came back on 4<sup>th</sup> May. She chased him and told him, "Toa laana ya mama yako." The accused answered, "mtanikumbuka." He went away. Two days passed. Augustino came to her home. He told her that Madere @ Kelvin Augustin was not seen since the previous day.

On the 8<sup>th</sup>, in the morning people went to look for the child. When she was preparing to go to look for the child, they told her that the child was found. He was murdered. She just shouted and said the child was murdered by Tinga Tinga. She suspected Tinga Tinga because he had told her tell Kubera that he gives him three days, he would do something that he won't forget. Another reason; that she suspected him is due to the fact that the accused did not join the others to look for the child.

PW6: ANNA THOMAS MUSINGA, also lives at at vilima vitatu. Nchemu hamlet. On 4/5/2015 at 2.00 p.m. while at home, Tinga Tinga came, he said he would torch her house; he would pour Petrol on her house so she could die inside the house or he would stab her with a spear.

She reported the threats to the chairman of the hamlet. He also had threatened Augustino Mpuki Kubera he told him that he would do something that he wouldn't ever forget. Augustino is her brother –in-law. Tinga Tinga is her relative and a neighbor.

The child (deceased) Madere was murdered after three days. She suspected that the murder was committed by Tinga Tinga as he had threatened to do something to Augustino. Tinga Tinga is the accused in the dock.

When the murder was committed the accused was around however he left for another village after an alarm was raised.

PW7: SANTU MARIKI NYANGE is a resident of vilima vitatu, Chemu Hamlet. In 2015 while going home, he met the accused. While on the way, they were talking. The accused told him that Kubera Augustino had casted spells on him (amemtupia jini). He asked him was he sure with what he was saying? The accused told him that it was true. They separated, he went home and the accused also went to his home. In the following day Tinga was shouting. He was insulting the women. He was saying, "kuma ya mama yenu." The matter was reported to the Hamlet chairman. He begged for forgiveness to the women. He was ordered to pay a fine in terms of a bull. Accused used to quarrel after drinking. The accused had also fought with Anna Thomas.

In the same year, 2015 Augustino's child died. The child was cut with a panga by Tinga. He thought that it was Tinga who committed the murder due to the words that he uttered. He said, he would do something to Augustino that he would not forget.

He saw the deceased's body at the grazing fields. All the villagers went to look for the child. Tinga Tinga was at home when the offence was committed. However, he was not seen on the following day.

That was the end of prosecution's case.

Miss Lilian submitted among other things that none of the witness saw the accused person committing the murder. All the witnesses said



that they had the feeling that it is the accused person who killed the deceased following the threats statements. She argued that however none of the said threats were ever reported to the village office or to the police station. In this respect she cited the case of **Simon Msoke V.R**, 1958 E. A 715 at pg. 716 where it was held that:-

*"In a case that depends on circumstantial evidence the court should not convict unless the circumstance evidence irresistibly prove that the accused is guilty of an offence charged against him.*

She also argued that, the gaps cannot be cured by defense case. The duty of the accused is only to raise doubt on the prosecution's case. In this regard she cited the case of **John Makune Vs. R.** (1986) T.L.R. 49.

The defence counsel also assailed the evidence regarding the disappearance of the accused person from the hamlet since the day that the deceased disappeared. She said that, this evidence is contradictory as apart from PW1 other witnesses testified that the accused person was around the village until when the alarm was raised.

I have considered these arguments and the evidence as a whole. It is true that the prosecution's case bases on circumstantial evidence.

As argued by the defence counsel there is an issue of escaping from the hamlet and the threats to do harm to the deceased's father and other members of the family.

To begin with, looking at the prosecution's evidence, there is no direct evidence that connects the accused with the murder.

Regarding the threats; it is evident that the accused person had disturbed and threatened the whole hamlet. According to the evidence, the accused would always turn hostile after drinking. He insulted people and threatened them. It is obvious from the evidence that the witnesses, suspected him to have committed the murder due to this character of his. It suffices, to say that this piece of evidence is based on suspicions.

It was underscored in the case of **Shaban Mpunzu @ Elisha Mpunzu V.R.** Cr. App. No. 12/2002, Court of Appeal of Tanzania that;

*"However, it is a settled principle of Criminal Justice that in a criminal charge, Suspicion, however strong it may be, is not enough to ground a conviction. Such was, unfortunately the position in this case, the prosecution case still left room for doubts which have to be resolved in favour of the appellant.*

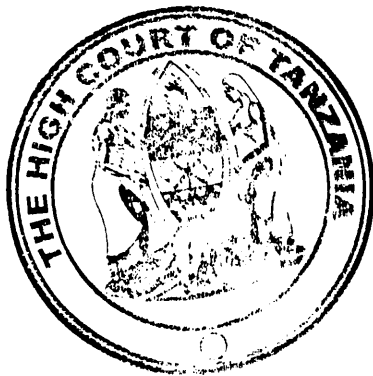
Regarding accused's escape from the hamlet; there are discrepancies that are obvious. PW1 said that the accused absconded on the date when murder was committed. Other witnesses said that the accused was in the hamlet; he left on the day when the alarm was raised. However, the evidence too shows that the accused in fact had not gone far. He was in a nearby hamlet, drinking "pombe" (Hard drink). The evidence shows that the accused was in the pombe huts with many other people. It is my view that these facts are not consistency with the person who intends to escape from the hands of justice.

Apart from the above evidence, there is no other piece of evidence that connects the accused with the offence that he stands charged with.

To ground a conviction on circumstantial evidence, there has to be unbroken chain of circumstantial evidence linking the accused with the death of the deceased and the exculpatory facts should be 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**, Cr. App. No. 18 of 2008, Court of Appeal of Tanzania. That said, I find that the prosecution has not established a prima facie case that establishes that the accused committed the offence.

I thus find the accused person not guilty of the offence of Murder c/s 196 of the Penal Code [Cap. 16 R.E. 2002]. Consequently, I acquit him accordingly; under 293 (1) C.P.A.

Right of Appeal is explained.



  
**S.C. MOSHI**  
**JUDGE**  
**10/07/2018**