

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[DAR ES SALAAM REGISTRY]
AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 72 OF 2015

REPUBLIC

VERSUS

- 1. RAMADHANI HUSSEIN RASHID**
- 2. ATHUMANI YUSUPH MBALILWA @ FUNDI**
- 3. ABDALAHAMANI HARUNA KIGONGO**

JUDGMENT

KITUSI, J.

Ramadhani Hussein Rashid, Athuman Yusuph Mbaliwa and Abdalahaman Haruna Kigogo who stand as first, second and third accused respectively are charged with Murder contrary to section 196 of the Penal Code, it being alleged that on 19th November 2011 at Kiwalani near Vingunguti area within the District of Ilala in Dar es Salaam Region they murdered one Maua Seleman Divele.

The three accused persons pleaded not guilty to the charge necessitating the prosecution to adduce evidence in proof thereof. The prosecution that was conducted by Ms Anna Chimpaye and Mr Gabriel

Kamugisha learned State Attorneys called five witnesses from whose testimonies the following story is made out.

The deceased was working in the production section of Mohamed Enterprises Company at Kiwalani where Shophia Juma Msangi (PWI) was working in the Accounts section. On the fateful date at about 9.30 P.M. PW1 was in the upper floor of the premises counting her employer's money together with one Vencant Subarao, her immediate boss. Pw1 stated that the counting of the money is normally done at night in the room upstairs for security reasons but eventually the money has to be taken downstairs.

PW1 stated that when Vencant Subarao had gone downstairs with the money in order to keep it in safe custody, she heard gunshots from the ground floor and people shouting that the money had been stolen, but for fear of her life she did not go there. Pw1 further stated that when the gunshots stopped after sometime and she became aware that policemen had arrived at the scene, she walked to the ground floor as other people also found the courage to go near the scene. Pw1 further testified that when she got downstairs she found the body of Maua Seleman Divele lying on the ground and that is when she learnt that she had been shot dead by the armed bandits.

There is evidence of a No G 853 DC Frank(PW2) stating how on 7th December 2011 at 6.00 he stumbled on to information that turned out to be relevant to the alleged killing of the deceased. Pw2 was on patrol with Filbert, Isakanisa and Benson (fellow policemen) along Shaurimoyo/

Lindi Street, using an official motor vehicle. Then they saw a motorcycle carrying three people approach their car from behind. As the three passengers on the motorcycle were not wearing helmets, the police intended to stop the motorcyclists for interrogations. However on realizing that they were about to be stopped by Policemen, the motorcyclists tried to escape and the police gave chase.

In the course of riding the motorcycle in escape, the fugitives hit a bump as a result of which the two passengers fell off the motorcycle, and according to PW2, one of them was carrying a small bag. These two people who had fallen off the motorcycle took to their heels too with Pw2 running in pursuit of the one who was carrying the small bag in the direction of Machinga Complex area. Pw2 managed to apprehend the fugitive with the bag, and with the assistances of Corporal Benson, took him back to where the police vehicle had been left. According to Pw2 when they were in the police vehicle the police checked the contents of the bag, and they found a gun which by improvisation had been made shorter, and that there was also a magazine and 55 rounds of ammunition.

Pw2 stated that the man he apprehended was the first accused who on being interrogated readily named the other two fugitives as Abdurahaman and Athuman. He further confessed to having taken part in the robbery at Kiwalani area in the course of which a person was killed.

When answering questions raised by counsel for the accused, Pw2 stated that when chasing the first accused he did not raise any alarm for

fear that an alarm would attract fatal mob justice, given the number of people around that busy street. He denied a suggestion by one of the counsel that the confession by the first accused was extorted by torture and said that initially he only suspected the motorcyclists with violating Road Traffic laws.

The case for the prosecution, is that the man who was apprehended after unsuccessfully trying to escape with the small bag was the first accused who, later at Sitakishari Police station, confessed to a Detective Ssgt Lameck (Pw3) that he took part in the robbery and killing of the deceased, the subject of this case. In the course of the interrogations he allegedly named other people who participated in the murder, and led the police, including ASP Vernon Malimali (PW4), to the place of abode of the second accused at around 4.00 a.m, where the second accused was arrested.

At the time of his arrest effected by a team that was led by PW4 in the presence of his landlord and after he had been identified by the first accused, the second accused was searched and found in possession of a gun and rounds of ammunition. He was taken to Sitakishari Police station where he recorded a cautioned statement before D/Ssgt Laurent (PW5). The statement was admitted as Exhibit P4.

In defence each accused represented by Mr Sosthenes Mbedule, Mr Mashaka Mfalla and Mr. John Nyange for the first second and third accused respectively denied having committed the alleged murder, and disowned the statements allegedly made by them. The first accused stated

that he is a businessman at Machinga Complex at Kariakoo area in Dar es Salaam and that on the day of his arrest he had just closed his business for the day and was walking to catch a bus home. Coincidentally a man he later came to know as a policeman was chasing a suspected offender heading his direction. The first accused said he managed to dodge the suspect who was ahead of the police and avoided colliding with him but he failed to dodge the police. As a result the police collided with the first accused and for this incident his mission to apprehend the suspect was fouled. First accused's defence is that the police arrested him out of anger after he had unintentionally failed their mission to arrest the offender. When the first accused was finally interrogated by the police at Stakishari police station, and this being after being in custody from 7th December 2011 to 10th December 2011, the police continued to blame him for causing the escape of their most wanted criminal and made no secret that he would bear the burden of that criminal.

The first accused narrated how he came to write and sign a statement; he said he was forced to copy the contents of a statement which had already been prepared, so he denied being the author of Exhibit P4. The first accused said that he signed Exhibit P4 to stop the police from assaulting him more than they had done, for he said, the police had assaulted him so badly that he could not stand on his own feet. The accused said in further attack against the prosecution, that he made the statement on 10th December 2011 but the same is dated 7th December 2011, and according to him, this is proof that the statement had been written well before.

Second accused stated that he was tortured and threatened death by being shown a person who had died as a result of torture in the hands of the police. He, like the first accused, was given a recorded statement which he was instructed to copy, and he told the court that for fear of his life he had to do what had been instructed. The third accused said that he was a victim of random arrests that were effected by the police and that when the others were taken to court he found himself charged along with four others(including the first and second accused) for offences her never committed. He pointed out the fact that even the police who arrested him never came forward to testify.

In this case the prosecution brought five witnesses but none of them claims to have identified the perpetrators of the robbery and killing. Therefore although there is no dispute that Maua Seleman Divele died an unnatural death as per the report on postmortem examination (Exhibit P2), no one saw the accused persons kill her. The only evidence for the prosecution is in a form of confessions made by the first and second accused while being interrogated by the police. The Assessors are of the unanimous opinion that the accused are not guilty

I am aware of the position of the law that a conviction may lie on a cautioned statement but the court must first be satisfied that the statement is true, it has been voluntarily made and implicates the maker with the offence charged. However these confessions are of no value as far as the third accused's guilt is concerned because if believed, these statements are accomplice evidence as against him. The law regarding evidence of an accomplice is that it needs corroboration before

acting on it to find a conviction. As regards the statement allegedly made by the first accused, (Exhibit P 3), it was admitted without any objection from the defence counsel. The law as stated in the case of **Twaha Ali & 5 Others V Republic**, Criminal Appeal No 78 of 2004 CAT (Unreported), cited in the case of **Mkwavi Njeti V Republic**, Criminal Appeal No. 301 of 2015, CAT (Unreported) is that;

"...a confession will be presumed to have been voluntarily made until objection to it is made by the defence on the ground that it was not so or that it was not made at all."

The statement of the second accused was admitted after a trial within a trial was conducted at the end of which I got satisfied that it was made voluntarily. Therefore the question regarding voluntariness in making the statements having been determined, it remains for me to determine whether they are true and they implicate the makers. As the Court of Appeal stated in **Manyangu Mang'wena @ Mlugaluga & Another V Republic**, Criminal Appeal No 227 of 2012, CAT (Unreported), ;

"Like any other evidence, this is the stage when this and the rest of the evidence is evaluated together."

In the course of the evaluation I will also consider the relevance and value of Exhibit D1, a statement by the first accused that PW3 admitted to have recorded. In both statements the first and second accused stated that

they took part in the armed robbery at Kiwalani Mohamed Enterprises offices on 19 November 2011. According to the second accused he came to learn later that a woman was shot dead in the process. In the second accused's statement a total of shillings forty two million was stolen on that night, and they proceeded to the first accused's residence where they shared the loot amongst themselves on the same night.

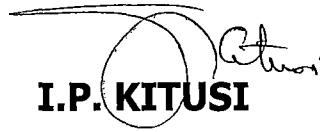
According to the statement of the first accused especially Exhibit D1, the stolen money was not shared on that night or at all. His version is that on 7 December 2011 when he was arrested he had met the second and third accused at Kariakoo area so that they would proceed to a place where they would share the money. According to PW4, the second accused was living at Bunyoko area, a place beyond Kimara area in Dar es Salaam. In his statement the second accused stated that after the robbery he is the one who took with him both guns which he hid at his residence. In the same statement the second accused stated that he met with the first and third accused on 7 December 2011 at Kariakoo area so that the three could proceed to the Airport area to hide one of the guns. Of course it hardly makes sense that a person would move with a gun from Bunyoko to Kariakoo so as to meet his colleagues in order for them to go to the Airport to hide that gun. This aspect may be less relevant and need not be pursued. The point is that the two statements are contradictory as to why the three accused persons met at Kariakoo, and they are also contradictory as to whether the money was distributed on the night of the robbery or not. The two statements, in my conclusion, do not speak the truth about

themselves, therefore do not qualify to be relied upon in finding the accused guilty.

There is the defence of the third accused whose story as to how he was arrested randomly for no apparent reason has not been contradicted by the prosecution. According to him, and that is uncontroverted again, none of the prosecution witnesses came forth to testify that he arrested him. It is my conclusion that what the third accused has stated casts doubt on the prosecution case not only in relation to his guilt but also in relation to the two cautioned statements of the first and second accused which mention him as a perpetrator of the offence in this case.

For the reasons shown, I agree with the Assessors that the accused are not guilty and acquit them.




I.P. KITUSI
JUDGE
6/03/2018