

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

**CRIMINAL SESSIONS CASE NO. 129 OF 2016**

**REPUBLIC**

*VERSUS*

- 1. KITEMBELE S/O MTATIRO @ KICHONGE**
- 2. MOHAMED S/O OMARY @ JONGO**
- 3. MBWANA S/O KASSIM ALLY @ KAMBANGWA**

**JUDGMENT**

**KITUSI, J.**

Kitembere Mtatiro @ Kichonge, Mohamed Omary @ Jongo and Mbwana Kassim Ally @ Kambagwa, hereinafter referred to as the first, second and third accused respectively are jointly charged with two counts under section 196 of the Penal Code Cap 16, for murdering Hekima s/o Mgata, in the first count and Ibrahim s/o Omary, in the second count. It is alleged that the three accused between 16<sup>th</sup> to 19<sup>th</sup> September 2012 at Chatembo - Mwandege area within Mkuranga District in Coast Region did murder the two persons to whom I shall henceforth refer as deceased. The accused persons pleaded not guilty.

In a bid to discharge the duty of proof the prosecution called a total of seven witnesses who were led by Ms Elizabeth Olomi and Ms Sophia

Bimbiga, learned State Attorneys. The accused persons were represented each by a separate learned advocate, Mr Kika Nzige, Mr Ashiru Lugwisa and Ms Catherine Peter, learned advocates, standing for the first, second and third accused respectively. To begin with, there was the evidence of Prisca Elia Kakwaya (PW1) an entrepreneur resident of Keko area in Dar es Salaam who had a poultry farm at Chatembo area within Mkuranga District in the Coastal Region. Pw1 stated that the deceased persons had been her employees at the farm and were working and staying at the said farm. On 21<sup>st</sup> September, 2012 she received a call from somebody who informed her that there was no body at her farm to attend it. She went to the farm and confirmed that the two employees were missing, after which she had to move and stay at the said farm to attend it herself because there were chicken to be fed, eggs to be collected and all and such other chores.

The story of Pw1 is that prior to the employment of the deceased, her farm was being attended to by the first accused who was dealing with poultry, and the second accused who was employed as a night security guard. She subsequently terminated their employment because first accused was being suspected of stealing from her neighbours and the second accused was reporting at work late, he being too busy with his other activities.

It is in evidence and not disputed that the first accused is Pw1's uncle, he being the younger brother of Pw1's mother, and that it was one Maria Baltazar @ Marial Matatiro a resident of Tabata area in Dar es Salaam who recruited that said first accused for her (PW1). Maria

Baltazar is also first accused's sister. So when she terminated his employment Pw1 sent the first accused to Maria Baltazar's residence at Tabata so that she would in turn send him back to Musoma where he had come from. However, instead of going back to Musoma, the first accused allegedly went back to Chatembo area within the area of PW1's farm.

About two days after the workers of Pw1 had gone missing, their bodies were found, according to Juma Salum (Pw2) and Omary Ramadhani (Pw3), in a dry well covered with dry grass and another in an unfinished house also covered by dry grass. The prosecution is alleging the fact that when the deceased's bodies were found the first accused disappeared from Chatembo Village. A/Insp Janeth (Pw6) stated that on 26 September 2012, the first accused's wife turned up at Mkuranga police to seek for assistance from the police on how to fend for herself and children because her husband had disappeared.

(Pw6) testified further that she was the one who visited the scene accompanied by a doctor and saw the decomposing bodies of the deceased. And that later she sent out what she referred to as CQ, which she said, is a message to alert all police in all police stations in the country to be aware that murder has been committed, and that the fugitive might be in their areas of jurisdiction. On 14/3/2014 Pw6 was informed by the OC- CID that a person believed to be the perpetrator of the murders had been arrested in Musoma and he was thereafter taken to Dar es Salaam.

It is further the prosecution's case that the first accused arrived in Dar es Salaam on 19<sup>th</sup> March 2014, and that on the same date at around 1.00 P.M. while recording his cautioned statement ( Exhibit P6) before Detective Ssgt Ayubu(Pw5) he confessed to have killed the deceased, jointly with the second and third accused. Thereafter the first accused was taken to a Justice of the Peace one Tumsifu d/o Gideon Barnabas (Pw4) now a Resident Magistrate but who was a Primary Court Magistrate when she recorded the statement on 21<sup>st</sup> March 2014.

In defence the first accused said that when PW1 terminated his employment he went to his sister at Tabata from where he travelled to Musoma with his wife and children. He denied having gone back to Chatembo village and killing the deceased. He denied the alleged disappearance and he accused the police for torturing him badly to force him confesse. He averred that even the extra judicial statement was recorded in the presence of the police who had initially tortured him. So, according to the first accused he was not a free agent both in making the cautioned statement (Exh P6) before D/Sgt Ayoub(PW5) and in making the extra judicial statement( Exh P5) before PW4. The first accused denied any acquaintance with the second and third accused whom he said he did not know before his arrest.

The second accused's defence was that he was never employed by Pw1 but that she had asked him to keep an eye on her employee who had been assigned security duty. He said he was operating a "*boda boda*" and that Pw1 was his regular customer whenever she wanted some farm related material taken to her farm.

He said he became aware of the deaths of Pw1's two employees just as any other resident of Chatembo got to know them, and that after the police granted the villagers permission to bury the bodies he participated in the burials. The second accused was more than surprised on 23 April 2014 when he got arrested in connection with the murders.

The third accused's defence was more brief, as he said he worked as a Mason and had nothing to do with PW1 nor her employees. He, like the second accused, took part in the burials of Pw1's two employees and to him that appeared to be the end of the matter. He said he was arrested on 23/3/2014 while he had been around at Chatembo for all the time from 2012.

Allan Ongala Wegesa (Pw7) is the Medical Practitioner who examined the bodies of the deceased when PW6 visited the scene. His conclusion as to what might be the cause of the deaths is wanting, and his response to cross examinations by learned defence counsel worsened matters. PW7's opinion is that the deceased were killed somewhere else and brought to the places where their bodies were found, because there were no signs of struggle around that area, which is stunning, in my view, because there is nothing medical in that part of the opinion. He opined that death was caused by strangulation by hands which he concluded by eliminating strangulation by rope on the ground that there would be marks left on the victims' necks. So, deaths according to PW7, were caused by what he called "robber". Although from the evidence of PW1, PW2, PW3, and PW6 it can be concluded that the deceased persons died unnatural deaths, it cannot be said from the testimony of PW7 that the cause of

death has been established. This is because what PW7 referred to as "Robber" being the cause of the deaths was his opinion as to what took place than what effect it had on the deceased, and as a medical practitioner he had no means of concluding that hands were used to strangle the deceased. Therefore I am going to attach no weight to the evidence of PW7 and the Report on Postmortem examination, (Exhibit P2).

I am aware that homicide can be proved without first establishing cause of death. [ See **Mathias Bundala V Republic**, Criminal Appeal No 62 of 2004, CAT ( unreported) followed by **Juma Juma Mohamed V. D.P.P**, Criminal Appeal No 243 of 2011,CAT ( unreported), both cited in the case of **Jeremiah John and 4 Others V Republic**, Criminal Appeal No 416 of 2013 CAT ( unreported)]. In the latter case the Court of Appeal held that that is an exception not the rule, and every case has to be decided on its own peculiar facts. In this case I think the prosecution had a duty to prove the cause of the deaths, because PW7 when responding to questions put to him by the defence counsel could not eliminate the possibility that death might have occurred due to causes such as suffocation caused by food wrongly going through the air passage, and the like.

In this case there is no eye witness who saw the murders, therefore I am going to consider whether on the basis of the allegation that the first accused's conduct (that he disappeared from the village) suggested guilt, and whether his alleged confessions prove his guilty and that of the second and third accused beyond reasonable doubt. Those two pieces are the evidence on which the prosecution case rests.

I will discuss the first accused's confessions allegedly made before the police and before the Justice of the Peace. First of all, the Extra Judicial statement was admitted without objection during the preliminary hearing, but at the time of the trial the original had gone missing. There is on record, a photocopy which PW4, the justice of the peace who recorded it, identified it as the one she had written when the first accused was taken before her on 21<sup>st</sup> March 2014. In both statements the first accused implicated himself as well as the second and third accused persons. However the first accused has alleged torture in making both statements as well as the fact that he is illiterate so he could not understand what was going on. He described the nature of the torture in these words; "My nails were pulled out until I shat on myself".

Before I conclude on the issue of the statements, I am anxious to reflect on two intertwined aspect of considerable relevance in my view. These are that, the first accused had been recruited from Musoma and had been working for PW1, a relative. Assuming that the first accused committed the alleged murder, he thereafter went back to Musoma where he lived for almost two years before his arrest and no witness for the prosecution has contradicted the first accused on this fact. The law is settled that the ability to name a suspect at the earliest possible time is an important assurance that a witness is reliable. [**Marwa Wangiti Boniface Matiku Magendi V Republic**, Criminal Appeal No 6 of 1995 CAT (unreported) cited in **Nebson Tete V Republic**, Criminal Appeal No 419 of 2013, CAT, (unreported)]. In this case two questions leap to mind, Did

PW1 name the first accused as the immediate suspect? If so, why didn't somebody check if he had gone back to Musoma?

With these disturbing questions unanswered, it is eyebrow rising that the first accused is arrested after 18 months only to readily confess. The Lady Assessors who sat with me opined that the accused persons are guilty because they developed hatred with the new employees of PW1 which was a motive for them to kill the said new employees. They also held the view that the first accused's disappearance was evidence of his guilt. With respect I hold different views because there is no evidence that the motive for committing the alleged murder was hatred, instead, if the confessional statements are anything to go by, the accused persons had intended to steal, and only when they were recognized did they resort to killing. Secondly the alleged conduct of the first accused if looked at as a whole does not suggest guilt as opined because he left Chatembo and went to a place that was known to PW1 and her aunt Maria Baltazar, and continued to live there. If conduct is relevant as I take it to be, what about the conduct of the second and third accused persons who, even when the first accused allegedly disappeared, remained at Chatembo and continued with their normal life?

In the prevailing circumstances of this case I find relevancy in the fact that the first accused was arrested on 13<sup>th</sup> March 2014 and made his cautioned statement on 19<sup>th</sup> March 2014 before he made the extra judicial statement on 21<sup>st</sup> March 2014. Coupled with the alleged torture, it cannot be said that the first accused was himself in making the statement, which is supported by the following passage in the case of Martin Makungu V



republic, Criminal Appeal No 194 of 2004 CAT ( unreported), cited in Mashimba Dotto @ Lukubanija V Republic, Criminal Appeal No 317 of 2013, CAT ( unreported );

*"It does not need extra – ordinary thinking to know that the appellant must have been under stressful condition..."*

My conclusion is therefore that since the cause or causes of the deaths has or have not been established, and as the first accused was arrested after 18 months while he was at a known place and that thereafter he made confessional statements under doubtful circumstances, I find no basis for holding the first accused guilty of the murders. As the guilt of the second and third accused is dependent on the first accused's confessional statements which I have discredited, it is my finding that the said second and third accused are not guilty as well. All accused persons are hereby acquitted.



  
**I.P. KITUSI**  
**JUDGE**  
**16/03/2018**