

**IN THE HIGH COURT OF TANZANIA**

**AT GEITA**

**ORIGINAL JURISDICTION**

**(MWANZA REGISTRY)**

**CRIMINAL SESSION CASE NO. 114 OF 2016**

**THE REPUBLIC**

**VERSUS**

**SHINONI S/O NKWABI**

**JUDGMENT**

Last order: 30<sup>th</sup> day of June, 2020

Judgment date: 08<sup>th</sup> day of July, 2020

**A.Z.MGEYEKWA, J.**

**SHINONI S/O NKWABI** hereinafter referred as the accused person is facing a charge of murder contrary to Section 196 of the Penal Code Cap.16 [R.E 2019]. In brief, he was stated to have murdered **DAUDI S/O BUNANGO** on the night of 10<sup>th</sup> day of October, 2013 at Nyakato Village, Geita District within Geita Region.

The accused pleaded not guilty to the charge compelling the prosecution to summon FIVE prosecution witnesses to discharge the burden of proof beyond reasonable doubt. In the course of the trial, the court admitted FIVE documentary exhibits to wit; Post Mortem Examination Report (Exh.P1) and Sketch Map (Exh.P2).

The accused was represented by Mr. Liberatus John, learned counsel while the prosecution was conducted by Mr. Pallanyo, learned State Attorney assisted by Ms. Monica Matwe, learned State Attorney. The trial was conducted with the aid of three assessors namely; Hawa Swedi, Jumanne Nkaina, and Mussa Samson. After each of the cases has been closed, the counsels for both parties made their final submissions. I thank the counsels for their informative submission and the same has been considered in this Judgment.

I extend my thanks to the three assessors who sat with me and stated their opinion basing on the facts of the case. All assessors opined to find the accused guilty for the reason that the deceased mentioned the before his death and that PW1 and PW2 alleged that they heard the deceased mentioning that the accused is the one who wounded him.

The case for the prosecution is set out in detail by the five witnesses summoned by the state. The summary of the evidence as captured by the witnesses is set out hereinunder as follows:-

Makisio Maiko (PW1), testified that he resides at Nyakato Village, Geita District within Geita Region. He said that his neighbours were Daudi and Manyanda Shija. He went on to testify that on 10<sup>th</sup> day of October, 2013 around 19:00 hours while seated outside his house, he saw Kazimili Lufungilo "Kazi" and Shinoni Nkwabi passing by his house heading to Daudi's place. PW1 testified that he knew Shinoni for two years, he was the deceased brother in law and that he was living a nearby Village called Nyamigogwa. PW1 continued to testify that on 10<sup>th</sup> day of October, 2013 around 21:00 hours he heard an alarm outside his house and he saw two people running; one was short and the other one was tall however, he did not identify them.

The witness went on to testify that, he saw the deceased lying down and was covered with blood. He said that the deceased uttered the following words "Yaani shemeji yangu amenionea amesema "anichanje dawa" PW1 testified that the accused mentioned Shinoni Nkwabi and Kazimili. Then he raised an alarm and people gathered at his place. PW1 went on to testify that the Village Chairman arrived at the scene of the



incident and started to search the accused persons. He concluded by stating that Daudi was injured on his hand, shoulder and neck.

During cross examination, PW1 testified that the deceased was able to talk and he uttered the following words "*Yaani shemeji yangu alikuja kwangu nikampikia chakula, akamaliza kula akasema ni mchanje dawa ili asiende kuonewa*". PW1 said that he did not identify the culprits. He went on to state that he was the only one who witnessed Daudi uttering the said words.

The next witness was Mr. Nyanda Petro (PW2), a Sungusungu commander. He testified that on 22:00 hours he was asleep at his house then he heard an alarm coming from Makisio. PW2 went to Makisio house and saw Daudi was lying down. PW2 testified that the victim was in bad condition but he was able to talk. PW2 testified that he asked him what happened, the deceased told him that Shinoni and Kazimili have assaulted him with a bush knife; "*They came to my place, I prepared food and Shinoni asked Daudi to prepare dawa but suddenly Shinoni cut me with a bush*". PW2 testified that they went to Shinoni's place and saw him coming from a bush. PW2 said they asked the accused's wife she told them that Shinoni was not around. PW2 continued to testify that they asked the accused his whereabouts and he told them that he is coming



from at Daudi's place and he heard that Daudi was invaded. PW2 was able to identify the accused.

When PW2 was cross-examined, he ended admitting that his statement made at the Police Station is true and his statements are inconsistent, the one stated at the Police Station, and during his testimony. PW2 further insisted that he heard the deceased saying that *"Amekuja shemeji yangu Shinoni na Kazimili nikaandaa chakula tukala. Tulipomaliza kula, Shinoni akasema nikutengenezee dawa akakubali alipokubali Shinoni akanikata na panga."*

Mr. Benson Mashongole, a Police Officer (PW3) gave evidence regarding the dying declaration of the late Daudi Bunango. He said that on 10<sup>th</sup> day of October, 2013 around 23:00 hours, a motorcycle arrived with three passengers with a sick person, they were asking for a PF3. PW3 said that he saw the victim, he had injuries on his head, shoulder, and hand. PW3 testified that he interviewed the victim and he told him that his brother in law; Shinoni Nkwabi assaulted him.

During cross examination, PW3 admitted to have recorded the dying declaration. PW3 went on to state that the deceased named only one; person Shinoni Nkwabe.

The testimony of Mr. Samwel Obiero, a Principal Medical Officer II (PW3) was to the effect that on 11<sup>th</sup> day of October, 2013 he examined a male body. PW4 testified that during examination he found that the cause of death was due to excessive bleeding and the body had several scars. He filled in the Post Mortem Examination Report and tendered it before this court and it was admitted as Exhibit P1.

During cross-examination, PW4 testified that after examining the body he noted that the deceased was cut with a sharp object.

The last witness was E1754 D/C Nuru, a Police Officer (PW5). He testified that on 11<sup>th</sup> day of October, 2013 at 08:00 hours he was instructed to investigate a murder case, which occurred at Nyakato Village, the deceased was called Daudi s/o Bunango. PW5 is the one prepared a Sketch Map.

PW5 continued to testify that Makisio narrated how the incident occurred and he said that the deceased told him that *"haya majeraha nilikatwa na panga na shemeji yangu Shinoni Nkwabi pamoja na mwenzake"*. PW5 testified that the deceased was sent to District Hospital of Geita and the next day early in the morning he passed away and he added that the person who brought the victim to the hospital passed by Geita Police Station to obtain a PF3.



When he was cross-examined, PW5 said that he recorded a statement at the Police Station. PW5 said that he did not name Kazimili he only named Shinoni Nkwabi.

In his respective defence, the accused disassociated himself with the commission of the offence. DW1 testified to the effect that he and PW1 were not in good terms. DW1 testified that the deceased person is his brother in law. DW1 went on to testify that at 23:00 hours many people arrived at his house searching for stolen cattle. He was told to go and identify the stolen cattle. DW1 went on to state that on their arrival at Nyakato Village they arrest him and was roped. DW1 went on to testify that he was informed that he is the one who assaulted Daudi with a bush knife. DW1 denied the allegations then they brought him to the Police Station and he denied having assaulted one Daudi Bunango. DW1 testified that he does not know Kazimil.

When he was cross-examined, DW1 admitted that the deceased was his brother in law. He insisted that on a fateful day he was asleep with his wife in his house. DW1 denied the allegations.

After having heard the witnesses in this case, the submissions made by both learned counsels. I do not doubt that DAUDI S/O

BUNANGO is dead, and it was an unnatural death. The issue for determination is *who caused the deceased's death*. I need to address my mind to the predominant legal principles which are of relevance to this case and will guide me in this judgment. These cover aspects of criminal law, as well as the law of evidence. These principles are meant to ensure that no innocent person is convicted of freak or flimsy evidence.

The prosecution is placed with a heavy burden than that of the accused. The first long-established principle in criminal justice is that of onus of proof in criminal cases, that the accused committed the offence for which he is charged with is always on the side of the prosecution and not on the accused person. It is reflected under Section 110 and Section 112 of the Evidence Act Cap.6 [R.E 2019], and cemented in the case of **Joseph John Makune v Republic** [1986] TLR 44 at page 49, where the Court of Appeal held that:

*"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."*



The second principle is that the standard of proof in criminal cases that is required by law is proof beyond a reasonable doubt. The Court of Appeal of Tanzania in the case of **Mohamed Haruna@ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) held that;

*"Of course in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."*

That means the evidence must be so convincing that no reasonable person would ever question the accused's guilt. See the cases of **Mohamed Said Matula v Republic** [1995] TLR 3, **Anatory Mutafulungwa v Republic**, Criminal Appeal No. 267 of 2010 (unreported) and **Festo Komba v Republic**, Criminal Appeal No.77 of 2015, the Court of Appeal of Tanzania (both unreported).

Mr. Palanyo, learned State Attorney and Mr. Liberatus, learned counsel for the accused submitted that the case against the appellant was entirely on circumstantial evidence and dying declaration. Additionally, from the evidence, it is clear that there was no eye witness to the murder of the deceased. The evidence implicating the accused

are alleged dying declaration and circumstantial evidence. The issues which I am going to address are as follows:-

1. *Whether the deceased made a dying declaration and identified the accused as the person who had assaulted him,*
2. *Whether the dying declaration was corroborated,*
3. *Whether the circumstantial evidence adduced against the accused pointed irresistibly to the guilt of the accused to the exclusion of anyone else.*

In determining the 1<sup>st</sup> issue *whether the deceased made a dying declaration and identified the accused as the person who had assaulted him*. I have perused the evidence on record and found that several witnesses testified that the deceased made a dying declaration and named the accused as the person who had assaulted the deceased. Under section 34B of the Evidence Act, Cap.6 [R.E 2019], a statement made by a deceased person relating to his cause of death is admissible in evidence. The admissibility of statements under section 34B (2) of the Evidence Act, cap. 6 [R.E 2019] was discussed at length in the case of **Elias Melani Kivunyo v Republic**, Criminal Appeal No. 40 of 2014 (unreported).

The dying declaration in question is oral dying declaration whereas three witnesses; Makisio Maiko (PW1), Manyanda Petro (PW2) and



Benson Mashogole (PW3), all testified that they spoke to the deceased before he died, inquiring who had assaulted him, and the deceased told PW1 and PW2 that it was Shinoin Nkwabi and one Kazimil and the deceased responded to PW3 that it was Shinoni Nkwabi. PW1 and PW2 maintained that it was Shinoni Nkwabi and Kazimil who assaulted the deceased while PW3 maintained that it was Shinoni who assaulted the deceased.

PW1 testified that he knew the accused person and the deceased alleged to have identified his two assailants; Shinoni Nkwabi and Kazimili and the deceased uttered the following words "*yaani shemeji yangu alikuja kwangu nikampikia chakula, akamaliza kula akasema ni mchanje dawa ili asiende kuonewa*". Therefore, according to PW1 testimony it is clear that the deceased said that the accused and his fellow assaulted him. In accordance to PW1 evidence the deceased made a dying declaration and he identified the accused and his fellow. Therefore this issue is answered in affirmative.

In determining the second issue *whether the dying declaration was corroborated*. It is trite law that dying declaration needs to be corroborated by other evidence. It is on record that the deceased went to PW1 house and PW2 saw Mr. Daudi at PW1 house before his death. PW2 testified in court that Mr. Daudi uttered the said words before his

death. PW2 evidence might corroborate the evidence of PW1 on dying declaration only if PW2 was a credible witness. In the case of **Philip Nzaka Watu v Republic** [2016] eKLR, the court stated the following on admission and reliance on a dying declaration:-

*“ Under section 33 (a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statement of admissible facts, oral or written, made by a person who is dead is admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statement is admissible when the person who made them was or was not expecting death when he made the statements... **While it is not the rule of law that a dying declaration must be corroborated to found conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a dying declaration is indeed safe.**” [Emphasis added].*

In this case, the deceased was found at PW1 house with serious injuries shortly before he died and told PW1 that the accused and his fellow assaulted him. PW2 testified in court that at 22:00 hours he heard



an alarm coming from PW1 house he headed there and found PW1 and the deceased in bad condition and he asked the deceased told him that *"Shinoni and Kazimil came to my house and they cut me with a bush knife, they came to my place and I prepared food and Shinoni asked me to prepare dawa, suddenly they cut me with a bush knife"* When PW2 was cross-examined he admitted that he made a statement at the Police Station.

Reading PW2 statement, I have found that he informed the Police Officer that it was around 02:00 hours when he heard an alarm from Makisio while PW1 testified that at 21: 00 hours the deceased uttered those words and he raised an alarm around 21:00 hours. PW2 in his statement at the Police Station he said that the decease uttered those words at 02:00 hours. This contradiction goes to the root of the case because at 02:00 the deceased was already in the hospital.

Additionally, there are contradictions and inconsistencies between PW2 and PW1 evidence. PW1 testified that he is the only witness who heard the deceased uttering those words while PW2 testified to the effect that he witnessed the deceased uttering the same words. It is trite law that minor discrepancies and contradictions do not jeopardize the credibility of witnesses" major discrepancies and contradictions do jeopardize the credibility of witnesses considerably. This was held by

the Court of Appeal of Tanzania in the case of **Dickson Elia Nshamba Shapwata & Another v Republic**, Criminal Appeal No. 92 of 2007 (unreported) and in **Ally Hussein Dugange v Republic**, Criminal Appeal No. 122 of 2013 (Unreported).

PW2 was not sure what he was testifying or he is trying to hide some information which might have been detrimental to him or he was exaggerating on something. All the said contradictions show that he gave doubtful evidence, his contradictions were major and the same goes to the root of the case thus, PW2 evidence is shakable the same cannot corroborate PW1 evidence on dying declaration.

Moreover, PW3 and PW1; both witnesses gave evidence on what they heard and saw but their statements were inconsistent. PW1 testified that the deceased told him that the accused and his fellow are the one who assaulted him and he uttered the following words "*yaani shemeji yangu alikuja kwangu nikampikia chakula, akamaliza kula akasema ni mchanje dawa ili asiende kuonewa*". While PW3 testified that Daud told him that Shinoni is the one who assaulted him in exclusion of Kazimila.

Another contradiction between PW1 and PW3 which goes to the root of the case is when the deceased alleged dying declaration was inconsistency. Failure for the deceased to tell PW3 that he prepared



food for them, the same leaves a lot to be desired because it was important to prove that the deceased told PW1 and PW3 the same words in order to bring similarities of the two dying declarations. Also, the same could lead this court to determine the duration under observation in order to prove a correct identification failure to mean the deceased did not identify the accused.

I am asking myself, what if the people who accompanied the deceased at the Police Station narrated the story to PW3? or may be the accused was not brought before the Police station to make his statement? I am saying so because none of the prosecution witness testified in court that they passed by the Police Station to collect a PF3. For PW3 evidence to stand it was supposed to be corroborated. Taking to account that even the said PF3 was not tendered in court to support PW3 testimony.

Moreover, in the instant case, the deceased is alleged to have named both accused, but he did not explain the brightness of the light on a fateful night. On the basis of the uncertainty of the intensity of the light on a fateful night, the deceased might have been labouring under a mistaken identity.

Based on the above observation, I consider the circumstance under which the dying declaration was made is tainted with suspicion. In the case of **Romanus Kabogo v Republic**, Criminal Appeal No.62 of 1998 and **Hemsi Nzuunda and two Others v Republic**, Criminal Appeal No.34 of 1995 the Court of Appeal of Tanzania held that:-

*"As a general rule, a court can act upon a dying declaration if it is satisfied that the declaration was made if the circumstances in which it was made give assurance to its accuracy and if is in fact true."*

Guided by the above authority, I hold that in the instant case the evidence of dying declaration was not reliable for main reason, that it lacked corroboration.

PW4 evidence was to the effect that he examined the male body on 11<sup>th</sup> day of October, 2013 and the body was with several scars and full of blood. PW4 confirmed that Daudi S/O Bunango died an unnatural death. However, PW4 evidence did connect the accused with the killing of the deceased. Likewise, PW5, a Police Officer who prepared the accused statement, his testimony was hearsay evidence taking to account that the accused denied to have been involved in the said murder.



I am fully aware that a dying declaration falls under the category of evidence in which material corroboration is necessary before it can be accepted and relied upon as it was observed in the case of **Crosperry Ntagalinda @ Koro v Republic**, Criminal Appeal No. 312 of 2015 (unreported), and the case of **The Republic v Joseph Ngaikwamo** [1977] LRT No. 6. Therefore, this court cannot rely upon PW4 and PW5 evidence without being corroborated by other prosecution witnesses.

Guided by the above cited case of **Philip Zaka Watu v Republic** (supra), I have taken caution to get necessary assurance that a conviction founded on dying declaration is indeed safe. Therefore, in my view, as long as the dying declaration in the instant case was not corroborated by any other evidence then the same renders the prosecution case to flop.

In determining the 3<sup>rd</sup> issue *whether the circumstantial evidence adduced against the accused pointed irresistibly to the guilt of the accused to the exclusion of anyone else.*

It is on record that PW2 testified that during the arrest of the accused they found the accused at his house and when they asked the accused he told them that he was coming from the victim's house. While at the Police station he stated that the accused was coming from the bush and he told them that he was outside his house.

The prosecution was required to clear those contradictions by calling other witnesses who were around when the accused was arrested to confirm PW2 words and the accused wife was listed among the prosecution witness but she was not called to testify. In the case of **Sadick Huseein Nyanza and Another v Republic** Criminal Appeal No. 186 of 2016 the Court of Appeal of Tanzania cited with approval the case of **Azizi Abdallah v Republic** [1991] TLR 71, the Court of Appeal of Tanzania held that:-

*“ The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.”*

Based on the above authority, I draw an adverse inference to the prosecution for failure to call witnesses other than PW1 and PW2 who were present at the scene of the crime who could clear the contradiction made by PW2.

Guided by the above findings, PW2 was not a credible witness, therefore I expunge PW2 evidence from the court record. PW3, one Mr. Benson Mashogole a Police Officer as I have elaborated above his



evidence was hearsay, he only gave an account of what he was told. He did not witness the death of the deceased and he testified that he does not know who murdered the deceased.

Moreover, there is no any exhibit that connected the accused with the killing of the deceased. There is no any cautioned statement of the accused which was tendered in court to prove that the accused confessed to have killed the deceased. Apart from oral declaration which could be considered by this court if only the same could have been corroborated by other prosecution evidence, the only reliable document for the prosecution was a dying declaration. However, the same was required to be corroborated.

As per court records, the dying declaration was not admitted. This court could not rely on a dying declaration which was prepared contrary to the law as it was held in the case of **Elias Melami Kivuyo v Republic**, Criminal Appeal No. 40 of 2014. The words under section 34B are couched on a mandatory term that the conditions stipulated under section 34B (2) must be followed cumulatively. In the instant case, the deceased statement violated section 34B (2) of the Evidence Act, Cap. 6 [R.E 2019] since the first condition (a) and last condition (f) were not met.

I am aware that this is a murder case, I am not sure if the deceased uttered those words in order to render conviction toward the accused. In a situation where more than one person is involved the court is left with doubt, the circumstance of the case does not point directly to the accused, It is settled trite principle of law that in a criminal case in which the evidence is based purely on circumstantial evidence, for the court to found a conviction on such evidence, it must be satisfied that the circumstantial evidence irresistibly and be devoid of any other explanation other than the guilty of the accused, to the exclusion of any other person.

In the case of **Shaban Mpunzu @ Elisha Mpunzu v Republic**, Criminal Appeal No.75 of 2002 (unreported), the Court of Appeal of Tanzania allowed the appeal after finding that the circumstantial evidence was insufficient to sustain the conviction against the appellant. Also in the case of **R v Kartin Cameron** 2003 TLR 84 the Court of Appeal laid down a number of principles as the basis of grounding conviction on circumstantial evidence:-

- (a) That evidence must be incapable of more than one interpretation.*
- (b) The fact from which inference of guilty is drawn must be proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred.*



*(c) In murder cases, evidence should be cogent and compelling as to convince a jury, judge, or the court that upon no rational hypothesis other than murder can the facts be accounted for.*

Guided by the above authorities and principle of criminal justice, it is clear that the prosecution failed to prove the charge of murder which was facing the accused person. The prosecution case still left room for doubts which have to be resolved in favour of the appellant. The prosecution failed to provide sufficient evidence that could assist this court to find that the dying declaration was safe to enable this court to ground conviction upon the accused. With such doubt, it follows that the dying declaration and circumstantial evidence did not, contrary to what the prosecution and the assessors concluded, irresistibly lead to the inference that it was the accused and nobody else who killed the deceased.

To conclude my findings, I have considered these glaring shortcoming, taking to account that this is a murder case and how slight doubt raises the trial court to direct itself in deciding in favour of the accused since the accused ought to be convicted on the strength of the prosecution case as it was held in case of **Aidan Mwalulenga v R** (supra). Thus, in the instant case, the circumstantial evidence against the accused weakens the inference of Shinoni Nkwabi guilty. For the reasons stated above, I differ with the assessors' opinion that the

accused is guilty because the dying declaration was not corroborated and the circumstantial evidence was not sufficient to ground conviction upon the accused person.

In conclusion, I hold without demur that the evidence, in this case, did not pass the test. The evidence did not exclude every possibility that the death of the deceased could have been caused by somebody else. In human eyes, one can say the accused murdered the deceased, but in the eyes of the law, it is on the contrary. I have no choice but to find the accused not guilty. Therefore, the accused person, **SHINONI NKWABI** is discharged from the offence of murder c/s 196 and 197 of the Penal Code Cap.16 [R.E 2019] and thus he is acquitted. I order the accused person, **SHINONI NKWABI**, immediately be released from the prison remand custody unless he is otherwise lawful held.

Dated at GEITA this 08<sup>th</sup> day of July, 2020.



A.Z MGEYEKWA

JUDGE

08.12.2020

Right to Appeal fully explained.