

IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
CRIMINAL SESSIONS CASE NO 47 OF 2020
THE REPUBLIC
VERSUS

FICHA PAUL _____ ACCUSED PERSON

JUDGEMENT

24th and 25th September 2020

GALEBA, J.

Around 2.00 o'clock in the night of 21.08.2018, while at local brew selling point at Kasahunga village within Bunda district in Mara region **Mohamed Bwire**, the deceased was badly hit with wood on his left leg thereby breaking his *tibia* which is the main bone at the front of a leg joining the knee to the ankle. That injury culminated into his death four (4) days later on 25.08.2018. It is in respect of this death that the Republic is now charging **Ficha Paul** for having hit **Mohamed Bwire** causing the injury which led to his death as indicated above.

The accused person denied the charge and the prosecution called three (3) witnesses to substantiate its case. Briefly the evidence of **PW1 E6599 Coplo Khamis Ali Juma** was that on 21.08.2018 while at Kibara Police Station **Mohamed Bwire** came there to report that he

had been attacked by **HAZARD KAZANA** and **FICHA PAUL** who hit him with wood causing him injury on his leg. This witness recorded the statement of **Mohamed Bwire** and gave him a PF3 for proceeding to the hospital. This witness tendered a statement of the deceased which was admitted as **Exhibit PE1**.

Dr. Samwel Paul Kasubi the 2nd witness testified that on 21.08.2018 at around 3:00 pm **Mohamed Bwire** went to Kibara hospital where he works with a PF3 and he attended him as he had an injury in the leg. His assessment was that he was supposed to be admitted or be referred to Bugando Hospital for proper medical attention but **Mohamed Bwire** and his relatives refused and demanded only an X rays examination, which was performed and the victim was released to go home. On 25.08.2018 **Mohamed Bwire** was brought back in serious anemic condition and before they could administer any drug, he passed away. This witness tendered a medical report **EXHIBIT PE2** indicating the cause of death to be excessive bleeding.

The last prosecution witness was **PW3 Mr. Biseko Koloye**. He testified that on 21.08.2018 at around 2:00 at night **Mohamed Bwire** knocked at his door with a bad injury on his left leg with the bone which had been broken protruding out of the skin. According to this witness the deceased was also bleeding and he told him that he had been beaten by **Ficha Paul** the accused person. The witness called **Sasira Bwire, Mohamed Bwire's** brother who took him to the hospital.

The accused person was found with a case to answer and it was only **Ficha Paul**, who testified for the defence stating that on 21.08.2018 around 2:00 am in the night himself, **Hazard Kazana** and **Mohamed Bwire** were at a local brew selling bar at Kasahunga and a misunderstanding arose between **Hazard Kazana** and **Mohamed Bwire** where the latter withdrew a machete and hit **Hazard Kazana** with its flat surface several times so the accused had to intervene and resolve the misunderstanding. When **Ficha Paul** was doing that, **Mohamed Bwire** hit him with the flat surface of the machete twice therefore he decided to leave the two alone. It is was at that time that **Hazard Kazana** picked one piece of firewood and hit **Mohamed Bwire** on the leg thereby causing the injury that led to his death. This witness denied to have hit the deceased or caused his death. **FICHA PAUL** testified that because of darkness the seller at the bar was using small torches to identify the money from her customers. This witness tendered a statement he made to the police and it was marked “**EXHIBIT PE3.**”

As for closing submissions, the prosecution opted not to make any submissions, but **Mr. Christopher Waikama** learned advocate for the accused person made his. His submissions raised 3 pertinent issues for consideration of this court. The **first** was that in order to convict a person relying on a dying declaration, the court must be satisfied that it was made in the circumstances where the same is accurate and true. **Secondly**, as the attack was in the night and the prosecution did not testify anything on the light and its source it

would be illegal to convict the accused person because he could be convicted on mistaken identity. **Thirdly** he submitted that the case is wholly based on circumstantial evidence and in such case the evidence must be water tight with no possibility of multiple interpretations. He submitted for instance that in this case the dying declaration mentions two people but it is possible that he could have been hit by **Hazard Kazana**.

The issue in this case is whether the evidence tendered did demonstrate beyond reasonable doubt that it was **Ficha Paul** who killed **Mohamed Bwire**.

In this case, there is no living man who saw what happened except the accused person whose statement is that the deceased was hit on the leg by **Hazard Kazana** in the dark. The statement relied upon by the prosecution is **EXHIBIT PE1**, the dying declaration of **Mohamed Bwire**. The relevant part of that document reads;

"...mnamo tarehe 21/08/2018 majira ya saa 02:00 usiku huko katika kijiji cha Kasaunga wilaya ya Bunda mkoa wa Mara nilipita kwenye nyumba moja inayouza pombe ya kienyeji na pia sigara niliomba kununua sigara nikajibiwa hakuna baada ya hapo walitokea watu wawili ambao ni HAZARD KAZANA na FICHA PAUL walifika kufahamu nini tunaongea na yule mama ambaye ni Mama DAUDI niliwaeleza kuwa nilihitaji sigara lakini sijapata, nilitaka kuondoka katika eneo hilo lakini baiskeli yangu ilizuiliwa niliteremka hapo watu hao wawili walianza kunipa ngumi na pia walichukua mti na kunipiga nao mguu wa kushoto na kunisababishia maumivu makali nilipiga kelele kwa ajili ya kuomba msaada lakini nilikosa mtu wa kunisaidia....."

According to **PE1** (the statement), **Mohamed Bwire** was hit with a piece of wood by both the accused person and **HAZARD KAZANA** and not one of them. According to **Biseko Koloye PW3**, **Mohamed Bwire** told him that the one who hit him was **FICHA PAUL**. There is therefore a contradiction on how many people injured **Mohamed Bwire** from the prosecution side itself. I must make it clear here that the one who hit **Mohamed Bwire** is the one who killed him. I will have to decide whether the prosecution had ability to point at who committed the offence with certainty.

The other aspect of this case lies in the defence of the accused. He testified that it was **HAZARD KAZANA** who hit the deceased and not him adding that as it was a dark night there was no way the said **Mohamed Bwire** could have identified him. I will deal with this aspect first. In respect of this class of evidence the Court of Appeal is not short of authorities as to the guidelines. The settled principle in this country is that, the evidence of visual identification in circumstances where visibility impairment is of the weakest kind and thus, before it is taken as a basis of conviction, it must be watertight. The Court of Appeal in **Waziri Amani v. R. [1980] TLR 250** held that:

"(i) Evidence of visual identification is of the weakest kind and most unreliable;

(ii) No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

To ensure that the evidence is watertight, a number of factors have to be taken into consideration by the Court of Appeal, including, the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance, whether it was day or night- time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before. Other cases on these principles include **Chacha Mwita and 2 others v Republic**, Criminal Appeal No. 302 of 2013, **Charles Nanati V Republic** Criminal Appeal No. 286 of 2017 and **Masolwa Samwel V Republic** Criminal Appeal No. 348 of 2016 (all unreported).

Of relevance in this case is that the offence was committed at night time so the issue becomes whether there was good or poor lighting at the scene of crime. There is no witness from the prosecution who mentioned if there was any light at the scene of crime. Even **EXHIBIT PE1** does not disclose whether there was light, and if it was there what was its source and intensity. Although during cross examination **DW1** stated that the seller of the drinks was using small torches to identify money he was receiving and the change he would give to customers, but such evidence is of negligible importance on the prosecution case. That is so because, there was no evidence from either side of the case that when **Mohamed Bwire** was being hit, he and his assailant were being illuminated by any light from any source.

In addition the fact that **Mohamed Bwire** states in his statement that he was hit by both **HAZARD KAZANA** and the accused person, the same person told **Biseko Koloye** that he was hit by **Ficha Paul** which confirms the likely possibility of mistaken identity. To cap it all, although the offence was committed during the night, no prosecution witness tendered evidence on how **Mohamed Bwire** identified his aggressor or aggressors. This court finds comfort in holding that **Ficha Paul** was not identified as the only man who attacked **Mohamed Bwire** or who could have attacked him in that night.

The other issue that was raised by the defence was that the case is wholly dependent on circumstantial evidence, and that is indeed the case because the evidence of the prosecution in this case was entirely circumstantial. For such evidence to be taken as authentic, it must meet the conditions that were adopted by the Court of Appeal in **Ndalahwa Shilanda and Buswelu Busaru v Republic**, Criminal Appeal no 247 of 2008 where it was held that for circumstantial evidence to ground a valid conviction, the following three 3 conditions must be met;

“(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused; and

(iii) The circumstances taken cumulatively should form a chain so, complete that there is no escape from conclusion that within all human possibilities the crime was committed by the accused and no one else.”

The test that the prosecution failed in this case is, by their evidence to establish that there is no possibility that any other person could have killed **Mohamed Bwire** except **Ficha Paul**. Indeed according to the evidence they tendered, **EXHIBIT PE1** and the oral testimony of the **PW3**, shows that there are possibilities that **Mohamed Bwire** could have been murdered by another person especially **HAZARD KAZANA**. The evidence against the present accused person was not water tight enough to qualify to ground a conviction.

The dying declaration **EXHIBIT PE1** was the only reliable document of the person who witnessed the acts of the crime charged. The principle of law is that for a dying declaration to form a basis of a valid conviction **first** it must have been made and **secondly** it must be corroborated see **R v Ally [1971] HCD no. 306**, **R v Magiligita Lumije [1974] LRT no 57**, **Republic v Joseph Ngaikwambo [1977] LRT no 6** and **Republic v Mohamed Shedaffa and three others [1985] TLR 95**. The question then before me is whether in this case, the statement of the deceased was corroborated. That is the point upon which I will now focus my full attention.

In this case, the evidence which would corroborate **EXHIBIT PE2** would be that of **PW1 Coplo Khamis Ali Juma** or **Biseko Koloye PW3**. Unfortunately those two pieces of evidence needed corroboration themselves because the two witnesses did not witness the act of the crime being committed. The principle of law is that the evidence that needs corroboration cannot corroborate other evidence see,

Jimmy Runangaza v Republic, Criminal Appeal no 159B of 2017 (unreported) where it was stated at page 11 that;

"...Further to that, it is a settle law that the evidence which itself requires corroboration cannot be used to corroborate another evidence."

Another case on the same subject is **Swelu Maramoja v Republic**, Criminal Appeal no. 43 of 1991 (unreported). That means that this court cannot rely on the dying declaration for any lawful purposes, because there is no evidence which we can say that it corroborates the statement.

One final matter that we must discuss is **EXHIBIT PW3**, which was a caution statement of **Ficha Paul**. The prosecution, did not tender it during the prosecution but during cross examination of **DW1**. It is not known why, but it is clear that during committal proceedings on 21.04.2020 the document was not listed as one of the documents that the prosecution would tender. Even on 20.05.2020 when the case came up for preliminary hearing, the document was not mentioned. That aside, this court is unable to rely on it because after the same was tendered and admitted the **EXHIBIT** was not read in court. That offended various decisions and directives of the Court of Appeal in **Bashiri John v Republic**, Criminal Appeal no 486 of 2016, **Festo Mgimwa v Republic**, Criminal Appeal no 378 of 2016 and **Lack Kilangani v Republic**, Criminal Appeal no 402 of 2015, all unreported. For instance in **Festo Mgimwa v Republic** the Court of Appeal held at page 7 that;

"On our part, firstly, we entirely agree that the contents of exhibit P1 was not made known to the appellant as it was not read over as required. We therefore expunge the same from the record as prayed by Mr. Mwandalama. We wish however to implore to courts to always adhere to what the Court stated in Robinson Mwanjisi and Three Others v. The Republic [2003] TLR 218, on the importance of reading over the contents of the document once it is cleared and admitted in evidence."

In the circumstances, this court being under a legal duty to expunge **EXHIBIT PE3**, this court hereby expunges the caution statement of the accused person for the reason above elaborated.

Before getting to the extreme end of this judgment, this case was tried with aid of assessors; Mr. Magori Changarawe, Ms. Anastazia Masamaki and Mr. Maira Maira. Mr. Changarawe was of the opinion that **FICHA PAUL** is guilty of the murder charged because *first* he was ready to admit a lesser offence, *second*, the deceased told Mr. Biseko that the one who injured him was the accused, *third* when the accused was beaten by using the machete, it is unlikely that he did not retaliate, so it is the accused who injured the deceased. On her part Ms. Masamaki was of the opinion that the **FICHA PAUL** is guilty of the murder because **Mohamed Bwire** saw the one who injured him to be FICHA PAUL because there were small torches which he used to see him. Finally Mr. Maira was of a different view. He opined that there was no evidence of sufficient light at the scene of crime and also in the statement of the deceased the latter said that he was injured by two people and finally there is no prosecution witness who testified that he saw the accused hitting the deceased with the

wood. In the circumstances, he was of the opinion that **FICHA PAUL** is innocent of the murder and he should be acquitted.

As for me I am at one with Mr. Maira, and I have explained every aspect and reasons of acquitting the accused throughout this judgment and for the same reasons I differ with the opinion of Mr. Changarawe and Ms. Masamaki, of finding guilty the accused person.

Finally and to conclude this judgment, in view of the evidence tendered and its analysis, this Court adopts the position that the prosecution did not manage to prove the case beyond reasonable doubt as required in criminal cases against the accused person. Accordingly **FICHA PAUL** is hereby acquitted of the offence of murder under the provisions of **sections 235(1) of the Criminal Procedure Act [Cap 20 RE 2019]** with further directions under section **312(3) of the same Act** that he should be released immediately from prison and be set to liberty unless he is otherwise lawfully held.

It is so ordered.

DATED at MUSOMA this 25th September 2020



Z. N. Galeba
JUDGE
25.09.2020

Court; This judgment has been delivered this 25th September 2020 in the presence of Ms. Agma Haule assisted by Mr. Isihaka Ibrahim learned state attorneys for the prosecution on one hand and Mr. Christopher Waikama learned advocate for the accused person.




Z. N. Galeba
JUDGE
25.09.2020