

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT TARIME

CRIMINAL SESSIONS CASE NO. 27 OF 2020

THE REPUBLIC

VERSUS

MANG'ANA CHACHA MANG'ANA

JUDGMENT

19th February and 2nd March, 2021

KISANYA, J.:

Mang'ana Chacha Mang'ana stands charged with an offence of murder contrary to sections 196 and 197 of **the Penal Code** [Cap. 16, R.E 2019]. It is alleged by the prosecution that on the 06th day of February 2019 at Mpakani village within Tarime District, in Mara Region, the said Mang'ana Chacha Mang'ana murdered one, Joseph Ryoba Magoge.

The deceased, Joseph Ryoba Magoge was the accused's father in law. On the 07th of February 2019, his body was found at Mpakani Village within Tarime District. The report on post-mortem examination (Exhibit **P2**) confirms that his death was caused by severe traumatic brain injury. Being among the last

persons to be seen with the deceased on the 06th of February 2019 at 22:00 hours, the accused was arraigned before this Court for murdering the deceased.

Determined to prove its case, the prosecution marshaled four witnesses, namely; Michael Matiko Chacha (**PW1**) and Nyangoko Matiko Chacha (**PW4**): who happened to be the neighbours of the deceased, the deceased wife one, Magige Ryoba Magoge (**PW2**) and a police officer, who investigated this case one, G.5081 DC Cyril (**PW3**). Further, the prosecution tendered a sketch map of the scene of crime (Exhibit **P1**) and the report on post mortem examination (Exhibit **P2**) to supplement the oral testimony.

In terms of the prosecution evidence, the deceased's daughter, one, Meremo was married to the accused person. She left the accused and returned to her parents (at the deceased's house) due to matrimonial issues. Thereafter, a dispute arose between the deceased and the accused. The deceased wanted to return the bride price (heads of cattle), and on the other hand, the accused person refused to accept the same. **PW1**, **PW2** and **PW4** testified that the accused attempted to grab the deceased's cattle on the 30th of January 2019. The deceased raised an alarm and many people responded, including **PW1**, **PW2** and **PW4**. And the accused left the scene after threatening to kill the deceased.

Six days later, on the 5th of February 2019 at around 17:00 hours, the deceased left the village to Sirari with one, Mugesi Nyaimaga. A day after, at around 17:00 hours, he was seen leaving the house with the said Mugesi Nyaimaga. On the same day, at around 22:00 hours, **PW1** saw the deceased standing along the road with the accused, Mugesi Nyaimaga and Marwa Sarya @Mganga. He greeted them and the deceased told him that, the accused, Mugesi and Mganga were going to buy some beer for him.

Since then, Joseph Ryoba Magoge, was not seen alive again. His body was found at Mpakani Village on the next day (the 07th day of February 2019).

The incident was reported aptly to the police station. The police went to the scene of crime. The sketch map of the scene of crime (Exhibit **P1**) and the report on post-mortem examination (Exhibit **P2**) were prepared on the 07th of February 2019. Thereafter, the deceased was buried on the 09th of February 2019. The accused did not participate in burying the deceased, and he was arrested on the 10th of February 2019 by the villagers and surrendered to the police station.

The accused availed his defence under oath, and called no witness to complement his testimony. He testified that on the 06th of February 2019 from 19:00 to 23:00 hours he was at his home with his wife and children. He admitted that the deceased was his father in law, however disputed not to be in good

terms with his wife Meremo. The accused told the Court that Meremo left the matrimonial home when he was arrested for this case. He neither attempted to grab the deceased cattle nor threatened to kill the deceased. The accused deposed further that, he did not participate in burying the deceased because on the 08th of February 2019 he was mourning for the loss of his sister's daughter who was living at his house. Also, the accused denied to have sent Nyabakanga Mwita to apologize on his behalf for having caused the deceased's death.

After closure of the defence case, Mr. Leornad Magwayega, Learned Advocate, for the accused and Ms. Monica Hokororo, Learned State Attorney made their respective final submissions for the defence and the prosecution.

In his final submission, Mr. Magweyega argued that the prosecution had not proved its case beyond all reasonable doubts. He argued that, since the prosecution case was based on circumstantial evidence, the prosecution was duty bound to demonstrate a complete chain to connect the accused person with the charged offence, of which they failed to discharge the same. The learned counsel went on to challenge credibility of the prosecution witnesses.

To start with **PW1** and **PW2**, Mr. Magwayega submitted that the said witnesses contradicted themselves on the issue related to the dispute between the accused and the deceased. He contended that at one point, both witnesses testified that the accused refused to receive back the bride price (cattle) from

the deceased, while later they stated that, the accused wanted to grab the said cattle from the deceased. It was also submitted by Mr. Magwayega that **PW2** contradicted herself by stating that the deceased had no grudges with any person, while her evidence implies that he had a dispute with the accused. Further to that, **PW2** deposed that the deceased reported the accused's threats to the police, while the police officer (**PW3**) admitted that the police had no any record on threats so reported by the deceased.

Mr. Magwayega pointed further that; **PW1**, **PW2** and **PW4** contradicted themselves on the weapons possessed by the accused person when threatening to kill the deceased on the 30th of January 2019. Citing the case of case of **Mohamed Seleman vs R**, Criminal Appeal No. 105 of 2012, CAT at Mtwara (unreported), he was of the view that circumstantial evidence must be proved. Also, that the accused person's *alibi*, as a defence, was not proved: the learned counsel urged the Court to find the accused person not guilty due to the weakness in the prosecution case.

In a reply, Ms. Hokororo submitted that the prosecution case was based on circumstantial evidence, that the accused was one of the last person to be seen with the deceased. She argued that evidence to prove that fact was adduced by **PW1**, who saw the deceased together with the accused person, Mugesu Nyaimaga and Marwa Sarya @ Mganga on the 06th of February 2019 at 22:00

hours, and the next day the deceased was found dead. Citing the case of **Emanuel Conrad Yosiphath vs R**, Criminal Appeal No. 296 of 2019, Ms. Hokororo contended that, the accused person is a killer on the reason that he failed to give reasonable explanation as to what happened thereafter.

It was Ms. Hokororo's submissions that, the accused person was properly identified by **PW1** on the material night due to the following reasons: **One**, that there was sufficient light, illuminated by electricity tube light from the house which was at the distance of 8 meters. **Two**, that he identified them at a distance of 2 meters. **Three**, that he had ample time to identify them when talking to them, for about three minutes; **Four**, that he properly described the clothes of the accused and of the two others; he knew the accused and others before the fateful night. **Five**, he named the accused and two others immediately after commission of the offence. The learned State Attorney referred the Court to the cases of **Waziri Amani vs R** (1980) TLR 250 and **Godfrey Gabinus and 2 Others vs R**, Criminal Appeal No. 273 of 2017 and went on to submit that all factors for visual identification which were manifested in those decisions were covered by **PW1** testimony.

Ms. Hokororo attacked the accused's defence of alibi. She argued that the accused did not demonstrate the said defence on balance of probabilities due to failure to call the persons who were with him on the material day. Therefore,

she asked the Court to reject the said defence for that reason. She supported her argument by citing the case of **Masoud Amlima vs R** (1989) TLR 25.

With regard to the credibility of **PW1**, the learned State Attorney contended that the contradictions pointed out by the counsel for the defence did not go to the root of the case, that the accused person was among the last persons to be seen with the deceased before his death. Therefore, Ms. Hokororo was of the firm view that **PW1** was a credible witness.

In the view of the above, Ms. Hokororo argued that the prosecution had proved its case beyond all reasonable doubts.

In summing up to three assessors, who aided the Court in determining this case, I guided them on the issue of facts and law governing circumstantial evidence, visual identification, credibility of witness, inconsistency and contradictory evidence, malice aforethought and the defence of *alibi*. All assessors were of the opinion that the accused person is not guilty of the offence. The first and third assessors' opinion was based on the inconsistencies of the prosecution evidence. On her party, the second assessor's opinion was premised on poor investigation for failure to charge Mugasa Nyaimaga and Marwa Sarya @ Mganga.

I have dispassionately considered the evidence on record, the submissions by the counsel for both sides and the opinion of assessors. The offence of murder

leveled against the accused is provided for under section 196 of **the Penal Code** (supra) which reads as follows: -

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

By necessary implication, an offence of murder constitutes the following ingredients; **One**, is on the existence of unnatural death of a person. **Two**, the said death was a result of an unlawful act or omission by another person, and **Three**, that the other person intended to cause the death or bodily harm to the deceased. Thus, the prosecution is duty bound to prove each ingredient beyond all reasonable doubt.

As regards the first ingredient, the accused person does not dispute that the Joseph Ryoba Magoge is dead. In terms of **PW1, PW2, PW4** and the sketch map of the scene of crime (Exhibit **P1**), deceased body was found along the road at Mpakani village. The report on post-mortem examination (Exhibit **P2**) reveals the cause of death as severe traumatic brain injury. This implies that the deceased died unnatural death. From the foregoing, the prosecution has proved the first ingredient of murder.

The next issue is whether the accused person unlawfully killed one Joseph Ryoba Magoge. As rightly argued by both counsel. There is no direct evidence to connect the accused person with a case at hand. The prosecution case rests

- on circumstantial evidence to the following effect: **One**, the deceased and the accused person had a misunderstanding, caused by matrimonial issues between the accused and the deceased's daughter. **Two**, on the 30th of January 2019 accused person attempted to grab the deceased's cattle and threatened to kill the deceased. **Three**, the deceased left the house with Mugesi Nyaimaga on the 06th of February 2019 at 17:00 hours. **Four**, the accused, Mugesi Nyaimaga and Marwa Sarya @ Mganga were the last to be seen with the deceased on the 06th of February 2019 at 22:00 hours. **Five**, the deceased was found dead on the 07th of February 2019. **Six**, the accused person did not attend the burial ceremony. **Seven**, the accused person sent one, Nyabagaka Mwita to apologize on his behalf for causing the deceased death.

The law is settled that, where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. See also the case of **Mark Kasimiri vs R**, Criminal Appeal No. 37 of 2017, CAT (unreported) when the Court of Appeal restated the principles governing reliability of the circumstantial as follows:

- That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that*

- the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else (See **JUSTINE JULIUS AND OTHERS VS REPUBLIC**, Criminal Appeal No. 155 of 2005 (unreported)).*
- ii. *That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See, **SIMON MSOKE VS REPUBLIC**, (1958) EA 715A and **JOHN MAGULA NDONGO VS REPUBLIC**, Criminal Appeal No. 18 of 2004 (unreported)].*
 - iii. *That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. [See - **MATHAYO MWALIMU AND MASAI RENGWA VS REPUBLIC** (supra).]*
 - iv. *That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected, [see **SAMSON DANIEL VS REPUBLIC** (1934) E.A.C.A. 154].*
 - v. *That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person, [See **SHABANI***

MPUNZU @ ELISHA MPUNZU VS REPUBLIC, Criminal Appeal No 12 of 2002(unreported)].

- vi. *That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See **ALLY BAKARI VS REPUBLIC (1992) TLR, 10 and ANETH KAPAZYA VS REPUBLIC**, Criminal Appeal No. 69 of 2012 (unreported)).*

It was argued by Ms. Hokororo that, the prosecution case is based on the circumstantial evidence; the accused person was among of the last persons to be seen with the deceased. In view of what was held in **Mark Kasmiri** (supra) and **Emanuel Conrad Yosephat** (supra), where the accused person is alleged to have been the last person to be seen with the deceased, he is presumed to be the killer unless a plausible explanation to explain away the circumstance leading to death is adduced by him.

In the instant case, the evidence that the accused person was among of the last persons to be seen with the deceased was deposed by **PW1**. He stated on oath to have met the deceased, the accused, Mugesu Nyaimaga and Marwa Sarya (Mganga) on the 06th of February 2019 at 22:00 hours. His evidence was therefore based on visual identification. I agree with Ms. Hokororo, **PW1** demonstrate how the conditions were favorable to identify the accused person, Mugesu and Mganga who were with the deceased on the material night. Thus, the factors

stated in **Waziri Amani vs R** (1980) TLR 250 and **Chacha Jeremia Mrimi and 3 Others vs R**, Criminal Appeal No. 53 of 2015 (unreported) were sufficiently addressed by **PW1**.

However, **PW1** being the sole identification witness, greatest care has to be taken in dealing with his evidence. This Court is required to warn itself on the danger of relying on the evidence of a single witness to convict the accused. This stance was taken in **Ahmad Omari vs R**, Criminal Appeal No. 154 OF 2005 (unreported). In that regard, this Court is obliged to evaluate the evidence and consider whether **PW1** is credible. See also the case of **Richard Matangule and Another vs R** [1992] TLR 5.

Guidance on how the credibility of witnesses can be determined was stated in the case of **Raphael Mhando vs R**, Criminal Appeal No. 54 of 2017(unreported) when the Court of Appeal cited with approval the case of **Shabani Daudi vs R.**, Criminal Appeal No. 28 of 2000(unreported) where it was held that:

"The credibility of a witness can also be determined in two other ways: one, when assessing the coherence of the testimony of the witness. Two when the testimony of that witness is considered in relation with the evidence of other witness, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."

In this case, the defence challenged the credibility of **PW1** and other prosecution witnesses on the reasons that they contradicted themselves and each other. On the other side, the prosecution was of the view that, the contradiction did not go to the root of the case.

I have assessed PW1's evidence together with evidence of other prosecution witnesses. They are at one that before the fateful day, the accused and the deceased had a dispute caused by matrimonial issue between the accused and the deceased' daughter. However, there are inconsistencies or contradictions in PW1 and other witnesses.

First, in his evidence in chief, PW1 said that when he was at the Sub-village chairman's home, on the 30th of January 2019, the deceased arrived and reported to have been threatened by the accused. PW1 went on to state that:

"Joseph Chacha told the Chairman that Manga'na Chacha Mang'ana had refused to receive the cattle and that all he wanted was his wife."

However, when cross-examined by the defence, PW1 stated that, the deceased reported that the accused wanted to grab his cattle. Such evidence was also given by PW2 and PW4 who testified on the accused attempt to grab the deceased cattle. The issue is, what specifically did the deceased reported to the chairman? Was it on accused's attempt to grab his cattle, or on the accused

refusal to receive cattle? It is unfortunate; that the Sub-village Chairman, whom the deceased was allegedly reported to, did not enter the witness's box.

Second, PW1's evidence that the accused had refused to receive the dowry (cattle), on the account that he wanted his wife back, is contradicted by the testimony of the deceased's wife (PW2), who testified that the accused did not accept the cattle for the reason that the same were calves.

Third, in his evidence in chief, PW1 did not state at all that he was one among those who responded to the alarm raised by the deceased, when the accused attempted to grab deceased's cattle. Unexpectedly, the same was disclosed during cross-examination. As rightly observed by Mr. Magwayega, it is not known as to why such important fact was not stated in his evidence in chief!

Fourth, PW1 deposed that the accused was armed with a matchet (*panga*) when he wanted to grab the deceased cattle. But, PW2 stated that the accused had a double edged knife (*sime*) and a knife while PW4 told the Court that the accused was armed with a matchet and an arrow.

Fifth, it was PW1's evidence that Sub-village chairman did not respond to the alarm raised by the deceased when the accused wanted to grab the cattle. On the other hand, PW4 testified on oath that, the Sub-village Chairman did respond to the said alarm.

Sixth, according to PW1, Mugesi Nyaimaga went to “the centre” looking for the deceased on the 05th of February 2019. Then, he was directed to the deceased’s house where he didn’t find him, and that later on they met at “the centre” before heading to Sirari. However, PW2 told the Court that the deceased left the house with Mugesi Nyaimaga on the 05th of February 2019.

Seventh, PW1 stated that the accused person was arrested three days after the deceased’s burial-ceremony, which was held on 09th of February 2019. This evidence was contradicted by PW2, PW3 and PW4 who testified to the effect that, the accused was arrested one day after the burial ceremony (10th of February 2019).

I am conscious to the trite law that only contradictions which go to the root of the matter can be used to challenge curability and reliability of witness. In the present case, I agree with the defence counsel that the above contradictions in the evidence PW1 and other witnesses are major and material contradictions. The facts stated therein relates to the accused’s conducts before and after the incident, which is one of the factors considered in ascertaining malice aforethought. In such a case, the accused’s malice aforethought seems to be not questionable. Therefore, my evaluation of the evidence on record leads me to the conclusion that PW1 was not a credible and reliable witness. So were PW2 and PW4 whose evidence was contradicted

by PW1. Consequently, there remains no evidence to prove that the accused person was the last person to be seen with the deceased, and nothing reflects the accused to be implicated in the case at hand. In the circumstances, the accused cannot be declared with certainty to be the killer.

Furthermore, PW1 and PW2 told the Court that the accused sent Nyabakanga Mwita to apologize on his behalf for having caused the deceased's death. As rightly argued by Mr. Magwayega, the said Nyabakanga Mwita was not called by the prosecution. He was an important witness to testify on the said oral confession alleged to have been made by the accused. Since the said witness did not enter the witness's box and his whereabouts was not stated, the Court has to draw an adverse inference against the prosecution. See also the case of **Aziz Abdallah v. Republic**, (1991) TLR 71, when the Court of Appeal was faced with a situation like the one at hand and went on to hold that:

"... the general and well known rule 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.

For that reason, the prosecution failed to prove the accused's oral confession, which was alleged to have been made before Nyabakanga Mwita.

- I have also considered the accused's defence that he was at his house at the time PW1 claimed to have identified him. However, he failed to demonstrate his defence of alibi on the balance of probabilities. He was required to call his wife or children who were with him on the material time for the defence of alibi to stand. However, an accused cannot be convicted basing on the weakness of his defence. His conviction should always be stemmed on the strength of evidence adduced by credible and reliable witnesses of the prosecution. Having decided that the PW1 and other prosecution witnesses were unreliable and incredible witnesses due to the above pointed contradictions, I find that the prosecution has failed to prove its case.

All said and done, I am in agreement with the ladies and gentleman assessors that the accused person is not guilty of the offence of murder. I accordingly acquit him for the offence of murder contrary to sections 196 and 197 of **the Penal Code** [supra] and order for his immediate release from custody unless held for other lawful cause.

DATED at TARIME this 2nd day of March, 2021.




E.S. Kisanya
JUDGE

Court: Judgment delivered in open Court this 2nd day of March, 2021 in the presence of the accused person, Ms. Monica Hokororo, learned State Attorney for the prosecution, and Ms. Mary Samson holding brief for Mr. Leonard Magwayega, learned advocate for the accused.

Right of appeal is well explained.




E.S. Kisanya
JUDGE
02/03/2021