

IN THE HIGH COURT OF TANZANIA
AT GEITA
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 123 OF 2016
THE REPUBLIC
VERSUS
KABARO S/O MWENDESHA @ BAHEGE ACCUSED

JUDGMENT

12 & 25/03/2021

RUMANYIKA, J.:

Kabaro Mwendasha @ Bahege (the accused) he stood charged with an offence of murder C/s 196 of the Penal Code Cap 16 RE. 2019 (the Code). According to the particulars of offence that on 30/2/2010 at about 19:45 hours at Mission Street within district and region of Geita the accused murdered Lucia Selemani @ Ndoshi (the deceased).

Messrs Masambu and Ng'wanzalima learned state attorney and defence counsel appeared for the Republic and accused respectively.

Messrs Hawa Samwel, Lucas Mabula and Martine lady and gentlemen assessors they sat with me.

Pw1 Naftael Isack Ndoshi (37) of Mission street / Msalala road herein the town he stated that as together with his biological mother (the

deceased) on 30/12/2010 he had been at the latter's restaurant around, but just after the mother had left for home, shortly, but within the proximity he heard one Pendo his sister cry then he rushed there onto only to find the deceased deadly stabbed with a knife and she named the accused much as also, the latter reported related but the company suspected the deceased bewitching.

Pw2 E. 8799 D/Cpl Edmund (48) of Rwamugasa police post CID he stated that as, on or by the material date he worked around in Anti-Robbery unit, but following the incident, and was duly assigned the matter, he, on 20/8/2014 accordingly interviewed the accused and recorded the latter's cautioned statement one having had been under the police restraint on 19/8/2014 (copy Exhibit "P3"). Copies of a sketch map plan of the scene of crime and post mortem report on examination - Exhibits "P1" and "P2" respectively having had been admitted on 29/10/2018 during plea taking and preliminary hearing. That is all.

Dw (the accused) (35) stated that having had been arrested on 19/8/2014 the policemen detained him for charges of stealing a motorbike they arraigned him in court in September 2014. If anything, with regard to Exhibit "P3" the policemen only fixed me. That is it.

Unanimously the lady and gentleman assessors opined against the accused.

At least the prosecution's case only hinged on; **(a)** according to Pw1 the deceased's oral dying declaration **(b)** the accused's repudiated cautioned statement (Exhibit "P3").

Whereas I am also aware of the legal principle that a dying declaration made during the last kicks it needs be taken by the court more cautiously, though seriously and deadly cut injured, the deceased may have had made it to Pw1 with sound minds yes, but the later did not name the accused at the earliest possible opportune until say 11 (eleven) years by way of dock identification if really on the spot the deceased had identified the accused much as Pw1 told the court that the accused was their relative. Pw1 may have not known the accused before yes, but at least if at all immediately the deceased had named the accused on the spot without ado, the son should have relayed the information to such other relatives but this was not done. Chances therefore of the Pw1's evidence being after thought were also there!

Moreover, but without prejudice to the foregoing if at all, in her dying declaration the deceased named the accused to pw1 in which case

therefore one would have expected him to be apprehended immediately much as the court was not told that the accused remained at large until around September, 2014 (say 4 years later). It is trite law that unexplained delay in arrest and arraign of the accused in court not only it weakened the prosecution case but also it suggested that the accused was not properly identified (see the case of **Juma Shabani @ Juma v. R**, Criminal Appeal No.168 of 2004 (CA)) unreported. The repudiated cautioned statement therefore it lacked the requisite corroborating evidence (case of **Abbakari Issa Mnyambo v.R**, Criminal Appeal No.34 of 2010 (CA) unreported.

It is for all these reasons that I would part company with the lady and gentlemen assessors.

In the upshot the prosecution case was not beyond reasonable doubts proved. Unless he was, for some other and lawful causes detained, the accused be acquitted and he is hereby set free.

Right of appeal explained.

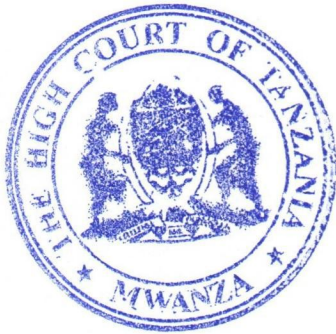


S.M. RUMANYIKA

JUDGE

20/03/2021

The judgment is delivered under my hand and seal of the court in court this 25/3/2021 in the presence of Mr. Kato state attorney and Mr. Mwanzalima advocate for accused.




S.M. RUMANYIKA

JUDGE
25/03/2021