

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA DISTRICT REGISTRY)
AT BABATI**

CRIMINAL SESSION NO. 70 OF 2018

*(Originating from the District Court of Babati, sitting at Babati, P.I No. 11 of
2017)*

THE REPUBLIC

Versus

MOHAMED SAID @ ISSA

JUDGMENT

18th & 25 March 2021

MZUNA, J.

The accused person Mohamed Said @ Issa, stands charged with the offence of Murder c/s 196 of the Penal Code, Cap 16 R.E. 2002. He is alleged to have unlawfully Murdered Ramadhan Mohamed, his biological son, on the 18th day of May, 2017 at Kisangaji Village, within Babati District in Manyara Region.

He pleaded not guilty prompting the Republic led by Ms. Luciana Shabani and Ms. Grace Mgaya, the learned State Attorneys to call five witnesses to prove their case. Similarly, the defence led by Ms. Asha Lusewa,

learned advocate for the accused called one defence witness being the accused person.

Brief facts of the case starts with **Mwajuma Joseph (PW2)**, the entangled wife of the accused since 2000. She told the court that the deceased was their son before each found his route to marry another man or wife of his/her choice. At one time after separation, the deceased was living with her. Then in 2012 he went to stay with his father. She narrated a story of 15/5/2017 when the deceased paid a visit to her. He told her that ~~the accused is threatening to kill him with panga because there was a~~ missing distiller machine "*mtambo wa gongo*" which was borrowed to someone. Due to such threats, PW2 advised him to stay with her. He let down the offer for what he said, should stay in the shamba so as to earn a living he being still young and energetic. He left on the following day ignoring the advice. Then on 18/5/2017 at about 8:00 a.m, PW2 was notified about his death. PW2 went to the scene, saw the deceased. PW2 says, he passed away at the age of 18 years.

The story leading to the arrest of the accused starts from **PW5 Hassan Hamad** who said was his casual labourer. He said that on 17 May,

2017 PW5 together with Ibrahim @ Sakaraa visited the accused at Huduma hamlet, within the same village of Kisangaji. The mission of the visit was basically two, first to claim for their outstanding money arising from their casual work. Apparently they were his labourers in his paddy farm at Kisangaji ya Juu. The second mission was to notify him about the stealing habit of the deceased that he steals flour, radio and torch which he takes to unknown place. The accused responded to the stealing habit of the deceased that he will make sure that the deceased will return them together with the purifier "*mtambo wa gongo*" else he will break his legs. They spent the night there after dinner.

Then PW5 and his colleague, Ibrahim @ Sakaraa, were awakened by the accused at 2:00 pm (2:00hrs). They all headed to his shamba where the deceased was staying together with Masharubu. The accused was holding a panga and a club. They arrived at the shamba at 03:00hrs. The accused awakened the deceased and Masharubu. The accused tied Ibrahim and Masharubu at their back at a tree using a rope made of mosquito nets. The accused started to interrogate his son on the whereabouts of the purifier used to prepare gongo. The deceased told him that "*Sikuchukua Baba mtambo huo wa kuchemsha pombe*", which literally means never took it.

The accused hit the deceased with the club at the deceased's legs. The deceased fell down. He continued to beat him with a club at the chest and head. Blood started to ooze from the mouth, nose and ears. Again, the accused hit the deceased with the side of a panga, and club. The deceased became unconscious, he then passed away. The accused told Ibrahim that the deceased upon gaining his senses, should be told to move away from the shamba so that the accused should not find him there anymore. Then PW5 told Mr. Mohamed, the accused, in the following words:- "Why are you beating him".

Then the accused threatened him with a panga. PW5 had to stand nearby watching at a distance of three paces. PW5 untied Ibrahim who notified the neighbours at the neighbouring village about the incident. He added that he witnessed the incident since there was bright moonlight which enabled him to witness each and everything including the oozing blood from the nose, mouth and ears. The whole incident of tying them up and beating the deceased, according to PW5, took about 25 minutes.

Zakia Ally (PW1), Kisangaji Village Executive Officer was notified about this murder incident on 18/5/2017 by Hamza Ramadhan, the cell

leader, when she was heading to her work place. She went to the scene of crime where she found gathered people. He was alleged to have been killed by Mohamed Said, the accused who was by then not at the scene. That after committing the offence at his paddy farms, he went back to his home Huduma hamlet. PW1 notified the Police. They arrived at about 11:00 a.m, on 19/05.2017 same date, among them was the Investigative Policeman **No. E 4617 D/CPL Prosper (PW4)**. He drafted the sketch map (exhibit P2) after arriving at the scene. They took the deceased's body and the accused who was at the Village Office after being arrested by some young men.

The Policemen were also accompanied by **Dr. Zephania Kushoka (PW3)**. He conducted the post mortem examination report (exhibit P1). He established cause of death was due to "Head Injury." Externally, the deceased had multiple blunt wounds on the head, face, back and arms and stab wounds at both legs and blood clots over the nostrils, ears and mouth.

In his affirmed defence, **Mohamed Said Issa (DW1)**, testified that on 18/5/2017 at about 08:00hrs some people went to his home and notified him that his son was suffering from pain in the shamba. He headed to the shamba to see him, but on his way, he was told that his son had passed

away. He went back to the street leader. Ibrahim Ramadhan, Hassan Hamis and Masharubu were brought there tied with ropes, allegedly that they have murdered him for the reasons that he stole from them. They were together with the VEO of Kisangaji and other villagers. The three together with him were taken to the Village Office, locked in different rooms. DW1 was joined because his son died while in his shamba.

The policemen searched in DW1's house looking for the items that might have been used in the commission of the offence but they found nothing. He was locked up together with the other three but knew Ibrahim only. On 19/5/2017 DW1 recorded his statement whereby he denied to have committed the offence. He strongly denied the allegation that PW5, whom he never knew before, slept at his home together with his colleague. He admitted that the deceased was his biological son whose mother was PW2, his former wife. That he lastly saw him for the past one year and had his own life and was self-independent. That marked the close of his case.

The main issue is whether the accused unlawfully killed the deceased? The second issue is, if the answer is in affirmative, whether he did so with malice aforethought?

Starting with the first issue, two Honourable Assessors who set with me said that indeed it is the accused who committed this offence. They were however divided on the second issue for reasons which I will demonstrate later. As opposed to that view, the third Assessor is of the view that the accused never committed this offence. That it is a cooked up story. She even branded PW5 as an accomplice.

Now on the issue of identification of the accused. The most implicating evidence against him is that of PW5 who said accompanied him up to the scene, saw him beating the deceased with a club at various parties of the body including at the *head*. This led to a depressed head and cause of death according to PW2 was "head injury". That he saw him with the aid of bright moon light which enabled him to see even the oozing blood from the mouth, nose and ears.

The prosecution further wanted to link the accused with the murder incident because he was heard saying to PW5 that he will ensure that the deceased will return all the stolen items, radio, torch and flour else he will break his legs. The deceased was in fact, according to PW5 hit on the legs. He fell down in the process. Again, PW1 said the deceased told her that the

accused threatened to kill him with a panga, which according to PW5 was also carried by the accused which was used to beat the deceased by its side and stabbing him at his legs, though according to him, he carried it as a defence shield. As expected, the accused denied the commission of the offence.

Starting with the information leading to the arrest of the accused according to PW1 Zakia Ally, it was from the cell leader Mr. Hamza Ramadhani. They met at the scene and was also informed that those who ~~witnessed the incident of murder were Samora and Bhojan. PW5 does not~~ feature in her evidence as among those who witnessed it. Bhojan and Samora were not summoned. This witness I dare say never witnessed the incident. The investigative Policeman (PW4) said saw as well stab wounds at the deceased legs suggesting that he was assaulted. That there were neighbours close to where the deceased body was found. He said at Kisangaji village they took three witnesses Hassan Hamis, Samora Michael and another, name not revealed up to the Police Station for interrogation. These witnesses were locked in another room different from that of the accused. PW5 said was told to record his statement three days after the

incident. In other words, PW5 is not among those who are referred by PW1 and PW4 to have witnessed the incident **or even reported it.**

The accused mentioned those who were tied with ropes and kept in another room to be Ibrahim Ramadhani, Hassan Hamisi and Mr. Masharubu. That he knew Ibrahim Ramadhan as "mlinda ndege". Masharubu was mentioned by PW5 as the one who was staying at the shamba together with the deceased. He was awakened by the accused together with the deceased. Ibrahim @ Sakaraa is among the persons whom PW5 said were together with the accused when they went to the shamba at night. He was tied with a rope together with Masharubu.

Reading from the above evidence, the whole case is based on the credibility and reliability of PW5, the only eye witness who purports to have witnessed the murder incident. The opinion of a dissenting third assessor Sophia Joseph was in the following words:-

"PW2, mother of the deceased, after hearing such threatening words to the deceased, ought to have summoned the accused to confirm the alleged accusation. She never reported anywhere showing that she was an irresponsible mother. I doubt if the deceased went to visit him. Even the chain of the alleged threats that he will break his legs which

was also said by PW5 is a cooked up story... PW5, the eye witness gave a framed up case. I see no reason to claim for his money during night time. He admitted was staying not very far, why leave his wife and sleep to the accused?...He further said was standing 3 foot steps away. He offered no assistance. Otherwise he is the one who killed the deceased...He even said untied Ibrahim who went to call neighbours why did he not go himself? He even said decided to go home after the incident. It is unimaginable to leave the deceased alone helpless.

The accused was first told his child was seriously sick, he was then told he passed away. Why did they not bring those who were tied up?... ”

The above observation brings three important points. First, PW5 is not a credible and reliable witness. This I would agree because at one point he said never knew the deceased while he admitted was a known thief and did report him to his father, the accused. Second, he said Masharubu and the deceased were staying at the farms and that PW5 worked to the accused for one year. During cross examination he said that the deceased took the flour and torch for the past one month before his death. He wanted to distance himself for obvious reasons that he should not be connected with the murder.

Another point is that the said PW5 purported to say he raised alarm during cross examination while in his evidence in chief, he said that it is Ibrahim who took trouble to call neighbours. The said PW5 said decided to leave leaving the gathered people together with the deceased and Ibrahim and Masharubu for what he said he was totally confused, which is not true. It is very inhuman to leave the deceased before knowing what will be the fate for him.

These are contradictions which affect the prosecution evidence. PW5 is not consistent in his testimony. In **Mohamed Said Matula vs. Republic** [1995] TLR 3 it was held:

"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the contradictions are only minor, or whether they go to the root of the matter."

In the case at hand, it is apparent that the contradictions and inconsistencies above highlighted goes to the root of the case. Such evidence cannot be relied upon. It was held in the case of **Simon Cleophace Balingilana and Another vs. Republic**, Criminal Appeal No. 442 of 2015, CAT at Bukoba (unreported), that:

"She was the only eyewitness to the murder. Given the nature of her testimony and the contradictions and discrepancies in her evidence which are apparent on the record we are compelled to agree with Mr. Kabunga that her evidence cannot be relied upon."

Likewise, in the case at hand, the only eye witness to the murder was PW5. However, his evidence was full of "*contradictions and discrepancies which are apparent on the record*" and therefore "*cannot be relied upon*".

The third equally important point is that the prosecution failed to call material witnesses. It was held in the case of **Azizi Abdalah vs Republic** [1991] TLR 71 (CA) 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."

Based on that case law, an adverse inference should be drawn against the prosecution that if Masharubu and Ibrahim were called they would have weakened their case. There was an argument that they were not traced because they were labourers. PW5 however said that Ibrahim resides at

Matufa Village which is Tshs 5,000/- Boda boda fare. He is therefore within reach. I say so mindful of the fact that "*no particular number of witnesses shall in any case be required for the proof of any fact*" as well stated under section 143 of the Tanzania Evidence Act, Cap 6 RE 2002. This court does not agree with the accused that he did not see the deceased for the past one year for the simple reason that he had his own life. I am quite sure had close link with him. All the same, such weaknesses cannot be used to base a conviction on a weak prosecution case.

I have ~~taken a different route from that which was expressed by two~~ gentle Assessors. Mr. Ramadhan Kassim opined that due to the fact that there was missing mtambo, and due to the deceased's stealing habit and that the accused had promised to break his legs, therefore he intended only to punish his son. He opined that the accused be found guilty of manslaughter and not murder. Mrs Aziza Idd opined that the accused intended to cause the deceased's death. After being told of his stealing habit, he should have called and warned him by words or simple beating and not the way he did. She opined that he be found him guilty of murder as charged. With due respect to their well respected views, as above noted, there is no evidence to base such finding be it murder or manslaughter.

The first issue having been resolved in favour of the accused, I see no need to labour on the second issue as to whether the killing was done with malice aforethought. The evidence of PW3 Doctor Zephania Kushoka which shows the deceased had multiple blunt wounds on the head, face, back and arms and stab wounds at both legs and blood clots over the nostrils, ears and mouth presupposes intention to cause death or at the least grievous harm. All the same, his evidence and the Post mortem report, exhibit P1 are hanging without the real culprit being properly identified.


~~I should say, though in passing, that it is possible those who went to~~ report leading to the arrest of the accused were also the accomplices, that is why they were not summoned as witnesses. All the same, it is unimaginable that the Village Executive officer could rely on the information that the accused murdered his child without even interrogating him. There is therefore sluggishness on the Village leaders and the investigative team.

Guided by the above analysis and authorities, and for the reasons above stated, the prosecution has failed to prove the case to the required standard of proof, that is beyond reasonable doubt. The above contradictions and inconsistencies cast doubt on their case. It is not safe to ground conviction on such uncorroborated evidence like the presence of the alleged

club and panga. More so because the last person who was together with the deceased at the shamba Mr. Masharubu (whom we were told was awakened by the accused together with the deceased) was not summoned as prosecution witnesses. Similarly, Mr. Ibrahim who took trouble to call neighbours unlike PW5, was also a material witness. The accused has successfully casted doubt on the prosecution case.

Consequently, I find Mohamed Said not guilty and do hereby acquit him.




M. G. MZUNA,
JUDGE.
25/03/2021.