

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 104 OF 2018

THE REPUBLIC

Versus

FLUGENCY DOMICIAN @ MAGALULA

JUDGMENT

04/05/2021 & 07/05/2021

Mtulya, J.:

The communities in Kyanshenge Village and other communities living next to Kyanshenge Village within Nshabago Ward in Muleba District of Kagera Region, like any other communities in lake regions of Tanzania, have set up a *Gulio* (Communities Open Market) in Kilamba area where sellers, buyers and holiday makers meet every Sunday in a week for business and happiness purposes. Traditionally, the communities were meeting area for selling and buying commodities attached with happiness in evening hours after all is done well.

However, the Sundays of 11th September 2016 was one of the unfortunate Sundays. One woman, Prisca Ludovick @ Fredrico (the deceased) of the neighboring village of Kanone mysteriously disappeared without any trace. In search of truth of what transpired, the criminal investigation authority in Muleba District invited village mates who were

together with the deceased in *Gulioni* on late hours of the fateful day for interrogation and cautioned statement recording. After, the questioning and statements recording of Mr. Mr. Pastory Rweyemamu and Ms. Deonida Jones from Kanone Village and Flugency Domician @ Magalula from Ngenge Village, a criminal investigator from the Criminal Investigation Department in Muleba District Police Force, police officer G. 3005 D/Cpl. Peter noted a clue on the disappearance of the deceased. The police officer thought that plausible explanations must be registered by Flugency Domician @ Magalula as he was suspected to be with the deceased at Bayenga Bar based at *Gulioni* in the evening hours of 11th September 2016.

Following this clue and connection of Flugency Domician @ Magalula to the murder of the deceased, he was arraigned in this court to reply the charge of murder of the deceased occurred on 11th September 2016, contrary to the law in section 196 of the **Penal Code** [Cap. 16 R.E. 2002] (the Code), which provides that: *Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.*

In order to establish the case against Flugency Domician @ Magalula (the accused), the Republic represented by Mr. Grey Uhagile, learned State Attorney, summoned a total of five (5) witnesses and tendered one

(1) exhibit. Mr. Pastory Rweyemamu (PW1) was summoned and testified that on the 11th November 2016 he was at *Gulioni* selling clothes up to 16:00hours when he decided to close his business in favour of a nearby bar. At this bar, PW1 testified to have seen the accused sitting with the deceased in presence of other people including Everius Buberwa, Deonida, and Pasikazia Nicodem, a mother of the deceased.

According to PW1, all named persons were drinking and after a lapse of some minutes, they all left the bar in favour of their home residence Kanone Village at around 17:00hours. Along the way towards their residence, according to PW1, the accused had called and pulled back the deceased for further drink in the bar and since then up to night hours of the days, the deceased was never seen in her residence hence PW1 notified her parents and Hamlet Chairman Mr. Jonas.

PW1 testified further that the search followed after the missing of the deceased and the deceased could not be found on this fateful day of 11th September 2016. With regard to a person known as Mr. Everius Buberwa, PW1 testified that they had left him in the bar when they left for Kanone and that he does not suspect him as it was the accused who had called the deceased back during the journey towards their home village of Kanone and to date Everius cannot be found.

Deonida Jones (PW2) who was also at *Gulioni* on the fateful day was invited to testify her version of what transpired on the 11th day of September 2016. According to her, she went at Kilamba *Gulioni* for buying food and other home use stuffs, but she was asked by the deceased to have drinks at *Kigata* where they found the deceased, Pastory, Kamugisha, Charles and other persons having their drinks. PW2 testified further that in the evening hours, they decided to leave the scene of *Kigata* in favour of their home Village Kanone, but the accused had asked the deceased to remain at *Gulioni* in favour of more drinks. However, after the call of the accused, the deceased was not found again. According to PW2, there were many people in the *Kigata* and that around 17:00hours the deceased had already been drunk.

The prosecution also invited brother of the deceased, Mr. Francisco Nicodem (PW3); clinical officer, Mr. Fredrick Kanombwa (PW4); and police officer G. 3005 D/Cpl. Peter to substantiate the death and search of the deceased. According to PW3 he was informed of the deceased disappearance by PW1 on 12th September 2016 and reported the incident to the Hamlet Chairman Mr. Jonas Serapio and immediately started search and found the deceased expired on the third day at mountainous area along the road from *Gulioni* to Kanone Village. As people from *Gulioni* were mentioning and suspecting the accused to have killed the

deceased, PW3 testified that they went at his home residence in Ngenge area, arrested and registered him into Kishuro Police Station.

PW4 on his part testified that he was cell-phoned by Nshabago Ward Councilor to go to the scene of the crime to examine the deceased's body. According to PW4, he went, examined the body and prepared a post-mortem report under the directions of a police officer. The Report depicts the death emanated from strangulation and lack of oxygen. The Report was admitted as exhibit P.1 to form part of the evidences in this case. On the other hand, PW5 testified to have investigated the case and from the statements of PW1 and PW2, he noted the connection of the death of the deceased and involvement of the accused.

The accused (DW1) on his defense testified that in morning hours of 11th day of September 2016, he left his home village of Ngenge for *Mahemezi* in *Gulioni*. After *Kuhemea* and after all went well, he went for relaxation and drinking of alcohol at Bayenga Bar, where he found Everius Buberwa having his drinks. A bit later around 14:00hours, according to DW1, the deceased and her mother arrived followed by Charles, Kamugisha, PW1 and PW2 and sat in different table enjoying their drinks. DW1 testified further that, after a long time, they raised up and went out of the bar and left the deceased who joined Everius Buberwa. According to DW1, he stayed in the bar with Everius up to

18:00hours when he left Everius, the deceased and other persons watching television. According to DW1, he left Bayenga Bar in favour of Sanziki Bar for *Rubisi* drinks, but could not find the drink hence preferred his home residence, Ngenge Village.

According to DW1, he was arrested in noon hours at his home residence by PW3 and other persons who asked him to assist in investigation on disappearance of the deceased. DW1 testified that apart from him, other persons were arrested, including: Kamugisha, Charles, Pastory, and Deonida and were arraigned before Kishuro and Muleba Police Stations for interrogations. However, DW1 stated that PW1 and PW2 are hiding the truth on presence of Mr. Everius Buberwa at the scene of the crime because they are residing in the same Village of Kanone hence Everius Buberwa was not arrested or brought before this court in search of truth on disappearance of the deceased. Finally, DW1 complained that he was arrested on 14th September 2016 and recorded statement on 19th September 2016.

The facts and evidences registered by the parties in this case were fine-tuned by Mr. Uhagile, learned State Attorney and Ms. Bujika, learned defence counsel, in their final submissions. According to Ms. Bujiku the prosecution failed to prove beyond reasonable doubt two (2) things as per precedent in **Nathaniel Alphonse & Another v. Republic** [2006] TLR

395. In mentioning three things which establish the offence of murder, Ms. Bujiku identified: *death of the deceased; the death was caused by the accused; and malice aforethought on part of the accused.* To her opinion, the prosecution has only established the death of deceased beyond reasonable doubt leaving the other two things in a shadow of doubts. To her opinion, doubts are raised on who caused the death of the deceased and malice aforethought. To substantiate her submission, Ms. Bujika cited:

- (i) Contradictions on testimonies of witnesses PW1 and PW2 on what transpired at the Bar. PW1 stated at the Bar he found the accused and Everius Buberwa whereas PW2 stated that she was in different *Kigata* with the deceased;
- (ii) PW3 could not interpret the report he prepared and that he admitted to be told what to write by the police officer;
- (iii) The accused was arrested on 14th September 2016 and recorded statement on 19th September 2016 in a gap of five (5) days delay without any explanation;
- (iv) The evidences against the accused person are mainly circumstantial without any link with the deceased as per

precedent in **Nathaniel Alphonse & Another v. Republic** (supra); and

- (v) That suspicion alone, however, grave cannot be used to convict accused person as per decision in **Richard Mtangule & Another v. Republic** [1992] TLR 9

According to Ms. Bujiku, the Republic was supposed to do more than stating that the accused was the last person to be seen with the deceased. To Ms. Bujiku's opinion, it may be correct that the accused was the last person to be seen with the deceased, and in fact casts a very high suspicion on him, but it is not a conclusive proof that the accused killed the deceased.

To Ms. Bujiku, the accused denied involvement in the killing and had explained in details what transpired on the fateful day and how he was connected to the case. Finally, Ms. Bujiku notified this court to visit the precedent of **Christian Kale & Rwekaza Bernard v. Republic** [1992] TLR 302 where this court is warned by the Court of Appeal to base its conviction on weaknesses of the defence, but rather to convict accused persons based on the strength of the prosecution case.

Mr. Uhagile on his part submitted that this court may convict the accused if it satisfy itself that the accused was the last person to be seen

with the deceased and no plausible explanations are provided on how they left each other. In order to justify his statement, Mr. Uhagile cited the authorities in **Makungire Mtani v. Republic** [1983] TLR 179 which held that last person to be with the deceased must explain at which point the dual had departed and **Mathayo Mwalimu & Another v. Republic**, Criminal Appeal No. 147 of 2008 where it was stated that in absence of plausible explanation on what transpired, the accused must be presumed as a killer. With the present case, Mr. Uhagile submitted that the accused was with the deceased drinking alcohol at the bar and does not give plausible explanation in this court as to where he left the deceased.

On prosecution witnesses and contradictions, Mr. Uhagile submitted that every witness must be presumed credible and reliable unless the court has reasonable explanations to disbelieve him. To bolster his argument, Mr. Uhagile cited the practice of the Court of Appeal in **Goodluck Kyando v. Republic** [2006] TLR 363 where it was stated that that every witnesses is credible and reliable, unless faulted with reasons by the court of law. According to Mr. Uhagile, PW1 and PW2 were consistent in giving their testimonies and this court must believe them whereas the accused stated different versions of his stories in cautioned statement recorded at the police and during the hearing of this case.

To Mr. Uhagile, if this court finds any contradictions in the present case, it may consider them minor as they do not go to the root of the matter that the accused was the last person to be seen with the deceased. To support his submission, Mr. Uhagile cited the precedent of **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 where it was stated that minor discrepancies and contradictions cannot fault prosecution case. According to Mr. Uhagile, minor contradictions and discrepancies cannot be avoided when considering the time taken and level of education of the prosecution witnesses.

On my part, I think, the law in section 62 (1) (a) of the **Evidence Act** [Cap. 6 R.E. 2019] (the Act) is certain and settled. It requires oral evidence to be direct. In the present case, five (5) witnesses were brought by the prosecution side to prove the case against the deceased. However, no one testified to have seen the accused killing the deceased. The prosecution based its facts and evidences on circumstances. Practices of this court and Court of Appeal have shown that circumstantial evidences may be considered in convicting accused persons provided the evidences produce more certainty with exclusion of every reasonable doubt.

The mainly quoted statement from our superior court and this court is that: *to convict an accused person based on circumstantial evidence, the evidence must point irresistibly to the accused person's guilty* (see: **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159 'B' of 2017; **Peter Mabara v. Republic**, Criminal Appeal No. 242 of 2016; **Republic v. Maximilian Leonidas**, Criminal Session Case No. 1 of 2018 (Bukoba District Registry, unreported); and **Republic v. Manila Hamduni & Another**, Criminal Session Case No. 76 of 2017 (Bukoba District Registry, unreported)).

In the present case, the facts and evidences show that there were many persons in the Bar, including Mr. Everius Buberwa and the evidences registered by PW1 and PW2, who are the key witnesses are contradicting on presence of this person. Facts and evidences brought by the prosecution on presence or arrest of Mr. Everius Buberwa are silent. Again, the evidence of PW1 and PW1 are not consistent on where exactly had left the deceased and which persons. That is why the law requires corroboration in circumstances like the present one to support other evidences which are sufficient, satisfactory and credible.

To rely on evidences registered by PW1 and PW2 to state the accused was the last person to be seen with the deceased, even if it is correct, it is not enough to land conviction against the accused (see:

Jimmy Runangaza v. Republic (supra). In present case the Republic failed to bring any other evidence to prove that the accused caused the death of the deceased.

I sat in this case with the aid with three (3) Hon. Assessors and all have reached a conclusion that it is unsafe to convict the accused based on incomplete evidence of the prosecution side. I understand each took his/ her course to arrive at final conclusion, but all were in doubt at two instances, namely: first, PW1 and PW2 are in contradiction on where exactly they saw the accused as a last person being with the deceased and second, all prosecution witnesses were silent on who saw the accused killing the deceased.

I appreciate Mr. Uhagile had cited the authority in **Makungire Mtani v. Republic** (supra) which held that last person to be seen with the deceased must explain at which point the dual had departed and that failure to give plausible explanation on what transpired, the accused must be presumed as a killer. I visited this reported case in our Law Report Books. In order to appreciate on what transpired, I will quote the case in details:

The deceased in that case disappeared mysteriously from his usual company of Mr. Makungire Mtani (the Appellant) and Mzungu Bituro (Mr. Bituro). When the Appellant and Mr. Bituro were asked on where about of

the deceased, they refused to give any explanation. The Republic was suspicious of the dual hence arrested and registered a charge of murder of the deceased. Mr. Mzungu, however, died in remand before the hearing started at this court hence the trial proceeded in respect of the Appellant alone.

The record in this court shows that the three persons, the appellant Mr. Mzungu and the deceased worked in a slaughter house where they skinned the carcasses and took the meat to the butchery. They also lived in one house, the deceased being the owner of the premises and then invited his colleagues to live with him. The facts registered in this court revealed that in the evenings the three friends used to go out together for drinks, leaving home around 18:00hours and returning at about 20:00hours. They drank the illicit liquor popularly known as *Moshi*. Sometime during their staying and working together, misunderstanding arose whereby the deceased threatened to expel the Appellant and Mr. Mzungu from the house, followed by a refusal by the two to leave the premises with a counter threat to *teach the deceased a lesson*.

Sadiki Iddi, who lived in the same house and heard the fighting words in the three friends, was summoned by the Republic to testify as prosecution witness number two (PW2). His testimonies showed that he intervened the quarrel by asking the deceased to take it easy and allow the

Appellant and Mr. Mzungu to continue to live in the house. This appears to have been settled the matter and life appeared to continue normal again. However, only about three days later the Appellant and Mzungu together with the deceased left home together at their usual time 18:00hours, but returned at 20:00hours without the deceased. When PW2 inquired as to the whereabouts of the deceased, the Appellant and Mr. Mzungu were rude and evasive. They retorted by asking the witness in what capacity he was asking them that question. When PW2 told them that he asked that question because the deceased was their host, they simply kept quiet, went into their room, closed the door and went to sleep.

The absence and disappearance of the deceased was noticed at his work and the Appellant and Mr. Mzungu were asked about his whereabouts but they said nothing, in fact PW2 thought that the Appellant and Mr. Mzungu were unusually quiet that day. Three days later the deceased was found dead laying in a potato field with injuries on the head and legs. The Appellant did not go to the scene of the crime but Mr. Mzungu did, and when he was asked by PW2 why he had not reported the absence of the deceased, he took to his heels. When later the Appellant was arrested at the market place he was desperate, and when he was asked he replied that he was so desperate because he had expected to be arrested at any time.

On the day the Appellant and Mr. Mzungu went out last with the deceased, the two wore clothes which were later found to have stains of human blood belonging to the same group as that of the deceased (AB), but different from that of their own which is *O* for the Appellant and *A* for Mr. Mzungu. At the trial the Appellant chose to keep quiet in his defence, and this court, after due review of the evidence, found the case proved and accordingly convicted the Appellant.

The Appellant's learned advocate Mr. Mr.R.W.G. Rugarabamu was not satisfied by the judgment of this court hence preferred an appeal before the full court of the Court of Appeal composed of justices Nyalali CJ, Makame JJA, and Kisanga JJA, contending that the prosecution evidence was highly circumstantial to support a conviction and that the learned trial judge misdirected himself as to the burden of proof. The Court of Appeal held that in the circumstances of the case there was more than considerable suspicion against the Appellant. The reasoning of the Court of Appeal was that the Appellant refused to give an explanation of how the deceased mysteriously disappeared from his compound. However, the Court of Appeal considered an evidence which corroborated the evidence of the last seen person to be with the deceased. The Court stated that the evidence of the Appellant's clothes bearing blood stains of the same blood group as the deceased but different from his own was an incriminating circumstance

which must be properly taken into account in establishing the Appellant's guilt. Finally, the appeal before the Court of Appeal was dismissed.

The precedent in **Makungire Mtani v. Republic** (supra) is distinguished with the present case in various levels, *viz*: first, in the present case, the accused provided detailed information on where he was and how departed with the deceased; second, he cooperated from the arrest, police stations of Kishuro and Muleba and during the hearing of this case; third, when he was arrested, he was not worried or escaped his usual residence of Ngenge; forth, the accused and deceased had no practice of going out or *Gulioni* together; fourth, the accused and deceased had no previous dispute; and fifth, no corroborating or any other evidence which connected the accused and death of the deceased, such as clothes or blood samples of similar group of the deceased.

I also understand that Mr. Uhagile submitted on minor contradictions and cited the decision in **Dickson Elia Nsamba Shapwata & Another v. Republic** (supra) stating that they may not be considered in this case. That could be correct, provided the evidences of PW1 and PW2 were watertight assisted by corroboration, which is not the case in the present case. The Court of Appeal has already stated in murder cases, like the present one, evidences registered must be watertight (see: **Waziri Amani**

v. Republic [1980] TLR 250; and **Shiku Salehe v. Republic** [1987] TLR 193).

At one point during the trial, Mr. Uhagile was complaining that the accused is not telling the truth as he is changing his evidences recorded at police station and in this court. However, practice of this court has been that it is the prosecution which is required to prove its case for the court to enter conviction (see: **Said Hemed v. Republic** [1987] TLR 117, **Mohamed Matula v. Republic** [1995] TLR 3, and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005). It is not lies of the accused or weaknesses of the defence (see: **Mushi Rajab v. Republic** (1967) HC 384 and **Christian Kale & Rwekaza Bernard v. Republic** (1992) TLR 302).

I am aware that lies of the accused may corroborate the prosecution case (see: **Felix Lucas Kisinyila v. Republic**, Criminal Appeal No. 129 of 2002, **Salum Yusuf Liundi v. Republic**, Criminal Appeal No. 26 of 1984 and **Kombo bin Khamis v. Crown**, 8 ZLR 122). However, in criminal cases involving charges of murder, like the present one, where the accused had raised several doubts during the trial, this court cannot render conviction against him.

In the present case, the evidences registered by the prosecution against the accused may be well highly suspicious. However, the position of the law on the subject is certain and settled that suspicion alone,

however strong is not enough to ground conviction to accused persons and that it cannot take the place of proof (see: **Nathaniel Alphonse & Another v. Republic** (supra); **Lucas Njoweka @ Jariba v. Republic**, Criminal Appeal No. 220 of 2005; **Shabani Mpunzu @ Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002, **B. Mapunda v. Republic**, Criminal Appeal No. 2 of 1989; **Haruna Mohamed & Mathew Lwali v. Republic**, Criminal Appeal No. 30 of 2001; and **Benedict Ajetu v. Republic** [1983] TLR 190). In **Lucas Njoweka @ Jariba v. Republic** (supra), for instance, it was categorically stated that:

The fact that the appellants were the last known persons to have been with the deceased casts very grave suspicion on them, but it is in itself not conclusive proof that they killed the deceased...other cogent corroborating evidence is necessary...

This is the position of our superior court in judicial hierarchy and I think, this court must abide with the precedent without any reservations. I recall during trial, defence counsel Ms. Bujiku was asking nexus between the death of deceased and participation of the accused in the killing and cited the practice of the Court of Appeal in **Nathaniel Alphonse & Another v. Republic** (supra). From the facts and evidences registered in this case, the question did not receive any reply.

Available precedents in the our superior court since 1995 has been that in murder cases the onus is always on the prosecution to prove not only the death but also the link between the said death and involvement of the accused. The onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence (see: **Mohamed Said Matula v. Republic** [1995] TLR 3).

Having considered the evidences registered by both sides in the present case, I have formed an opinion that the accused is not guilty to the charged offence of murder. Therefore, the accused is hereby ordered to be released from prison custody forthwith, unless he is lawfully held therein.

Ordered accordingly.

Right of Appeal explained.



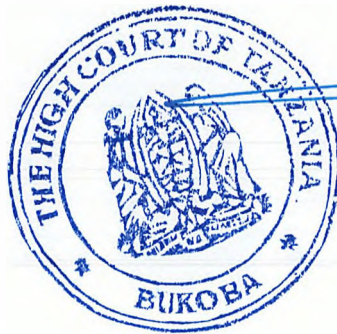

F.H. Mtulya

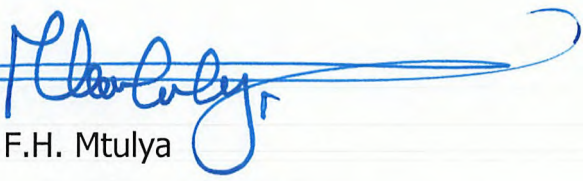
Judge

07.05.2021

This Judgment was delivered under the seal of this court in open court in the presence of learned State Attorney Mr. Grey Uhagile for the Republic, Ms. Theresia Bujiku for the Defence, and in the presence of the accused, Mr. Flugency Domician @ Magalula.

Honorable assessors thanked and accordingly discharged.




F.H. Mtulya

Judge

07.05.2021