

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
AT RUANGWA
[MTWARA REGISTRY]

CRIMINAL SESSION NO. 17 OF 2019

THE REPUBLIC
VERSUS

1. SHADRACK ^{s/o} ABDALLAH @ MTEMAYA
2. JUMA ^{s/o} SAMI @ SAMBE
3. SILVANUS ^{s/o} ERICK NAYOKE @ NAYOWE
4. AIDANI ^{s/o} WILIAM
5. BAKARI ^{s/o} ABDALLAH @ KADODO

JUDGEMENT

Final Hearing date on: 20/3/2021

Judgement date on: 29/04/2021

P.J. NGWEMBE, J.

The Republic preferred a charge of murder contrary to section 196 and 197 of the Penal Code [Cap 16 R.E. 2002] against all accused persons, namely; **SHADRACK ^{s/o} ABDALLAH @ MTEMAYA; JUMA ^{s/o} SAMI @ SAMBE; SILVANUS ^{s/o} ERICK NAYOKE @ NAYOWE; AIDANI ^{s/o} WILIAM; and BAKARI ^{s/o} ABDALLAH @ KADODO.** According to the particulars of the offence, the accused persons, are alleged to have jointly

murdered one Suwina Hamisi Maokola. That the deceased Suwina d/o Hamis Maokola, met her death on 18th December, 2017 at Nammanga Village within Nachingwea District in Lindi Region.

The ordeal began on the midnight of 18th December, 2017 at Nammanga Village in Nachingwea District within Lindi Region. The accused persons were present at Nammanga Village whereby at unknown time in the midnight, the deceased was murdered. It is alleged that the source of death of the deceased was due to strangulation which blocked flow of oxygen to her brain, thus, led into her death. The body of Suwina d/o Hamis Maokola was taken to Nachingwea District Hospital for medical examination, whereas, it was revealed that the cause of death was due to neck strangulation, which blocked flow of oxygen to her brain.

Following demise of the deceased, the accused were suspected to be behind that death, hence on diverse dates and time, all were arrested and finally arraigned in this court. Silvanus Erick Nayoke was arrested on 10th January, 2018 when he was at his house in Nammanga Village. At the same time Juma Samli was arrested on 9th January, 2018, Aidan William was also arrested on 10th January, 2018, Shadrack Abdallah and Bakari Abdallah were likewise were arrested on different dates. All were arrested when were at their village and at their respective homes.

When the information was read over to the accused persons, they all pleaded not guilty. Hence the prosecution lined up four (4) witnesses to establish and prove the accusations against them. Those witnesses are; Mohamed Abdallah Nivako (PW1); Kuruthum Issa Runje (PW2); E.9944 D/CPL. Emmanuel (PW3); and G 1808 D/C Rogato (PW4) (hereinafter

referred to as PW1 – PW4 respectively). The prosecution also tendered two exhibits in court, namely; Extra Judicial Statement recorded by Silvanus Erick Nayowe and Statement recorded by Dr. Ibrahimu Pazia, both were admitted during trial, marked exhibit P1 and P2.

Upon closure of the prosecution case, this court delivered a ruling on whether the prosecution managed to establish a prima facie case against all five accused persons. Upon review of the whole evidences adduced in court together with exhibits tendered therein, court found only three accused persons were touched with the prosecution evidences. The remaining two accused persons were not in any way pointed fingers on the alleged murder. Thus, **Shadrack s/o Abdallah @ Mtemaya** and **Bakari s/o Abdallah @ Kadodo** were released, by having no case to answer. As such, the remaining three accused persons namely; Silvanus Erick Nayoke of 23 years; Juma s/o Samli @ Sambe 21 years old; and Aidan s/o William 27 years old were found to have a case to answer.

According to the Prosecution evidences at the scene of crime, no accused person was seen by an eye witness. The evidences attached to the death of the deceased was purely circumstantial based on extra judicial statement recorded by Silvanus Erick Nayoke before Justice of Peace.

The evidences adduced by both parties are briefly summarized that, Mohamed Abdallah Nivako (PW1), testified as a Ward Executive officer of Ugawaji in Nachingwea District within Lindi region, among other duties he also act as a Justice of Peace. In so doing on 11/1/2018, at around 2: pm, he recorded a confession statement of one Silvanus Erick Nayoke, who upon all preliminaries, he voluntarily confessed his involvement to the

killing of the deceased. The statement was tendered and admitted in court as exhibit P1 and was rightly read over its contents.

The second prosecution witness was Kuruthum Issa Runje (PW2), testified in respect to recording of caution statement of Juma Samli @ Sambe on 10th January, 2018, but same was successfully objected by the defence counsel and was not admitted as exhibit in court. She proceeded to testify that she knew the accused who recorded his statement.

The third prosecution witness was E 9944 D/C Emmanuel (PW3) who testified on how he recorded a statement of an accused who is not in this court. Also the said statement was not admitted in court, so his testimony is inapplicable in this case.

The last prosecution witness E 1808 Corporal Rogato (PW4), introduced himself as investigator of the offence facing the accused persons herein. He testified that the incidence of murder occurred on 18th December, 2017 at midnight in the village of Nammanga. Being so assigned to investigate the incidence, he visited the scene of crime on 19/12/2017 where he found a dead body of Suwina Hamisi Maokola, whose neck had finger marks indicating that she died by strangulation. He drew a sketch map of the scene of crime and the body was taken to Nachingwea District Hospital. Due to his investigation and information received from his informers, he observed the culprits were six namely; Shadrack Abdallah @ Mtemaya, Juma Samli, Silvanus Erick, Aidan William, Bakari Abdallah; and Charles Makwita. Added that at that particular time, all culprits were outside of their village. However, after two weeks, all culprits returned to the village, thus on 10th January, 2018 he participated in arresting them. Upon interrogation,

five of them confessed to have involved in killing the deceased. Those are; Shadrack Abdallah; Juma Samli; Silvanus Erick; Aidan William; and Bakari Abdallah.

In cross examination, he admitted as investigator, did not visit the accused persons' respective houses during his investigation to know if the accused persons were available in their houses or ran away from the village. Also he did not recognize whose finger marks on the neck of the deceased.

After finding that the Medical Doctor Ibrahim Pazia could not be made available in any means to testify in court, the learned State Attorney, rightly, employed section 34B (2) of the Evidence Act to issue notice to produce statement by a person who cannot be called as a witness. Such notice was not objected by the defence counsel and this court was satisfied, hence ordered recalling of PW4 to testify on the statement made by Medical Doctor Ibrahim Pazia. That his statement was made on 19/12/2017. The statement of Dr. Ibrahim Pazia was tendered in court by PW4 and admitted as exhibit P2. The contents of the statement indicates that the source of death of the deceased was lack of oxygen in her brain, which caused her death.

Upon review of the prosecution evidences, the court found three accused persons to have a case to answer. Hence the court proceeded to explain to the accused persons all their rights as provided for under section 293 of CPA. In turn the defense case was blessed by those three accused persons. All testified under oath and affirmation.

The first defence witness (DW1) was Silvanus Erick Nayoke, now aged 23 years old. He testified briefly that, he is a peasant, cultivating food crops at

Nammanga village in Nachingwea District. That he was arrested on 10/1/2018 when asleep in his house. The arresting was not accompanied with reasons or information as to why police arrested him.

That they took him to the police vehicle, where he found two others, who are Shadrack Abdalla and Juma Samli. However, he did not know the accusations and Police were silent on his accusations. Instead he was thoroughly beaten, which spots and scars are still in his body.

Testified further that, on 13/1/2018 together with three others, were taken to Nachingwea District Hospital for medication. However, sick sheet and treatment receipt were alleged to be kept by Police. Also when he was taken to prison for custody, likewise he continued with treatment and medication.

To satisfy if it is true that DW1 has scars as a result of torture and beating by police, this court ordered Hon. Mtunguja - Resident Magistrate and assistant to Judge in the High Court of Tanzania at Mtwara, to examine those sports and scars in the back borne of DW1. Hon. Mtunguja satisfied the court on the allegations that DW1 has two scars at his back borne, on his left side of the limb and on his kneels of both legs. DW1 justified his assertion that police used wire to beat him.

Following that beating, on 11/1/2018 was taken to Justice of Peace, while he was still bleeding. Further testified that, Justice of Peace, did not examine his body because he was bleeding. Added that in the room of Justice of Peace, they were three, one being a Police officer called Michael.

Testified further that, Justice of Peace never recorded his statement, rather he was asked his name and place of domicile, the rest were recorded by Justice of Peace under instruction of Police officer called Michael. Rested by stating that all along he never travelled outside his village.

The defence case was also built by DW2 Juma Samli @ Sambe aged 25 years old. Despite his name indicating as a Muslim, yet he took oath and at the beginning of his testimony, he denied his name that he is not Juma Samli Sambe but his name is Felix Samli Chitumbi. The same denial of name is apparent in the proceedings during Plea Taking and Preliminary Hearing. It is on records of 19th November, 2019 when was called to plead, he denied the accusations together with his name as follows:- *"My Lord I am not called Juma Samli Sambe, but I am Felix Samli Chitumbi and I am a Christian"*

Proceeded to deny generally of any knowledge on the alleged murder. However, he admitted to know the deceased by name of Aluleni. That since the demise of Aluleni up to the date of arrest (9th January, 2018) he was present at his village continuing with his activities. Further, testified that he participated in burial ceremony of Aluleni and throughout, he was at the same village. Testified further that, his arrest was associated with conflict with another woman on 7/1/2018, whose woman is different from the deceased. On cross examination, he denied to know Silvanus prior to being arrested and taken to police station.

The last defence witness was Aidan William Chigombo of 28 years old. He knew the deceased Suwina Hamisi Maokola and he participated in her burial ceremony. That he knew the deceased through her daughter called

Khadija and also he knew the death of Khadija's mother, thus he participated in the burial. That he was arrested at night of 10th January, 2018 when he was at his house. DW1 was arrested earlier and when they met at Police lockup, DW1 was bleeding with fresh wounds. Rested by denying to murder the deceased.

Upon closure of the prosecution and defence cases, this court ordered the learned counsels to file their final written submissions on 22 March, 2021. Both counsels dutifully, complied with the court order and filed timely their final written submissions.

In a summary form, the learned State Attorney was firm to his submission that the case was well built and the three accused persons are liable for murder contrary to sections 196 and 197 of the Penal code. To comprehend his conclusion, the learned State Attorney argued that all elements of murder were proved, that Suwina Hamis Maokola was found dead; her death was unnatural and was unlawfully caused; that the killing was actuated by malice aforethought; and the accused persons were responsible for the death of the deceased.

On the actual name of the 2nd accused, whether Juma Samli Sambe or Felix Samli Chitumbi, he argued quite forcefully, that both names are related to one person who is the accused in this case. He rested by rightly pointing out that since the defence counsel failed to cross – examine the testimonies of PW2, who identified DW2 on his actual name, it meant admission.

In the contrary, the learned defence counsel, strongly raised three reasons to discard the prosecution's case; that the case against the accused was

not built and proved to the standard required; the extra judicial statement made by Silvanus Erick Nayoke required corroboration. The contents therein were related to a woman who was beaten by fist (Pigwa Ngumi) not strangulation as proved by the medical doctor; that the statement of Silvanus was procured under influence of torture from police, which cannot be said was freely and willingly procured as required by law. Rested his submission by a prayer that, since the prosecution has failed to prove a case of murder against all three accused persons, this court should acquit them forthwith.

Upon summarizing the whole evidences and counsels written submissions and summary of legal points involved therein, the honourable assessors were invited to air their opinions. All three assessors, unanimously, arrived into a uniform conclusion that all accused persons are not guilty of the offence charged. Each has his reasons, but the conclusion was the same that the prosecution failed to call material witnesses to prove the case beyond reasonable doubt. Above all the investigators, failed to use investigative skills to identify the alleged marks of fingers on the neck of the deceased.

At this juncture, it is important to elaborate out on the basic elements of the offence of murder.

According to section 196 of the Penal Code, murder is defined to mean:-

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

Murder comprises unlawful killing of another human being, with malice aforethought. In order for the offence of murder to stand, corpus must exist; (unlawful killing or omission) that is best known as *actus reus*; existence of malice aforethought best known as *mens rea* and strong evidence linking the accused with murder of the deceased.

Malice Aforethought is defined under section 200 of the Penal Code by providing various circumstances upon which malice aforethought may be established. The section is quoted hereunder:-

Section 200 "*Malice Aforethought*" shall be deemed to be established by evidence providing any one or more of the following circumstances: -

- a) *an intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b) *knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous harm is caused or not, by a wish that it may not be caused;*
- c) *an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
- d) *an intention by the act or omission to flight or escape from custody of any person who has committed or attempted to commit an offence".*

Apart from the statutory meaning of those basic terms, the fundamental issue before this court is whether the prosecution successfully, established

the offence of murder against the accused persons. The duty of the prosecution on cases of this nature, always is to establish and prove a prima facie case against the accused persons; second the proof must be beyond reasonable doubts; that the prosecution evidences must link and point all fingers to the accused persons. It is a trite law that, the burden of prove in Criminal Cases lies on the prosecution side and it never shifts and the degree of prove is beyond reasonable doubt.

Also it is well established and settled in our jurisdiction that, the accused persons shall not be convicted on the basis of the weaknesses of their defence evidences; rather, conviction shall always be based on the strength of the prosecution case. Weak defense case may only enhance the prosecution case, but shall not be the basis for their conviction.

The term "beyond reasonable doubt" may literally mean no other logical conclusion or explanation can be derived from the evidences adduced in court, than to find the accused persons liable to the offence committed. There is a danger to think proof beyond reasonable doubt means proof beyond human thinking or human imagination or beyond any remote possibilities. I think the law will fail to protect innocent persons if the term beyond reasonable doubts will be admitted fancifully to deflect the course of justice. If the evidence is strong enough against the accused persons as to leave only a remote possibility in their favour such proof is enough to find them liable to the offence committed. In this point I am reminded by a long standing lucid definition provided for, just two years after the Second World War by Lord Denning in the case of **Miller Vs. Minister of Pensions**, (1947) 2 All ER 372 held: -

"...Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is strong against a man as to leave only a remote possibility in his favour which can be dismissed"

Another equally danger if the term proof beyond reasonable doubt is taken loosely, many innocent persons may find languishing in jail or executed. Therefore, always courts must be conscious on critical analysis of every relevant piece of evidence to net the true and only culprits who committed the alleged offence.

The question is whether in the circumstances of this case the prosecution proved the case beyond reasonable doubt?

As I have already stated above, in this case, there was no single witness who testified as an eye witness of the alleged murder. Above all the prosecution failed to call the alleged child who was staying in the same house with the deceased. As such, the whole prosecution evidences are purely circumstantial.

To rely the case of murder on purely circumstantial evidence, such evidence must irresistibly be leading to the inevitable inference that the accused persons committed the alleged murder. In the case of **Makame Junedi Mwinyi Vs. Serikali ya Mapinduzi ya Zanzibar (SMZ)** [2000] T.L.R 455, the court defined circumstantial evidence to mean:-

"What is circumstantial evidence? Simply put, these are circumstances in the form of evidence which enable a court to reasonably infer or conclude the existence or non-

existence of a fact in issue or the guilty of an accused person. It is generally in the form of oral evidence."

As rightly so defined, circumstantial evidence always must be as direct as possible and must in all respects point to none save to the accused persons. In similar reasoning in the case of **Ally Bakari & Pili Bakari Vs. R, [1992] TLR 10** Justices of Appeal held:-

"where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred.

In respect to this case, there are several gaps, which were not tied up by the prosecution at the investigation stage and on trial. For instance, there is no clear investigative explanation on whether the deceased was murdered; the only explanation available is that the deceased was murdered due to available finger marks on her neck. An immediate question is whose those fingers? Whether was her own fingers or fingers of another person other than the accused persons? These questions have no answers because no prosecution witness came up with clear explanation on this. Nowadays, there are scientific investigative devices, like the use of forensic instruments to assist investigators to identify whose those finger marks.

Second, PW4 an investigator, when was asked during cross-examination on the absence or presence of the accused in their respective village, he clearly disclosed to court that he never went to the accused houses to find if they were absent or present in their houses/village soon after the event. In turn all accused persons alleged to have been in their homes all along

and indeed they confirmed that they participated in the burial ceremony of the deceased. Such poor investigation has reminded me to the lamentation made by the justices of the Court of Appeal in the case of **Hosea Francis @ Ngala & Maria Hosea @ Ulanga Vs. R, Criminal Appeal No. 408 of 2015 (CAT at Dodoma)** held:-

"We are obviously concerned about the failing standards of professionalism in the collection of evidence at scene of crimes. We are as surprised why, after visiting the alleged scenes where the deceased met her unlawful death, PW1 and other police officers who were in his entourage, failed to collect physical evidences which the police according to PW3 were shown"

Similar remarks were made in the case of **R, Vs. Issa Mohamed @ Chiwele & 3 others, Criminal session No. 39 of 2016 (HCT at Lindi)** held:-

"Having found that the prosecution has failed to prove the case to the required standard, I feel it necessary to sound a note to the investigators, in the hope that they will take a lesson therefrom. Too often in criminal cases, I have noticed an inexplicable lack of seriousness on the part of police investigators a rather casual way of going about the business of collecting, handling, preserving and analyzing evidence. The result is a prosecution case that lacks crucial pieces of evidence that one would expect in a well-handled case"

I fully subscribe to the sentiments made in those cases on lack of professionalism of our investigators. Even in this case one may wonder why investigators did not investigate on whose those finger marks on the neck of the deceased? Why they failed to attend the burial ceremony of the deceased as part of their investigative measures? Why didn't they visit the

accused homes? Why they failed to record statement of the child who was staying with the deceased? and many more unanswered questions.

Again in our jurisdiction, it is settled that failure to arrest the accused immediately after the event, while they were within the village, create reasonable doubt as was well articulated in the case of **Salum Seleman @ Bandari Vs. R, Criminal Appeal No. 6 of 2013** the Court of Appeal held:-

“Also PW1 did not bother to arrest the appellant on that day despite of seeing him inside her toilet where her daughter came from instead the appellant was arrested after three days passed while he was staying nearby. No explanation was given for the delayed arrest while the appellant was her neighbor”

The alleged murder occurred in the night of 18th December 2017 and the burial ceremony was on 20th December 2017, and the accused all alleged to attend it, why they were not arrested immediate thereafter. The investigator waited until 9th and 10th January 2018 when they found necessary to arrest them. Such unexplained delay to arrest them raise serious doubt.

Perusing inquisitively on the extra judicial statement of Silvanus Erick Nayoke; such statement was alleged to have been recorded, while he was bleeding from fresh wounds arising from torture by police. Such allegations is supported by the existence of sports and scars in his back borne, left limb and both knees. Also is supported by DW2 and DW3. The prosecution did not cross – examine properly on the existence of those scars and sports.

Above all, Silvanus retracted and indeed repudiated the whole confession he alleged to make before justice of peace. In this issue, has drawn my attention to the warning made by the Court of Appeal in the case of **Hemed Abdallah Vs. R, [1995] T.L.R. 172** where they held:-

“Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances, is satisfied that the confession must but be true”

The circumstances which explained by DW1 in his defence, I find difficult to disbelieve it, for the prosecution indeed failed to call material witness to corroborate the contents of the confession, especially the alleged child who was staying with the deceased.

Notably, the evidence of DW2 and DW3 are likewise, strong in the sense that; first is on his name that he is not Juma Samli @ Sambe rather is Felix Samli Chitumbi; second that he is not a Muslim rather is a Christian and that he was within the village when the event occurred and he participated in the burial of the deceased. Moreover, his name was denied from the time of pleadings and consistently denied even during trial. However, the prosecution failed to call evidences to contradict his assertion, while they were aware from the time of pleadings.

In the circumstances of this case, I fully subscribe to the honourable assessors that the investigators and prosecutors abdicated their Nobel duty to conduct thorough investigation on the death of the deceased and the prosecution, likewise, had no witnesses to prove their case.

In criminal trials like this one, judgement must comprise facts leading to the offence as charged in the charge sheet, analysis of facts, law and precedents, conviction and sentence and or orders. The eminent legal author **A.D. Singh's on Judgements and How to Write them**, 4th edition, defined judgement to mean an expression of the opinion of a judge arrived at after due consideration of the evidence and of the arguments advanced before him. It is a final verdict of the trial of an accused or appellant. **It is a cardinal principle which must not be forgotten that a court judgement should be based strictly on the evidence on record, and not on outside evidence, however acquired.**

Similar position was captured by the Court of Appeal in the case of **Hamis Rajabu Dibagula Vs. R, [2004] T.L.R. 196** where they described the contents of a court judgement to comprise among others, evidence adduced in court, all material portion of evidence adduced during trial; analysis of factual issues; legal issues and reference to precedents where applicable before arriving into conclusion. For clarity the court held:-

"A judgement must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. A good judgement is clear, systematic and straight forward. Every judgement should state the fact of the case, establishing each fact by reference to the particular evidence by which it is supported and it should give sufficiently and plainly the reason which justify the finding. It should state sufficiently particulars to enable a court of appeal to know what facts are found and how"

In this trial, one may ask which material evidences are viable to lead the court to convict the accused persons? I find none, hence I may safely conclude that the prosecution failed to prove the accusations against the three accused persons beyond reasonable doubt. Above all the allegations of murder were poorly investigated, thus led the prosecution difficult to build a prima facie case against the accused persons and prove it beyond reasonable doubt.

Accordingly, I find **JUMA ^{s/o} SAMI @ SAMBE; SILVANUS ^{s/o} ERICK NAYOKE @ NAYOWE; and AIDANI ^{s/o} WILIAM** are not guilty of the offence of murder. Subsequently they are hereby acquitted and should be released from custody forthwith unless lawfully held.

It is so ordered.

DATED at RUANGWA this 29th day of April, 2021



A handwritten signature in black ink, appearing to read "P.J. NGWEMBE".

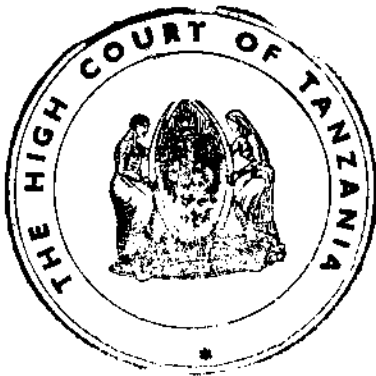
P.J. NGWEMBE

JUDGE

29/04/2021

Judgement Delivered at Ruangwa on this 29th day of April, 2021 in the presence of Yahya Gumbo State Attorney for the Republic and in the presence of Stephen Lekey, Advocate for the three accused persons.

Right to appeal to the Court of Appeal explained.



A handwritten signature in black ink, appearing to be "P.J. NGWEMBE".

P.J. NGWEMBE

JUDGE

29/4/2021

ASSESSORS

1. MOHAMED A. NASSORO;
2. BIBIE NANDONDE; AND
3. MWAJUMA KIBWANA.