

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBOZI
CRIMINAL SESSIONS CASE NO. 39 OF 2018

THE REPUBLIC

VERSUS

GODWIN JAIWELO MSOMBA

AND

HASSAN LANGSON RUNGWE

JUDGEMENT

Date of Hearing : 10/05/2021
Date of Judgment: 12/05/2021

MONGELLA, J.

Godwin Jaiwelo Msomba and **Hassan Langson Rungwe**, the accused persons herein, stand charged with the offence of murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E. 2002. They are alleged to have participated in the killing of one **Salum Ghambi** in what is obvious a mob justice. The facts of the case as deduced from the charge and the facts adduced by PW1, PW2, PW3, DW1 and DW2 in their testimonies are as follows:



On 04th November 2012, a cow belonging to one Ipyana Msomba was alleged to have been stolen and locked inside the deceased's house located at his farm in Isoka village, Ileje district. When the local government leaders attended the crime scene, that is, the Ward Executive Officer (WEO), named Hilda Songa and the village chairman named Hassan Rungwe (the 2nd accused herein), they ordered the deceased's 2nd wife named **Cathy Elia Mwanja (PW2)** to open the door to the house in which the cow was locked in. She looked for the key to the house but did not find it.

The WEO then ordered some militiamen including the 1st accused person to go get the deceased at Mpemba area where he had gone. The 1st accused thus headed to Mpemba with other three militiamen namely, Manyile Kabuka, Tuyange Ndimbwa and Biton Nzunda. On their way at Nandanga area they met the deceased with his 1st wife named **Anna Ambindwile Masebo (PW1)**. After telling him the reason they had gone to get him, they all went to Isoka village at the deceased's house. On arrival the WEO asked the deceased if the said house was his. The deceased admitted that the house was his, but was used by his son and currently used to store some crop harvest. The WEO told the deceased that there is a cow that has been stolen and is said to be locked inside his house. The deceased then sent his 2nd and 3rd wives to get the key to the door. They searched for the key but did not find it. In the end the deceased suggested that the door should be broken.

When the door was broken the cow was found inside eating corn bran "pumba." It was then ordered by the WEO that the cow and the

deceased be tied with ropes and taken to the ward office where the police shall find the deceased there. The WEO ordered the villagers who were gathered to disperse as they head to the ward office. The villagers however refused to disperse and followed the village leaders and the deceased to the ward office.

On the way the villagers started attacking the deceased with clubs and stones. They kept walking until they reached mbugani area. At that area one named Jacob Mwashitete took a machete and gave it to one named Vibaya Ngonya. Vibaya Ngonya chopped the deceased's three fingers and private parts. He put the chopped body parts in a banana leaf and handed them to Jacob Mwashitete. The deceased started bleeding profusely. They however, lifted up the deceased and walked a few paces whereby the deceased lost strength and fell down. After falling down they took stalks, grass and petrol and set fire on the deceased. The deceased was burnt to death.

Following this incident seven people namely; Jacob Mwashitete, Vibaya Ngonya, Fumbo, Tito Mwaupilu, Daudi Kandonga, Ezekia Rungwe and Angumbwike Kabuka were arrested, charged and sentenced in this court in 2018. It happened that during the hearing of their case, the accused persons who had appeared in court as witnesses were mentioned by the deceased's wives to have participated in the killing. They were thus arrested and hereby charged accordingly for the murder of the deceased Salum Ghambi. The 1st accused, Godwin Msomba was a militiaman and party leader in Mbebe village, and the 2nd accused was the village chairman of Ipanga-Isoka village.

As witnesses from both sides testified to the unnatural death of the deceased, there is no dispute on the death of the death. The issue that remains for determination by this court is whether the accused persons participated in the murder of the deceased.

PW1, PW2 and PW3 who are the deceased's wives testified to have eye witnessed the accused persons participating in the murder incident. They said that the incident occurred between 16 to 17 hours and they were very close to the deceased thus clearly saw the accused persons attacking the deceased. To be specific, they all said that Godwin Msomba, the 1st accused hit the deceased with a club while Hassan Rungwe, the 2nd accused hit the deceased with a stone.

On the other hand, the accused persons denied participating in the murder incident. The 1st accused person said that when they were heading to the ward office, they saw a group of angry villagers following them. The said villagers started throwing stones to the deceased. The WEO thus told them to run away to save themselves from being killed by the angry villagers. They thus ran away and were not present when the deceased was cut his body parts and burnt to death.

The 2nd accused on his part said that when the leaders left to the ward office with the deceased, he was ordered by the WEO to stay at the accused house to see that the villagers dispersed to their homes. He denied being present at the crime scene where the deceased was killed.



All three assessors were of the opinion that PW1, PW2 and PW3 have failed to prove that the accused persons were involved in committing the offence. They were of the view that since there were a lot of people it was difficult to know who exactly threw stones or clubs in attacking the accused. They considered the fact that the accused being leaders in the village had the responsibility of keeping peace and protecting their people instead of attacking them. They as well considered the fact that a lot of time passed from 2012 when the offence was committed to 2018 when the accused persons were arrested. They as well considered the contradictions between PW1, PW2 and PW3 as to how the deceased was tied. While PW1 and PW2 testified that the deceased was tied with ropes, PW3 testified that he was told to hold the cow. On these contradictions they concluded that the PW1, PW2 and PW3 were not near the deceased to have clearly seen the attackers as they claimed.

I am in fact in line with the observation made by the wise assessors regarding this case. If we recall the facts of this case we see that the offence was committed in 2012. The witnesses were also interrogated in 2012, but according to PW4's testimony, they were interrogated several times by different police officers. PW4 was the police officer who was assigned to investigate on the case. The statements of PW1, PW2 and PW3 led to the arrest of the seven suspects who were tried and sentenced in 2018. The 1st accused and the 2nd accused are militiaman and village chairman, respectively, who served their positions until 2014. They were present in the village all the time until 2018 when they got arrested.



The above facts in my opinion give rise to the question as to whether the accused persons were mentioned at the earliest possible opportunity to the investigating police officer who arrested and charged the first seven suspects. The law is settled to the effect that the mentioning of the accused person at the earliest possible opportunity is an all assurance of the credibility of that witness. This legal position was settled in the case of **Bakari Abdallah Masudi v. Republic**, Criminal Appeal no. 126 of 2017 (unreported) whereby the Court of Appeal held that:

"...the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his credibility."

In the case of **Jaribu Abdallah v. Republic** [2003] TLR 271, the Court also held:

*"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not guarantee against untruthful evidence. **The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor.**" [Emphasis added].*

PW1, PW2 and PW3 testified that when they gave their statements to the police officers after the incident, they as well mentioned the accused persons to have taken part in the murder of their deceased husband. However, their testimony was contradicted by that of PW4, the chief investigation officer of the murder incident. PW4 testified that he did not charge the accused persons together with the first seven suspects

because the accused persons were not mentioned by the witnesses to have been involved in the killing. He added that some of the witnesses he interrogated told him that the accused persons tried to rescue the deceased from the attacks, but ran away after being overpowered by the attackers. He testified further that the 2nd accused person specifically assisted him a lot in finding the seven suspects.

In my settled view, the testimony of PW1, PW2 and PW3 on mentioning the accused persons at the earliest possible opportunity needed corroboration from the person to whom they mentioned the accused persons before. PW4 testified that he interrogated and recorded the testimony of PW1. He said that in his interrogation, PW1 never mentioned the accused persons as being involved in the offence. He however, testified that PW1, PW2, and PW3 were interrogated several times by other police officers and additional statements taken. Under the circumstances, I am of the settled view that it was imperative for the prosecution to call these police officers who recorded statements from PW1, PW2 and PW3 to corroborate their testimonies. These were in fact very key witnesses in proving that the accused persons were mentioned by PW1, PW2 and PW3 at the earliest possible opportunity and not later as an afterthought. Unfortunately the prosecution did not call these key witnesses.

The law is settled to the effect that failure to call a material witness can lead to adverse inference being drawn against a party failing to call the said witness. This position was observed by the Court of Appeal in the case of **Aziz Abdallah v. Republic** [1991] TLR 71 in which it held:



"...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."

The prosecution did not call the police officers who recorded the testimonies of PW1, PW2 and PW3 mentioning the accused persons as involved in commission of the offence and no explanation was given for not calling them. In the premises the evidence of PW1, PW2 and PW3 remains uncorroborated and cannot be relied upon. See also: **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 351 of 2008 (CAT, unreported) and **Raphael Mhando v. The Republic**, Criminal Appeal No. 54 of 2017 (CAT at Tanga, unreported).

In consideration of the observation I have made hereinabove, I find that the prosecution has failed to prove its case beyond reasonable doubt. Under the circumstances, I find the accused persons; **GODWIN JAIWELO MSOMBA** and **HASSAN LANGSON RUNGWE, NOT GUILTY** of the offence of murder they stand charged with under section 196 and 197 of the Penal Code, Cap 16, R. E. 2002 and consequently **acquit** them from the same charge.

Dated at Mbozi on this 12th day of May 2021.


L. M. MONGELLA

JUDGE

Court: Judgement delivered at Mbozi in open court on this 12th day of May 2021 in the presence of the accused persons, and their advocate Mr. Moses Mwampashe and Mr. Innocent Njau, learned State Attorney for the Republic.


L. M. MONGELLA

JUDGE

