

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**CRIMINAL SESSIONS CASE NO. 1 OF 2021**

**THE REPUBLIC**

***VERSUS***

**1. JUMA S/O MARWA**

**2. MARWA S/O WAMBURA**

**JUDGMENT**

17<sup>th</sup> and 25<sup>th</sup> June, 2021

**KISANYA, J.:**

In this trial, **Juma Marwa** and **Marwa Wambura** have been indicted with the offence of murder contrary to sections 196 and 197 of the Penal Code [Cap. 16, R.E. 2019]. The particulars of offence indicate that, on 16/07/2019 at Baranga village within Butiama District in Mara Region, the accused murdered one, **Marwa Mwichabi @Mwikwabe**.

During the trial, Mr. Frank Nchanila, learned State Attorney represented the Republic while, both accused were represented by Mr. Amos Wilson, learned advocate. Before the commencement of the trial, three assessors, namely, Tabu Sembu, Risiki Magesa and Merciana Changerawe, were selected to aid the Court in determining this case. They were present during the whole of the trial proceedings and did perform their duties appropriately.

Determined to prove its case, the prosecution called three witnesses and relied on two exhibits namely, the sketch map of the scene of crime (**Exh. P1**) and the report on post mortem examination (**Exh. P2**) which were tendered during the preliminary hearing. On the other side, each accused person defended himself on oath without calling any witness or tendering any exhibit.

In view of evidence adduced by both parties, the facts material to this case went as follows: On 16<sup>th</sup> July, 2019 around 1600 hours, the accused persons and the deceased went to the house of **Bhoke Matiku (PW1)** to drink local brew commonly known as "*machicha*." They left PW1's house at 2100 hours. The deceased was found dead on the next day (17/07/2019). His body was found at Nyameko hamlet in Baranga Village. Many people including, **Marwa Nchangwa (PW2)** responded to the alarm raised by the villagers and went to the scene of crime. The matter was also reported at Butiama Police Station. As a result, the police officers, **E.291 D/CPL Michael (PW3)** inclusive, went and arrived at the scene of crime around 0900 hours on 17/07/2019. In the course of exercising their duties, the police officers drew the sketch map of the scene of crime and took the deceased to Baranga Health Centre for examination. Pursuant to the Report on Post-Mortem Examination (**Exh. P2**) the cause of death was due to "*inter-aeramial hemorrhage, bleeding of blood in brain cause of death*." At the same time, the

accused person were arrested on the account that they were the last persons to be seen with the deceased.

During the preliminary hearing and trial, the accused persons did not dispute to have spent time with the deceased at the house of **Bhoke Matiku** on the material day. Further to that, they did not dispute to have left **Bhoke Matiku's** house with the deceased and that the latter was found dead on 17/07/2019. However, the accused persons accounted that they went separate ways, thirty (30) paces after leaving **PW1's** house.

Having considering the testimonies from the prosecution and defense side, the issue which the court is called to determine is whether the prosecution's evidence has proved the charge preferred against the accused, beyond all reasonable doubts. There is a plethora of authorities on this stance. See for instance, the decision of the Court of Appeal in **George Mwanyingi vs R.**, Criminal Appeal No. 335 of 2016, CAT at Mbeya (unreported), wherein it was held as follows:

*"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shifts back to prosecution."*

As far as the offence of murder is concerned, the prosecution is duty bound to prove three ingredients as follows: *One*, that there is a human being who has died an unnatural death. *Two*, that the said death was a result of an unlawful act by the accused before the court. *Three*, that the accused intended to cause death or grievous bodily harm when doing that unlawful act. The issue is whether the prosecution has proved all of the above ingredients.

In view of evidence adduced by both sides, there is no dispute that **Marwa Mwichabi @ Mwikwabe** is dead and that his death was unnatural as depicted in **Exh. P2**. It is also not disputed that the deceased was unlawfully killed. The circumstances show that his death is not sanctioned by the law and that the person who killed him intended to cause death or grievous bodily harm. The crucial issue is whether the deceased was murdered by the accused persons at hand.

It is common ground that there is no direct evidence or eye witness to connect the accused persons with the offence of murder. The prosecution case rests on circumstantial evidence from the testimony adduced by **Bhoke Matiku (PW1)** that, the accused persons and the deceased left her house together. Also, there is evidence of the said **PW1, Marwa Nchangwa (PW2)** and **E291 D/CPL Michael (PW3)** that, the deceased was found dead on 17/07/2019. Further to that, the investigator of this case (**PW3**) was firm that the accused were arrested because they were the last persons to be seen with the deceased.

The law is settled in our jurisdiction that, where a case is founded on circumstantial evidence, the conviction stands only if such evidence irresistibly leads to the conclusion that it is the accused and not any other person who committed the crime. This implies that the inculpatory facts from the prosecution case must be incapable of any other interpretation or explanation than that the person before the court is guilty of the charged offence. This position has been taken in many cases including, **Hamida Mussa vs R** [1993] T.L.R. 123, where the Court of Appeal stated:

*"circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"*

As indicated earlier, the circumstantial evidence in the case at hand is to the effect that the accused persons were the last persons to be seen with the deceased. Again, the law is settled on this aspect. If the accused person is alleged to have been the last person to be seen with the deceased, he is presumed to be the killer unless he adduces a plausible explanation to explain away the circumstances leading to death. See for instance, **Mark Kasimiri vs R**, Criminal Appeal No. 37 of 2017, CAT (unreported), where the Court of Appeal re-stated this principle by holding that:

*"...That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer..."*

In the light of the above position, the question to ask ourselves is whether plausible explanation has been given by the accused persons to explain away the circumstances incriminating them to the case at hand. Both accused persons stated on oath that they left each other after 30 paces from **PW1**'s house. While the deceased headed to Baranga center, the second accused went to his house leaving behind the first accused looking after his blocks' furnace.

It is noteworthy here that no person who saw what happened when the accused and deceased left **PW1**'s house. In the absence of a person who saw the accused and the accused beyond 30 paces from **PW1**'s house, I find no reason to disbelieve the accused persons' defence that, they went separate ways after leaving **PW1**'s house. This is so when it is considered that **PW1**, **PW2** and **PW3** admitted that there are different pathways within Baranga village. Further to that, nothing suggests that the accused persons were duty bound to ensure safe arrival of the deceased at his house.

I have also considered the accused persons' conduct after the deceased's death. None of them fled from the village. The first accused responded to the alarm raised on 17/07/2019 and informed the village chairperson that he, the


second accused and the deceased had a drink at PW1's house before the incident. The village chairman was not called to testify. However, PW3 seems to support the first accused person's evidence. He deposed that the police was informed by the village chairman that the accused persons were the last persons to be seen with the deceased. In my opinion, the accused persons' conduct after the incident suggest that they were innocent.

From the foregoing, I am of the humble view that, the circumstantial evidence in this case casts a serious shadow on the prosecution's case. It is my considered opinion that the prosecution has not proved its case against both accused persons. For that reason, I am at one with the three assessors who opined that the accused persons are not guilty of the charged offence due to the weakness on the prosecution case.

In the result, I acquit **Juma Marwa** and **Marwa Wambura** for the offence of murder contrary to sections 196 and 197 of **the Penal Code** [supra] and order for their immediate release from custody unless held for other lawful cause.

DATED and DELIVERED at MUSOMA this 25<sup>th</sup> day of June, 2021



  
E.S. Kisanya  
JUDGE  
25/06/2021



Court: Judgment delivered in open court this 25<sup>th</sup> day of June, 2021 in the presence Mr. Frank Nchanila, learned State Attorney for the Republic, Mr. Amos Wilson, learned advocate for both accused, the accused person and the ladies and gentleman assessors.



E.S. Kisanya  
JUDGE  
25/06/2021

Court: Right of appeal explained. Assessors thanked and discharged.

E.S. Kisanya  
JUDGE  
25/06/2021

