

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT TARIME

CRIMINAL SESSIONS NO. 75 OF 2020

THE REPUBLIC.....PROSECUTOR

VERSUS

OMAHE OMAHE @ RYOBA.....ACCUSED

JUDGMENT

13th & 15th July, 2021

Kahyoza, J.

Ghati Bhoke Chacha died a violent death on the 22nd May, 2012, his head was severed from the body. He went to cut grass in the bush, near Nyamakendo village and his body was recovered on the 23rd May, 2012. The police suspected two persons who were last seen with Ghati Bhoke Chacha. Seven years later the police managed to arrest one of the suspects and charge him.

After his arrest **Omahe Omahe @ Ryoba** (the accused person) the prosecution charged him with an information of murder c/s 196 and 197 of the Penal Code [Cap. 16 R.E 2019]. The prosecution alleged that on 22/5/2012 at Nyamakendo Village in Serengeti District, Mara Region the accused person murdered one **Ghati s/o Bhoke @Magige**. The accused pleaded not guilty to the information of murder.

As the accused person pleaded not guilty to the charge, the prosecution summoned five witnesses and tendered two exhibits establish

that the accused person killed **Ghati s/o Bhoke @Magige** and that he did so with malice aforethought. There are primary and secondary facts, which are either common ground or undisputed between the parties. The undisputed facts are; **One**, that Ghati Bhoke Chacha is dead; and **two**, he died a violent death on the 22nd May, 2012. The court admitted the post mortem examination report as Exh. P1, without objection from the accused's advocate. Exh. P1 shows that Ghati Bhoke Chacha's death was caused by severe bleeding. The summary report has it that the neck was totally cut off, the head separated from the trunk. Also, there was partial cut of the upper left arm.

The dispute is whether it is the accused person who killed the deceased.

According to Bhoke Magige (**PW5**), the deceased's father, the deceased, the accused person and Magige Ryoba were friends. They quarrelled. The accused person and Magige Ryoba went to Bhoke Magige (**PW5**) to confront the deceased for being quarrelsome. They contended that the deceased triggered the quarrels. The accused person and Magige Ryoba went to Bhoke Magige (**PW5**) on the day Ghati Bhoke died, each of them holding a panga. Bhoke Magige (**PW5**) inquired from them what was the matter. They told him they had quarrels with his son, the deceased. Bhoke Magige (**PW5**) beseeched them to stop quarrels. Ghati Bhoke was at his home place at that time. Bhoke Magige (**PW5**) advised them to stop quarrels. They left with Ghati Bhoke. Omahe and Magige left each holding a panga. Bhoke Ghati had sickle (mundu) for cutting grass. They left all together in the afternoon at around 04:00PM. Unfortunately, Bhoke Magige

(PW5)'s son, the deceased, did not come back. Later, one man called Wambura told him that his son was killed. They cried for help.

Bhoke Magige (PW5) deposed further that Omahe and Magige were friends. They used to come to Bhoke Magige (PW5)'s house frequently to visit the deceased.

Bhoke Magige (PW5) went to the scene of crime in the bush, where he found Ghati Bhoke, the deceased lying dead. He deposed that his son was "slaughtered". The neck was severed from the rest of the body. The deceased bled profoundly. He added that after his son was killed he did not see the accused person and Magige Ryoba. They disappeared until the chairman arrested Omahe Omahe. He testified that even Omahe Omahe came back after Wambura, the person who saw them running from the scene of the crime, died. Bhoke Magige (PW5) identified Omahe Omahe as the person in the dock.

During the cross-examination, Bhoke Magige (PW5) deposed that at times, Ghati Bhoke, (the deceased), Omahe Omahe and Magige Ryoba visited each other three times a day. They, sometimes took dinner or lunch together.

Albert Kasanga Mnalimi (Pw1), a clinical officer examined the dead, body, identified to be of Ghati Bhoke on the 23/5/2012. The deceased's neck was severed from the rest of the body. He also found the deceased body with an injury on the left hand/arm inflicted by a sharp object. He established that the deceased died of severe bleeding. He tendered post-mortem examination report Exh. P.1.

Joel Kiberenge Mwita (**Pw2**) a village chairman of Nyamakendo from 2019, whilst at his office on the 17/12/2019 saw the accused person, Omahe Omahe Ryoba passing Joel Kiberenge Mwita (**Pw2**) knew that Omahe Omahe Ryoba was suspected of causing death of Ghati Boke Nyaimagise together with Magige Chacha Lotera. He deposed that he had not seen him for long time. Omahe Omahe Ryoba disappeared after he was suspected of committing the offence. He ordered the militiamen to arrest him. They arrest him.

Joel Kiberenge Mwita (**Pw2**) deposed that the deceased met his demise on the 22/5/2012. He knew that as he was a villager. He added that he went to the scene of the crime which was within Serengeti National park. He witnessed the deceased's head severed from the body. Omahe Omahe Ryoba and Magige had a dispute.

After arresting Omahe Omahe Ryoba, Joel Kiberenge Mwita (**Pw2**) informed the OCS of Machochwe police post. The OCS sent No. G.5892 PC Ezra Msogwa (**Pw3**) to pick the accused person. On 17/9/2019 at around 04:00PM No. G.5892 PC Ezra Msogwa (**Pw3**) picked the accused from Joel Kiberenge Mwita (**Pw2**). He took him to Machochwe police post. Later, on the same day at around 04:45PM police from Mugumu centre police took Omahe Omahe to Mugumu centre police station.

No. G. 6069 DC Elias (**Pw4**), a police working in the Criminal Investigation Department (CID) at Mugumu centre police station interrogated the accused person on the 17/12/2019 at around 05:30PM. He informed him that he wanted to interrogate him regarding the death that took place on 22/5/2012 near Nyamakendo village Serengeti District.

He explained to him his basic rights, that; **one**, he was free to answer the questions or to remain silent; **two**, the statement he gives may be used in the trial against him; **three**, he was free to call his relative to be present. The accused person responded that he was ready to given his statement. Finally, No. G. 6069 DC ELIAS (**Pw4**) asked him if he could read and write. He answered that he did not know to read and write.

The interview or interrogation started at 06:00PM up to 07:30PM. At the end, No. G. 6069 DC ELIAS (**Pw4**) requested him to sign the statement. He signed it. He tendered the caution statement as Exh. P.2. He read the contents of the cautioned statement to the accused person.

During cross-examination, No. G. 6069 DC ELIAS (**Pw4**) deposed that the accused person could only write his signature. He added that he took the accused person to the Justice of Peace. The accused person did not confess to the justice of peace. He endorsed his finger print and wrote his name except on page two (2) where there is no signature.

Omahe Omahe Ryoba (**Dw1**)'s defended himself on oath. He denied to kill the deceased. He testified that he woke up on the 22/5/2015 went to his farm. He came back from his farm in the late evening at 06:45PM took bath and food. Later, at around 10:00PM, he slept. On the 23/5/2015 he woke up and went to finish weeding his farm. He denied going to Bhoke Magige (Pw5) on the 22/5/2015. He deposed that he did not know Bhoke Magige's home place. He testified that Ghati and Magige were not his friends. He denied to quarrel with Ghati. He also denied to go to the bush with Magige and the deceased. He added that the allegation that Wambura saw him committing the offence was false.

He deposed that he did not leave his home place from 2012 up to the time he was arrested. He refuted to admit to commit the offence. He told the Court that he gave the statement after he was tortured. He added that he did not confess before the justice of peace because he was a free agent. He was beaten for three days. He gave the statement after he was torture.

During the cross-examination, Omahe Omahe Ryoba (**Dw1**) deposed that he knew Bhoke Magige (Pw5). Bhoke Magige (Pw5) was his village mate. He used to see him at the centre. He concluded that he had no quarrels with Bhoke Magige (Pw5).

At the end of the trial, the learned defence advocate and the learned State Attorney submitted orally. I commend them for their able submissions, which I will refer to while answering the issues.

As pointed above the issue is whether the accused person killed the deceased and did so with malice aforethought. There is no eye witness. The accused person raised the defence of *alibi*. The prosecution, therefore relies on the circumstantial evidence together with the cautioned statement exhibit P.2, which the accused challenged that he did not make it as a free agent.

It is trite law, as submitted by the defence advocate that where the prosecution evidence hinges on circumstantial evidence, such evidence must irresistibly lead to the conclusion that it is the accused who committed the offence and not anybody else. See the case of **Mswahili Mulugala v R.**, [1977] L.R.T 27 and **Ally Bakari and Pili Bakari v R.**, [1992] T.R.L 103. I am also alive of a settled principle of criminal justice

that suspicion, however strong it may be, is not enough to ground a conviction. This position is found in many cases, one which is **Shaban Mpunzu @ Elisha Mpunzu V.R.**, Criminal Appeal No. 12 of 2002 (CAT unreported). The defence advocate submitted that the accused person is merely suspected to have killed the deceased.

I will determine if the accused person is suspected to have killed the deceased or there is evidence to link him with the offence of murder.

It is also settled that circumstantial evidence to ground conviction inculpatory facts of circumstantial evidence must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court of Appeal in **Walii Abdallah Kibutwa and 2 Others V. R.** Criminal Appeal No. 181 of 2006 sought inspiration from the Indian case of **Sharad Birdhichand Sarda v State of Maharashtra**, AIR (1984) SC 1622 in which the court stated the conditions precedent before conviction could be based on circumstantial evidence. There are:

1. *The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;*
2. *The facts so established should be consistent only with the hypothesis of guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
3. *The circumstances should be of a conclusive nature and tendency;*

4. *They should exclude every possible hypothesis except the one to be proved; and*
5. *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

The prosecution, in the current case, seeks to rely on the following circumstances; **one**, that the accused and Magige, on one side and the deceased, on the other had quarrels. The deceased was the source of quarrels. The accused and Magige went armed with machetes to Bhoke Magige (**PW5**) to confront the deceased. The accused denied that he did not know the Bhoke Magige (**PW5**) and that he never went to his house. The accused further deposed that he was not near the crime scene on the 22/3/2015. I find it proved that the accused and Magige went to Bhoke Magige (**PW5**). Bhoke Magige (**PW5**) was a witness of truth. He deposed that he knew the accused very well. The accused, Magige and Bhoke Magige (**PW5**)'s son Ghati were best friends. They visited each other and at times they could meet three times a day and eat together. I could not find any reason why this old man could lie. I know some people would just tell lies for sake of telling lies but not that Oldman.

It is not just that I could not find why the old man would lie but also the accused person did not convince me that he was telling the truth. The accused's defence of *alibi* referred to 22/5/2015 as the date the offence was committed instead of 22/5/2012. Maybe it was a slip of tongue coupled with the number of years that have since passed. Further still, the

accused during the examination in chief he stated that he did not know Bhoke Magige (**PW5**) while on being cross-examined he stated that he knew Bhoke Magige (**PW5**). He used to see Bhoke Magige (**PW5**) at the village centre where he was drinking local brew called Machicha. The accused person's evidence is to be treated with the caution.

I find Bhoke Magige (**PW5**) reliable and his evidence that the accused and another person went to his house armed with machetes to confront the deceased following the undisclosed quarrels is true. I find the accused person's defence of *alibi* that he did not visit Bhoke Magige (**PW5**) homestead not true. Thus, the accused person's defence of *alibi* that did not raise any reasonable doubt, which is his duty. See the decision of the Court of Appeal in **Jumanne Juma Bosco & Mohammed Jumanne v. R**, Criminal Appeal No. 206/2012 CAT (Unreported), where it was held that-

"When an accused person puts forward an alibi as an answer to the charge or information, he does not thereby assume a burden of proving the defence throughout on the prosecution."

Two, another circumstance which the prosecution relies upon is that the accused and Magige left Bhoke Magige (**PW5**) together with the deceased. The deceased had a sickle going to cut grasses in the bush and the accused and his friend Magige had machetes. They left Bhoke Magige (**PW5**) house at 04:00 pm. The deceased did not come back until the following day when his body was discovered. This piece of evidence is not materially opposed. The accused person's defence was that he did not go to Bhoke Magige (**PW5**) and he did not know him or know where he

stayed. I have already determined that accused person's defence *alibi* did not raise a reasonable doubt. I, therefore find it proved that the accused went to Bhoke Magige (**PW5**)'s homestead. Bhoke Magige (**PW5**) knew the accused very well and he (the accused) went to Bhoke Magige (**Pw5**) during the day. Bhoke Magige (**PW5**) saw everything that took place and he saw all three leaving his place. It is true that there is no one saw them in the bush. Bhoke Magige (**PW5**)'s evidence that Mr. Wambura saw the accused and his friend Magige escaping from the bush after killing the deceased was hearsay. It has no evidential value. I find it proved that the accused person and his friend Magige left Bhoke Magige (**PW5**)'s place with the deceased who was going to cut grasses in the bush. The deceased had a sickle.

Another circumstance which is not disputed and therefore proved is that the deceased did not comeback on the 22/5/2012 when he left with the accused person and his friend, until his body was recovered on the 23/5/2012.

The prosecution added that the accused person and Magige disappeared from 22/5/2012. The accused emerged in 2019 when he was arrested. The accused denied this allegation. He stated that he never moved from the village. Bhoke Magige (**PW5**) and Joel Kiberenge Mwita (**Pw2**) deposed that the accused person disappeared after he and his friend were suspected to commit the offence. Joel Kiberenge Mwita (**Pw2**) is the one who arrested the accused person. At the time, he arrested the accused he was the village chairman. He was surprised to see the accused after a long time of his disappearance. Joel Kiberenge Mwita (**Pw2**) was

not moved by anyone to arrest the accused person but he did so because he knew the accused person was a suspect who disappeared for period of almost seven years. It is my firm view that if the accused person was in the village, he would have been arrested long time ago. I found it proved that the accused therefore disappeared after being suspected for committing the offence.

The defence advocate, Mr. Obwana citing the Court of Appeal decisions of **Mohamed Seleman V. R.** Cr. Appeal No. 105/2021 in which the CAT cited one Indian case of **Balwinder Singh V State of Punjab**, 1996 AIR 607, prayed this court to guard itself against convicting the accused on suspicion. In that case, the Court of Appeal held that-

"In a case based on circumstantial evidence the Court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid danger of being swayed by emotional considerations however strong they may be, to take the place of proof".

I took pains to consider the circumstantial evidence in this case whether the proved *incriminating circumstances form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible.* The proved facts in this case from which an inference of guilt of the accused person is sought to be drawn are that the deceased angered the accused person and Magige. They went each with a machete to the deceased's home place to confront him. The deceased's father sought to please them to stop their quarrels. In the presence of the deceased's

father, the dust seemed to have settled. The deceased took a sickle to go to cut grass the accused and his friend went with him. The deceased did not return home. He was found dead. Then, the accused and his friend disappeared. Did all those facts happen by a mere coincidence? The Court of Appeal in **Nkanda Jilala V. R.**, CR. APPEAL NO 348 2017 CAT (unreported) observed that-

*".....Circumstantial evidence has been described as the best evidence. As was aptly articulated by Sir Udo Udoma, the then Chief Justice of Uganda, in **Republic v. Sabudin Merali & Umedali Merali**, Uganda High Court Criminal Appeal No. 220 of 1963 (unreported)..*

"It is no derogation to say that it was so; it has been said that circumstantial evidence is very often the best evidence. It is the evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics."

The defence advocate submitted that if there was a dispute the same was settled by Bhoke Magige (**PW5**). Thus, there was no reason for the accused and Magige to attack the deceased. He submitted further that since the deceased was a trouble maker and his body was found on the 23/5/2012 he might have been attacked and killed by any other person. I am not able to find the defence's submission to be plausible hypothesis. Had that been true, why did they accused person and his friend Magige disappear after the deceased was killed?

Apart from circumstantial evidence, there is another piece of evidence that the accused confessed to No. G. 6069 DC ELIAS (**Pw4**). The prosecution tender the cautioned statement as exh.P.2. The accused defence was that he was not a free agent when he made the statement. The accused deposed that he was tortured for three days before he made the statement.

The prosecution prayed to this Court not to accord weight to the accused person's defence that he was tortured before he made the cautioned statement (the confession), as he failed to object to its admissibility before it was admitted. To buttress his argument, he cited the case of **Nyerere Nyangue v. R.**, Criminal Appeal No. 67/2010. He concluded that had the accused objected the prosecution would have proved that the accused confessed voluntarily.

The sub-issue is whether the accused person's confession should be considered. The prosecution submission is that the confession was made voluntarily as the accused did not object to its admissibility. The defence contends that it has no value as the accused person was not a free agent at the time he made the statement. He was tortured.

I examined the case cited of **Nyerere Nyangue v. R.**, (supra) to find out what is the position of the Court of appeal on the matter. The Court of Appeal made the following guidelines-

"Objections to the admissibility of confessional statements may be taken on two grounds. First under section 67 of the Evidence Act that, it was not made voluntarily or no made at all. Second, under section 169 of the Criminal Procedure Act: that it was taken in

violation of the provisions of the CPA, such as sections 50, 51 etc. Where the objection is taken under the Evidence Act, the trial court, has to conduct a trial within trial (in a trial with assessors) or an inquiry (in a subordinate court) to determine its admissibility.”

The Court of Appeal went on-

*“As we understand it, the relevant law regarding admission of accused’s confession under this head is this: **First**, a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground, either that it was not voluntarily made or not made at all (See **Selemani Hassani v R**. Cr. Appeal no. 364 of 2008 {Unreported}) **Secondly, if an accused intends to object to the admissibility of a statement/confession, he must do so before it is admitted, and not during cross examination or during defence (see Shihoze Seni and Another v. R (1992) TLR 330, Juma Kaulule v. R., Criminal Appeal No. 281 of 2006.”***
(Ephasis is added)

Given the above guiding principles, if the accused person does not object to the admissibility of the statement/confession when it is tendered, like in this case, the statement is presumed to be made voluntarily. I therefore, determine that Exh.P2 was voluntarily made. The Court of Appeal in **Nyerere Nyangue v. R.**, (supra) added that even where the trial court finds that the statement was made voluntarily it has a duty to determine the weight to attach to it. It stated-

"Fifthly, even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case (see Tuwamoi v. Uganda (1967) E.A 91....)"

It is my duty to consider the weight to attach to Exh. P.2, the statement. The accused deposed that he was touched for three days before he gave the statement. The evidence on record which was not contradicted by cross examination is that the accused made a statement on the day he was arrested just a few hours after his arrest. He made the statement on the 17/12/2019 at 06:00PM up to 07:30PM. After his arrest, Joel Kiberenge (Pw2) handed him to No. G5892 Pc Ezra (Pw3) at 04:00Pm, who took him to Machochwe police post. Then Machochwe police post handed the accused to police from Mungumu central police station at 04:45pm. The record is silent as to the time they reached Mugumu central police station but the interrogation commenced at 06:00PM up to 07:30PM. The same was within time and it is not true that it was conducted after three days of torture as the accused tried to impress the Court. I read the statement and found the accused endorsed his figure print and signed on each page. I am of the view that the statement has evidential weight. I see nothing to suggest otherwise.

The ladies and gentleman assessors opined unanimously that the accused person is guilty of murder. I have no different views. There is circumstantial evidence corroborated by the accused confession statement that the accused killed the deceased. Circumstantial evidence proved that the accused to have killed the deceased. The accused also confessed to kill

the deceased. I also find that accused killed the deceased with malice aforethought. Malice aforethought is construed from the force the accused person used in the commission of the offence. The deceased had his head severed from the trunk. A person who cut the deceased's neck to that extent intended to kill and not anything else. See the case of **Mosses Michael alias Tall V R.** [1994] TLR. 195, where the Court held that-

- (1) malice may be inferred from the amount of force which an offender employs in inflicting fatal injury; and further that*
- (2) the conduct of the accused may be indicative of the malice aforethought as it was in this case where the appellant was persistent in beating the deceased for long time for long time and prevented intervention by persons who wanted to help the deceased.*

I, therefore, find the accused person, **Omahe Omahe @ Ryoba** guilty of the offence of murder of one **Ghati s/o Bhoke @Magige** and convict him of that offence u/s 196 and 197 of the Penal Code [Cap. 16 R.E. 2019].



J. R. Kahyoza,

JUDGE

16/7/2021

SENTENCE

The accused person is sentenced to be hanged to death under section 196 & 198 of the Penal Code read together with S. 322 of the Criminal Procedure Act, [Cap. 20 R.E 2019].

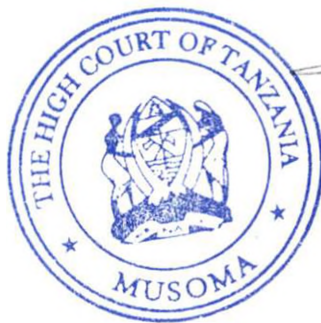


J. R. Kahyoza,

JUDGE

16/7/2021

Court: Right to appeal explained. The accused is required to lodge notice of Appeal within 30 days from today.



J. R. Kahyoza,

JUDGE

16/7/2021