

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
CRIMINAL SESSIONS CASE NO. 73 OF 2017
THE REPUBLIC
VERSUS
JUMA SILAS
JUDGMENT

9th&28thJuly,2021

MDEMU.J.:

Juma Silas, the accused person, is charged with the offence of murder contrary to the provisions of section 196 and 197 of the Penal Code, Cap.16. It is in the particulars of the offence that, on the 2nd day of September, 2015 at Chibe Village in the District of Shinyanga, the accused herein murdered one Njile Jacob. At the plea taking and preliminary hearing held on 22nd of February, 2019, the accused person pleaded not guilty to the charge. He only admitted his names and that, he was arrested and accordingly charged with the instant homicide. Is the accused person in the dock the one brutally murdered the deceased?

In an attempt to resolve the above question, the prosecution led by Ms. Edith Tuka and Mr. Enoshi Kigolyo both learned State Attorneys, called (6) witnesses to wit: Deus Samike Mpamila, Elizabeth Jacob, Joyce Mihambo Dotto, Elias Kashinje, Maria Paulo and Insp. Owen Joseph PW1, PW2, PW3,

PW4, PW5 and PW6 respectively. The prosecution also tendered in evidence three documentary evidence, to wit: the Statement of Elias Kashinje (PW4) at the request of the defence, sketch map and postmortem Report; exhibits P1, P2 and P3 respectively. The defence called only one witness, that is, the accused himself.

The prosecution opened their case by calling **PW1** one **Deus Samike Mpamila** who testified that, on 3rd of September, 2015 while on the way to town, Atanas Silas informed him through cellphone on the incident. He responded and found Njile Jacob hanging in a tree (Mnyaa) while his hands tied with a rope. He then informed the police and sungusungu. He added that, a doctor performed postmortem examination and that the accused, Richard Amigo and Grace Miambo were arrested at the *locus in quo*.

The second witness was **Elizabeth Jacob (PW2)** who on the night of 2nd of September, 2015 at 21:00 hours heard noises at almost 10 paces from her house. She then rushed and found the deceased being assaulted by her co villagers namely; the accused, Richard Amigo and John Niga using sticks at the road side near the house of Joyce Miambo (PW3). She was commanded to return home which she did. As testified by PW1, on 3rd of September, 2015 she also went to the crime scene and found the deceased hanging in the tree (mnyaa). She too witnessed postmortem examination.

On her part, **PW3, Joyce Mihambo Dotto**, in the night of 2nd of September, 2015 at about 22:00 hours heard noises outside. She got out only to find the accused, Richard Amigo and John Joseph assaulting the deceased using sticks. She identified them as her relatives, by their voices and through the aid of moonlight. As was to PW1 and PW2, she also witnessed the deceased hanging in the tree and that, the deceased was killed because the accused found to be disrespectful for him to have love relationship with PW3 and one Esther who is her mother's young sister.

It was also the prosecution case according to **PW4 one Elias Kashinje** that, on 2nd of September, 2015 in the night, was awakened by noises near the residence of Joyce (PW3) where he met the deceased being assaulted by Richard Amigo, the Accused and John Joseph or Niga using sticks. He identified them as neighbors by the aid of moonlight. The deceased thereafter escaped. The assailants then followed PW4 and broken his door. He however tendered his statement as exhibit P1 such that, he neither mentioned the Accused nor moonlight in that statement.

On her part **Maria Paul** testifying as **PW5** rented a residential room to the deceased and that, on 2nd of September, 2015 at about 21:00 hours while at home, the Accused and Juma Amigo went there looking for the deceased as they wanted to set on fire his articles/properties because he is a disrespectful person. She refused to give them access thus they left. As

was to PW1, PW2, PW3 and PW4, she also witnessed her tenant hanging in the tree (mnyaa) while dead.

The last prosecution witness was **PW6 Insp. Owen Joseph**, who in the course of investigation on 3rd of September, 2015 organized other police detectives to the crime scene at Mwalugoye where he prepared a sketch map (P2) and also witnessed postmortem examination at the crime scene (P3).

After closure of the prosecution case, in terms of the provisions of section 293(2) of the Criminal Procedure Act, Cap.20, the accused was found to have a case to answer. After being addressed in terms of that section, the accused person testified as **DW1 Juma Silas** that, on 2nd of September, 2015 with one John Joseph and Cherehani Luhende passed by Mwalugoye center for watching news broadcast in the television when from Ndala on construction works. He left for home leaving John Joseph watching video move and at about 22:00 hours, Richard Amigo asked his company to Jacob Njile's premises where they met **PW5** so that they set fire to all the belongings of the deceased. The reason was love affairs between the deceased with Joyce Mihambo, (a sister to Amigo) and Esther Maige (a mother to Amigo). They left without fulfilling that mission for **PW5** asked them to leave her premises.

He added that, on 3rd of September, 2015 in the morning, he responded to the alarm raised by Sungusungu and found the deceased body hanging in a tree where he was arrested by Sungusungu together with Richard Amigo and **PW3**. He denied to participate, the reason why PW4 did not mention him.

As observed earlier on, the question now is whether, owe to the evidence on record, the accused person is the one who murdered the deceased in that material night. As observed in the testimony of all witnesses in this trial, there are two sets of evidence, **one** is visual identification and **two** is circumstantial evidence.

As to visual identification, it is not disputed that, the incident took place in the night and that, according to both prosecutions and the accused evidence, in that material night, the accused and one Richard Amigo went to the house of Maria Paulo (PW5) aiming at setting fire the belongings of the deceased. It is equally not disputed that, the deceased in her life time was a tenant to PW5.

On visual identification, the accused was identified by PW5 to be the person who went to her house looking for the deceased. After they were told that the deceased is not at home, they left. In a short while, they were identified by PW2 who, on hearing noises of quarrel outside naming the deceased, she quickly rushed and identified the accused assaulting the

deceased near the house of PW3. This latter also responded to the noise and identified the Accused together with Richard Amigo and John Niga. Through the aid of moon light and as PW2 and PW3 tried to intervene the quarrel, they were thus too close such that, they recognized them as relatives and co-villagers. This evidence is corroborated by the evidence of PW4 who also rushed to the locus in quo on hearing such noises and that, as the Accused followed PW4 to his house, then he had enough time to observe them.

With the above evidence on visual identification, I have no doubt that this is good case to apply the principles of recognition which is more reliable than identification to strangers. I am aware of the evidence of the accused (DW1) that, he was not named by PW4 the reason why he did not mention him in his police statement, exhibit P1. Nevertheless, under the circumstances of this case, I take that to be a minor discrepancy which has neither discredited the evidence of PW4 nor shaken the evidence of PW2 and PW3 who recognized the accused at the crime scene. In the case of **Charles Nanati vs. Republic, Criminal Appeal No.286 of 2017** (unreported), the Court of Appeal at page 13 of the judgment quoted the decision in **Kenga Chea Thoya vs. Republic, Criminal Appeal No.375 of 2006**(unreported) that:

On our own re-evaluation of evidence, we find this to be a straight forward case in which the Appellant was recognized by witness PW1 who knew him. this was clearly a case of recognition rather than identification and it has been observed severally by this Court, recognition is more satisfactory, more assuring and more reliable than that identification of a stranger.

In the instant case, it is quite obvious that, the accused was well known to PW2, PW3 and PW4 as a relative and co-villager respectively. I have no doubt that he was recognized in that material night with his colleagues to assault the deceased.

With regard to circumstantial evidence, there is the evidence of PW5, a land lady of the deceased that, the Accused in the company of one Amigo went to his house looking for the deceased with intent to burn his belongings. The reason was like to teach the deceased a lesson for his fornication behavior to their family members, PW3 inclusive. They missed him. Shortly thereafter, the accused was seen near the house of PW3, the deceased lover, assaulting the deceased. PW2, PW3 and PW4 recognized him. At the quarrel, the Accused and the deceased disappeared. The following morning, the deceased was found in a tree hanging while dead. A summary of report on postmortem examination(P3) indicate that, the

deceased was assaulted and there are no cut wounds. The evidence of PW2, PW3 and PW4 is to the effect that the accused assaulted the deceased using sticks. In my considered view, there are unbroken chain of events which connect the accused in terminating the life of the deceased. In the case of **Republic v Kerstin Cameron (2003) TLR 84** it was observed that:

The facts from which an inference of guilt or adverse to the accused is sought to be drawn, must be proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred.

With the evidence of recognition and circumstantial evidence, I have no doubt that the evidence of the prosecution has proved that the accused was recognized at the crime scene to be the author of the deceased death.

Did the act of the Accused associated with culpable malice aforethought? This is the next question to be resolved. In my considered view, the circumstances of this case compels me to decide otherwise. In the first place, the accused went to PW5 so that he be given the belongings of the deceased to put down to fire. PW5 did not, in her evidence, testified that the accused and his companion traced the deceased with any other mission.

The second component to gather, certainly because the trial was not blessed with a evidence of the doctor who performed postmortem

examination, is the cause of death. Both the Accused and the prosecution witnesses testified that, the deceased was found hanging in a tree. Was he strangled? Did the accused person assaulted him to death and hanged him in the tree to disguise the whole move of assault? In the prosecution evidence, there is variance as to whether the deceased was hanged using a rope or piece of cloth. In the summary of the report(P3), the doctor opined that, the injuries were due to assault by a group of people. Whether or not the summary is crafted in a professional way, it may not be a big deal, but there is no correlation between strangulation as the cause of death and the assault in the summary.

Having that in mind, it is my considered view that the act of the accused leading to the demise of the deceased was not associated with the requisite malice aforethought. The two gentlemen assessors Mrisho Juma and Tatu Mkaima opined that, the accused is guilty of murder. Maganga Elias, thought the accused is not responsible at all. However, in terms of the provisions of section 298(2) of the Criminal Procedure, Cap.20, I am not bound by the opinion of assessors, as I hereby depart for the reasons just stated above. I therefore find the accused person not guilty of murder as charged. He is accordingly acquitted of that offence.

In the foregoing analysis, there is overwhelming evidence that the accused did not act with malice aforethought. The evidence therefore

constitutes the offence of manslaughter under the provisions of section 195 of the Penal Code I am aware that. The accused was not charged with this offence. Can he be convicted though not charged? Section 300 (1) and (2) of the Criminal Procedure Act provides that:

300 (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

It was also stated in the case of **Godfray Mwasumbi & Rashid Shabani v Republic, Criminal Appeal No.29 of 2015** (unreported) had expounding on the above quoted provisions that:

1. When a person is charged with an offence and the facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged.

2. The above is the position of the law. However, case law has construed that provision and stated that, an accused person in order to be convicted of a lesser or minor offence, the offence should be on the face of it minor and cognate in character to the greater offence to which the accused person was initially charged with.

With this position, I have no iota of doubt that the offence of manslaughter which the evidence in this case proved to exist, is minor to the offence of murder which initially, the accused was charged with. Under the premises, I therefore find the accused Juma Silas guilty of manslaughter under the provisions of section 195 of the Penal Code, Cap.16 and he is accordingly convicted. It is so ordered.


Gerson J. Mdemu
JUDGE
28/7/2021

DATED at SHINYANGA this 28th day of July, 2021



Gerson J. Mdemu
JUDGE
28/7/2021