

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT MPANDA

CRIMINAL SESSIONS NO. 43 OF 2018

(C/O P.I. No. 27 of 2017 Mpanda District Court)

THE REPUBLIC PROSECUTION

VERSUS

SADI S/O MAARUFU @ KASHATO 1st ACCUSED PERSON

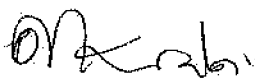
JOHN S/O THOMAS 2nd ACCUSED PERSON

JUDGMENT

17/09/2021 & 27/10/2021

Nkwabi, J.:

The night of 11th day of October, 2017 did not pass peacefully in Msikitini Kapanga hamlet within Katuma Ward in Tanganyika District within Katavi Region. This is because one **Suzana** d/o **Charles** was brutally killed by hooligans who are allegedly used a gun to shoot her dead at around 08:00 pm at the time the family was enjoying their superb supper. The deceased was eating with her daughters-in-law outside the house while, PW1, her son, was having the supper with his colleagues in a house just near the entrance door. At the material time, the husband of the deceased (PW2) was away from home only to be phoned and informed of the incidence. He was able to go to the scene of the offence in company of the police.

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PW1 in his testimony claimed to have positively recognised 3 persons among them namely John Thomas, Sadi s/o? and Bahame s/o? through solar powered lights which, according to him, were illuminating clearly and the incidence took about ten minutes. Then the culprits ran away. The culprits used to reside with them in the sub-village for several years. Bahame shot the deceased. People came to the scene. He mentioned the culprits to the police at the scene in the night of the incidence which was supported by PW2.

Investigations were mounted and the accused persons namely **Sadi Maarufu @ Kashato** and **John Thomas** were arrested in connection with the murder and accordingly charged with murder contrary to section 196 and section 197 of the Penal Code Cap. 16 R.E. 2002. No murder weapon was seized. Apparently, one suspect namely Bahame is still at large. Since no police officer came to testify in court the only evidence as to when the accused persons were arrested is that of the accused persons.

The accused persons disputed the charge/information. The 1st accused person said on the material day, he was sick and would not go anywhere.

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The 2nd accused person put forward an alibi and brought witnesses to support him that at the material time he was attending a ceremony at a friend's family home.

During the trial of this case, the prosecution was skilfully represented by Mr. Abel Mwandalama, learned Senior State Attorney on the one hand and Mr. Patrick Makyusa, learned advocate admirably advocated for the accused persons on the other hand.

In the course of the trial, the prosecution called three witnesses and tendered two exhibits namely, the post-mortem examination report (Exhibit P. 1) and the sketch map of the scene of offence (exhibit P. 2) and the defence called five witnesses but had no exhibit to tender.

It is based on the above evidence that the prosecution submitted that they proved the case against the accused persons beyond reasonable doubt and a valid conviction and sentence could be founded upon such evidence on the one hand and the defence argued seriously that the

prosecution has miserably failed to prove the charge against the accused persons and they deserve to be acquitted by this court.

The defence counsel, in his robust submission, clearly indicated that the deceased met an unnatural death through gun shot. He observed that the prosecution claimed there was sufficient light from solar tube light and bulb, the accused persons deny there was such light, only DW5 who said there was one dim solar light. Even the sketch map indicated one solar light. He said the statement, "*Karibu shimeji John*", from the deceased is shallow for identification. PW1 did not mention the 1st accused person and was not acquainted with him and his name not uttered by the deceased. DW1 was suffering from malaria on the material day hence he could have not participated in the commission of the offence.

DW2 could have not committed the offence as he was attending a ceremony at the material time and from there he went to sleep until he was woke-up by DW5 to be informed of the deadly incident. He said it was impossible for the 2nd accused person to be at his home and at the same time to be at the scene of offence. Circumstances which lead to the death of the deceased indicate she was shot from a distance else there

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could be bullet holes at her back, hence identification was impossible, Mr. Mwakyusa improved. He said probably, the person who killed the deceased is PW2 due to contradictions in his testimony or he knew the murderers. He denied to have a grudge with the accused persons but yet he was called to settle out a difference with 2nd accused person. The prosecution failed to call material witnesses. He argued the prosecution has failed to prove the case against the accused persons. He entreated this court they be set free.

The prosecution submission was that PW1 was key witness who was able to identify the culprits due to two ZOLA lights sufficient enough for water-tight identification during the night. The accused persons are known to PW1 as village mates and had no grudges. He was at the distance of 3 paces from the culprits at the scene of offence. That the deceased mentioned the 2nd accused when she welcomed him saying, "*Karibu shimeji John*". Citing **Waziri Aman v R. [1980] TLR 252** and **Hassan Juma Kinenyela v R. [1992] TLR 100**, Mr. Mwandalama concluded that the evidence of PW1 is water tight to hold that the accused persons are responsible for murder of the deceased. That PW1 mentioned the culprits at the earliest opportunity, which is supported by PW2, citing **Ezra**

Mkota & Another v R. Criminal Appeal No. 115/2015 CAT at Dodoma (Unreported).

In respect of the defence of the accused persons, Mr. Mwandalama stressed, it was a general denial by the accused persons that they did not commit the offence which is no defence at all in law. PW1 is a credible witness of the incidence. Participation in early stage of investigation as per DW2 does not mean he did not participate in committing the offence, he argued. He finally submitted that the prosecution proved its case against the accused persons and the accused persons had the requisite malice aforethought. He pleaded this court to find them guilty of murder and convict and sentence them accordingly.

The following are matters admitted by the accused persons. Firstly, that the deceased Suzana Charles met her unnatural death on 11/10/2017 at the scene of the offence. Secondly, they admit that they were residing in the same sub-village with the deceased.

The following matters are dynamically in dispute, that the accused persons are the culprits of the offence. They maintain they are virtuous.

They also denied the scene of offence had solar powered lights at the material time though DW5 said there was one which was dim, though.

Based on the above position of the evidence available in this case the main issues that require the determination of this court in this case are:

- i. Whether the accused persons are responsible for the killing of the deceased.
- ii. If the first issue is answered in the affirmative, then whether the accused person(s) had malice aforethought for killing the deceased.

Essential elements of the offence of murder which must be proved beyond reasonable doubt by the prosecution, thus, (what constitutes murder) are that:

- i. A human being is killed.
- ii. His/her death was unnatural death one.
- iii. Killing was premeditated/with malice aforethought.
- iv. The link between the death of the deceased and the accused persons.

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It is established law that the burden of proof lies in the prosecution to prove the offence beyond reasonable doubt, see **Mohamed Said Mtula v Republic, [1995] TLR 3 (CA)**:

Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.

Speculation and guesswork are highly discouraged in criminal justice as per **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006 (C.A.)**. Further, criminal trials are not like a game of football but a serious business of convicting the guilty and acquitting the innocent in a sensible manner according to the law, **Hatibu Gandhi vs. R. [1996] TLR 12 (CA)** being the authority.

The cause of death, according to the prosecution witnesses and defence in submissions, is that the deceased died an unnatural death as she was shot at by use of a firearm. That is supported by the medical report (exhibit P 1) admitted without objection at preliminary hearing and the expert opinion of the medical doctor (PW3) who conducted the postmortem examination, to the effect that the cause of death of the

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deceased was sustained severe shock (hemorrhagic shock), as she had suffered multiple perforation of the viscera with penetrating wounds.

After, I had indicated, to the court assessors the silent features of the evidence of both parties in this case, I gave directions to the Court Assessors on the following matters for their consideration in order to reach at a just opinion.

- Whether the prosecution witnesses are reliable.
- The accused persons denied they were involved in the murder in their defence.
- Whether the prosecution has proved murder offence against the accused persons.
- It is not mandatory that they give reasons for their opinions.

Then, I called upon the wise court assessors to give their opinion, I will show their opinions in the course of this judgment.

I have given a careful consideration of the prosecution evidence in respect of the identification done by PW1. Despite the claim by PW1 that he identified (recognised) the 1st and 2nd accused persons as well as one Bahame to be the culprits at the scene and mentioned them to the police

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at the scene, it raises a million questions as to why the 2nd accused person who was involved in drawing the sketch map of the scene of offence was not arrested on the spot. The claim of earlier mentioning the culprit to the authorities should go hand in hand with the earlier arrest of such suspect(s), else sufficient reasons should be assigned by the prosecution for failure to arrest the mentioned culprit at the earliest opportunity. There is no explanation in this case. No police officer (arresting officer) came to give evidence. The accused persons have to benefit from the doubt that is on the prosecution evidence. I am well guided, on this view, by the decision of the Court of Appeal of Tanzania **in Marwa Wangati Mwita & Another v Republic, Criminal Appeal No. 6 of 1995** (unreported):

The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry.

and **Raymond Francis vs. R. [1994] TLR 100** where it was held:

In our view, it is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance.

In this case, I am of the firm finding that the conditions favouring a correct identification were slim. Even the words claimed to have been said by the deceased prior to meeting her death that, "*Karibu shimeji John*" are insufficient, as they are not exclusively referring the 2nd accused person as rightly submitted by Mr. Mwakyusa learned advocate for the accused persons.

Admittedly, the accused persons gave general denials that they did not commit the offence. Mr. Mwandalama argued that that is not enough, hence they are guilty. With the greatest respect to Mr. Mwandalama, I am aware that conviction cannot be based on the weaknesses of the defence but on the strong prosecution case. There is no strong prosecution case here. I sought guidance from **Mwalim Ally and Another v. Republic Criminal Appeal No. 39 of 1991** (Unreported) (CAT) (DSM):

"Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely water tight to justify a conviction."

In the case of **Godson Hemed v Republic**, [1993] TLR 241 where the court of Appeal of Tanzania held that in the circumstances of that case visual identification by PW1 of the appellant was unreliable hence the alibi of the appellant was held to have been wrongly rejected by the trial court.

Since the 2nd accused person was at the scene of offence and was involved in drawing the sketch map of the scene of offence while assisting the police officer, in the circumstances, and in the absence of explanation from the police why he was not apprehended there and then, it is difficult to say that his (PW1) claimed identification and that of the 1st accused person is watertight. Further, this court has to accord adverse inference for the police officer(s) who investigated or arrested the accused persons' failure to appear in court and testify. The case of **Godson Hemedi** (supra) is a clear authority on this. In that case the Court of Appeal called into question the failure to call to testify of the children of PW1:

According to PW1 he followed the direction taken by the deceased until he reached the police station and on his return home the children told him that they saw the appellant going away from his house. None of these children was called to testify on this point which was of crucial importance in

assessing the veracity and accuracy of PW1 as a witness. The question is: why were these children not called?

The credibility of PW1 is lowered to the level of being incomprehensible due to the reply he gave in cross examination, where he replied that he does not remember if DW2 came to the scene after the incidence. The lapse of memory cannot go unnoticed by this court to the detriment of the 2nd accused person. Credibility of the testimony of PW1 is further lowered when considered in line with the testimony of PW2 Musa, his father, who said that the police said they would investigate the incidence while not indicating that the 2nd accused person who was mentioned thereat was arrested on the spot. In fact, the 2nd accused person was not arrested on the spot after being mentioned by PW1 if indeed was mentioned. Surprisingly too, PW2 did not mention of DW2 involvement in drawing the sketch map of the scene of offence, whereas the map appears to show he witnessed it being drawn up.

In the circumstances of this case, I am inclined to accept the evidence of DW5 SAIDI WAMBALI, the V.E.O. of Kapanga, who testified that at the scene of offence they found the body of the deceased laying at the door of a house and at the scene there was the light of car. There was one

light of solar power (ZOLA Company) which was one on the main house, but it was faint. If there were brightly illuminating solar powered lights, why the police kept the car lights switched on at the scene? So, I accept that there was only one faint solar powered light at the scene of offence which could not favour unmistakable identification (recognition). The 1st issue is answered in the negative.

The culmination of the above deliberation, I agree with the accused persons and their counsel that in the circumstance of this case, there is no evidence to prove the charge against the accused persons. The prosecution has failed to link the murder/killing of **Suzana** d/o **Charles** with the accused persons which is against the holding in **Mohamed Said Mtula's** case (supra).

Since the 1st issue is answered in the negative, it is of no use to discuss the 2nd issue. The accused persons, therefore, are not guilty of the offence they stand charged with. I proceed to dismiss the charge/information and acquit both accused persons with the offence of murder they were charged with. My decision is in line with two of the court assessors (the

2nd and 3rd) who opined that the accused persons are not guilty of the offence.

It is so ordered.

DATED at **MPANDA** this 27th day of October 2021.


J. F. Nkwabi

Judge

Court: Judgment is delivered in open court this 27th day of October 2021 in the presence of Mr. Dickson Elias, learned State Attorney for the Republic and Mr. Patrick Mwakyusa, learned advocate for the accused persons and the accused persons present in person.

J. F. Nkwabi

Judge

Court: Right of appeal is explained.

J. F. Nkwabi

Judge

27/10/2021

Court: Court Assessors are thanked and discharged.


J. F. Nkwabi

Judge

27/10/2021

