

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

**(IN THE DISTRICT REGISTRY OF MBEYA)**

**AT MBEYA**

**CRIMINAL SESSIONS CASE NO. 36 OF 2017**

**REPUBLIC**

**VERSUS**

**JULIUS S/O PATSON MWAMPASHE**

**JUDGMENT**

**30/09/2021 & 04/10/2021**

**A.A. MBAGWA J,**

The accused person one Julius Patson Mwampashi stands charged with the offence of murder contrary to sections 196 and 197 of the Penal Code. It is alleged that the accused Julius Patson Mwampashi on 11<sup>th</sup> day of November, 2016 at Tunduma, Mpakani area in Momba district and region of Songwe murdered one Zabron s/o George Mkeya.

When the matter came before this Court for plea taking, the accused pleaded not guilty to the offence hence a full trial.

In a bid to prove its case, the prosecutions called a total of seven (7) witnesses along with six (6) exhibits both documentary and physical. Two exhibits namely, postmortem examination report (P1) and sketch map of the scene of crime (P2) were tendered during preliminary hearing on 28<sup>th</sup>

day of August, 2018 before Hon. Levira J, as she then was, whereas the other four (4) exhibits were tendered during hearing of the case. It is worth noting that the marks 'P1' and 'P2' were inadvertently repeated. Whereas P1 and P2 were assigned to exhibits which were admitted during preliminary hearing, when hearing commenced before Hon. Mambi J, the exhibits tendered started from P1 instead of P3. As such, the total number of exhibits tendered is six (6) but the marking ends at four (4).

The prosecutions witnesses who testified are; PW1 Lilian Nyandidi, a wife of the deceased person Zabron George Mkeya, PW2 Menard Chisunga, an elder brother of Dickson Chisunga who also died at the scene of crime, PW3 Tumaini George Mwakasoka, a wife of the deceased Dickson Chisunga, PW4 H8763 DC Julius, a police officer at Vwawa Songwe who submitted the mobile phone which was recovered at the scene of crime to Cyber Forensic Unit in Dar es Salaam and thereafter collected it along with the report, PW5 E8752 SSGT Mika, a police officer who went at the scene of crime immediately after the incident, collected the mobile phone (exhibit P1) and took the two dead bodies to Tunduma hospital, PW6 F6960 D/CPL Shabani, a police officer at Vwawa Songwe in the Cyber Crime Unit who examined the recovered mobile phone (P1) and used the information contained therein to locate and finally arrest the accused and lastly PW7 Baraka Kusaya Musabila, a Vodacom sales manager at Mbeya who extracted the printouts from Vodacom system (exhibit P4).

The four exhibits tendered by the prosecutions during hearing of the case are; P1 (mobile phone make MTN black in colour which was recovered at the scene of crime, a request letter from RCO Songwe to Cyber Forensic Unit Dar es Salaam for mobile phone examination, Call Data Record (CDR) for sim card No. 255766198813 and cyber investigation report), P2 (a letter

dated 05/12/2016 from RCO Songwe to Manager Vodacom Mbeya requesting for M-Pesa and communication records), P3 (a letter dated 13<sup>th</sup> December, 2016 from Manager Vodacom Mbeya to RCO Songwe) and P4 (a printout from Vodacom containing communication record in respect of sim card No. 255762004977)

The accused, on his part, fended himself as DW1 and called another witness Trabo Ramson Sinkolongo (DW2) to testify in his favour. The defence did not tender any exhibit.

In brief, the prosecution account is to the effect that the accused person Julius Patson Mwampashi in the company of one Stanford Mbughi, who is still at large, murdered the deceased Zabron Mkeya. In that plot, the duo had the company of Dickson Chisunga who was accidentally shot to death by his fellow culprits. It should therefore be noted that in this incident two persons namely, Zabron Mkeya and Dickson Chisunga were killed but the subject matter of the information in this case is Zabron Mkeya.

It is the evidence of PW1 Lilian Nyandidi that on the 11<sup>th</sup> day of November, 2016 at around 20:30hrs at Tunduma Mpakani area, while returning home after closing their shop business, the deceased Zabron Mkeya and his wife Lilian Nyandidi (PW1) were attacked by accused Julius Patson Mwampashi, Stanford Mbughi and Dickson Chisunga. One culprit invaded Lilian Nyandidi (PW1) while the other two attacked the deceased Zabron Mkeya. While confronting them, the assailants were demanding money. It appears Zabron Mkeya did not readily heed to their demands hence there was a kind of struggle. In the course of resisting, the deceased Zabron Mkeya was shot to death. It would appear that Dickson Chisunga was one confronting the deceased Zabron Mkeya thus, he got shot and died instantly as well.

Due to gunshot, the residents assembled at the scene of crime and thereafter the information on the incident was conveyed to the police. PW5 E.8752 SSGT Mika was informed via phone by a person who introduced himself as Oscar. PW5 quickly responded and arrived at the scene of crime shortly. PW5 found two dead bodies of Zabron Mkeya and Dickson Chisunga. He also found the neighbouring people already gathered including the deceased's wife PW1 one Lilian Nyandidi. On inspecting the dead bodies, PW5 SSGT Mika retrieved a mobile phone make MTN black in colour (exhibit P1) from the trousers' pocket of Dickson Chisunga. He thereafter took the dead bodies to Tunduma hospital where a postmortem examination was conducted by Dr. Adrian Biseko. According to the postmortem examination report of Zabron Mkeya (exhibit P1), the cause of death was internal bleeding.

PW6 D/CPL Bashari told the court that from the mobile phone (exhibit P1) which was recovered at the scene of crime, the investigation retrieved useful information which enabled them to unearth the culprits and ultimately arrest the accused Julius Mwampashi. In the phone book, among other information, there was contact No. 0762004977 saved as BABA RECHO. The investigation pursued all communications with respect to this number and finally discovered that No. 0762004977 saved in the name of BABA RECHO belonged to the accused one Julius Mwampashi. In his testimony, during trial within trial, the accused admitted that he had a child called RECHO. Further, the people who used to communicate with the accused told the investigation that Julius Mwampashi stopped using 0762004977 after the incident instead, he started using a new sim card notably, 0767148915. PW6 testified that they used the new number of the accused

i.e. 0767148915 to track and finally managed to arrest him on 8<sup>th</sup> December, 2016 at Mlowo. PW6 told the court that they tricked the accused by sending him an M-Pesa message and required him to meet at M-Pesa kiosk in order to withdraw money and when the accused showed up it is when they arrested him. On the other hand, PW7 Baraka Musabila confirmed that, according to Vodacom record, the sim card 0762004977 was, at the material time, registered in the accused's name.

The accused Julius Patson Mwampashi did not dispute using 0767148915. He also admitted that he was arrested at Mlowo after someone trickily called him through 0767148915. PW6 D/CPL Bashari stated, that their efforts to arrest the co-accused Stanford Mbughi proved futile hence he is still at large.

PW3 Tumaini George Mwakosoka, the wife of the late Dickson Chisunga told the Court that on 11<sup>th</sup> November, 2016 at around 20:00hrs, Stanford Mbughi and Julius Patson Mwampashi (accused) went at her home and took her husband stating that he was to escort them somewhere. Her husband Dickson Chisunga did not return home on that night. She called the accused Julius Patson Mwampashi on the night of 11<sup>th</sup> November, 2016 to ask him on the whereabouts of her husband but the accused was not picking her call and ultimately switched off the phone. PW3 came to see her lovely husband at Tunduma hospital while already dead. PW3 identified the accused in court and insisted that Stanford and the accused were close friends of her late husband Dickson Chisunga. PW3 said that despite their friendship neither Julius Mwampashi nor Stanford Mbughi attended the burial of her husband. PW3 said that Stanford Mbughi, Julius

Mwampashi and Dickson Chisunga were living in the neighborhood at Tunduma.

The evidence of PW3 found support of Menard Chisunga PW2, the elder brother of the late Dickson Chisunga. PW2 testified that the accused and Stanford Mbughi were close friends of his late brother Dickson Chisunga and for the last time he saw all the trio together at Tunduma on the fateful day at around 17:00hrs. He said that he used to sell shoes to the accused as he was a marching shoe vender.

PW7 Baraka Kusaya Musabila testified that the sim card number 0762004977 was registered in the name of the accused Julius Mwampashi and on the material day it was located within Tunduma. PW7 made reference to and expounded on the contents of the print out (exhibit P4) to buttress his evidence.

In contrast, the accused denies the allegations. He denied being a friend of Dickson Chisunga nor did he admit to know him. However, there was no cross examination to PW2 and PW3 when they said that the accused was close friend of Dickson Chisunga and left together on 11<sup>th</sup> November, 2016. The accused also disputed to have ever used sim card No. 0762004977 which was saved in the name of BABA RECHO in the mobile phone that was recovered at the scene of crime (exhibit P1).

The accused further raised the defence of alibi. He stated that from 28<sup>th</sup> October, 2016 to the date of arrest i.e. 8<sup>th</sup> December, 2016 he was at Mpanda village at his uncle's home one Trabo Sinkolongo for farming activities. He called his uncle Trabo Sinkolongo who testified as DW2. Sinkorongo confirmed the accused's version that from 28<sup>th</sup> day of October,

2016 to 8<sup>th</sup> December, 2016 the accused was at Mpanda village within the district of Mbozi and at all time they were together.

There is no dispute that the deceased Zabron Mkeya died unnatural death. It is also a common fact that the only direct evidence in this case is of PW1 Lilian Nyandidi who, at the time of incident, was with the deceased Zabron Mkeya, However she did not identify any of the three attackers. What she only remembers is that the assailants were three in number. As such, this case rests largely on circumstantial evidence. In law circumstantial evidence is admissible and may be used to ground conviction where such circumstantial evidence irresistibly leads to no other inference than the accused's guilt. See the cases of **Hamida Mussa vs R [1993] TLR**, **Republic v. Kerstin Cameron [2003] TLR 8** and **Juma Salum Singano vs the Republic, Criminal Appeal No. 172 of 2008, CAT at Dar es Salaam** to mention a few.

What is important therefore for determination of the case is whether the circumstantial evidence irresistibly leads to the conclusion that it is the accused who murdered the deceased Zabron Mkeya.

The gentlemen assessors unanimously entered a verdict of not guilty. The reason for their opinion is that there was no eye witness who identified the accused at the scene of crime. They further opined that the prosecution did not tender the registration documents in respect of the sim card No. 255762004977. According the gentlemen assessors, the evidence was insufficient to warrant conviction.

It is undisputed that the fateful death of Zabron Mkeya occurred conjointly with that of Dickson Chisunga on the 11<sup>th</sup> day of November, 2016 at

Tunduma Mpakani at around 20:30hrs. PW3 Tumaini Mwakosoka said that on the fateful day at around 20:00hrs the accused and Stanford Mbughi went at her home and left with her late husband Dickson Chisunga on ground that he was escorting them to the place best known to themselves. The accused did not cross examine PW3 on this important fact. The accused came to dispute this fact during defence by stating that he does not know Dickson Chisunga and that he was at Mpanda village on the fateful day. It is the position of law that an important fact which is not cross examined is taken to have been admitted and the adverse party is estopped from asking the court to disbelieve what the witness said. See the cases of **Nyerere Nyague vs the Republic, Criminal Appeal No. 67 of 2010**, **Bomu Mohamedi vs Hamisi Amiri, Civil Appeal No. 99 of 2018, CAT at Tanga** and **Athanas Ngomai vs the Republic, Criminal Appeal No. 57 of 2018, CAT at Dar es Salaam**.

On the strength of the testimony of PW2 and PW3 and the above cited decisions, I take it as uncontroverted fact that the accused Julius Mwampashi was at Tunduma on the fateful day. I am also inclined to believe PW3 that the accused and Stanford Mbughi went at PW3's home and left with Dickson Chisunga. PW3 version is in consonance with PW1 Lilian Nyandidi who stated that they were attacked by three people. Throughout the evidence there is nowhere the accused, be it during cross examination or defence, suggested that PW2 and PW3 had grudges with him such that they could concoct a case against him.

More so, the evidence of PW3 Tumaini Mwakasoka that the accused was at Tunduma on the fateful day is corroborated by PW7 and the printout (exhibit P4) which clearly indicates that on 11<sup>th</sup> day of November, 2016



between 07:14 and 11:47 PM sim card no. 255762004977 was located by Vodacom towers of Tunduma 3, Tunduma Kilimahewa, Mpemba and Tunduma centre which fact according to PW1, tells that the accused was within the vicinity in which the homicide occurred.

I have carefully scrutinized the Call Data Record (P4). It appears on 9<sup>th</sup> day of November, 2016 from 7:57 PM to 8:43 PM there were several calls from Stanford Mbughi (255766198813). This 255766198813 belonged to and was registered in the name of Stanford Mbughi. This is the very sim card which was inserted in the mobile phone (exhibit P1) that was recovered at the scene of crime. Exhibit P4 therefore further strengthens the evidence of PW2 and PW3 that the accused, Stanford Mbughi and the late Dickson Chisunga knew each other and were all at Tunduma on the fateful day. As such, the accused testimony that he does not know Stanford Mbughi and Dickson Chisonga is an outright lie

Further, as per the Call Data Record (CDR) for 255766198813 (P1), on the fateful day i.e. 11<sup>th</sup> November, 2016, Stanford Mbughi was within Tunduma and on 8<sup>th</sup> and 9<sup>th</sup> of November, 2016 there were several calls from Julius Mwampashi (255762004977)

PW3 further told the court that after the incident, the accused Julius Mwampashi disappeared and switched off the phone he was using. She said that Julius Mwampashi did not even attend his friend's burial. Also, when PW3 called him on the fateful night to know the whereabouts of her husband, the accused did not pick the call and finally switched off the phone. Certainly, the accused's conducts after the incident suggest his culpability as they were not consistent with innocence. See the case of

**Tumaini Mollel @ Walker & others vs the Republic, Criminal Appeal  
No. 40 of 1999, Court of Appeal of Tanzania**

As hinted above, in his defence, the accused contended that from 28<sup>th</sup> October 2016 to 8<sup>th</sup> December, 2016 he was at Mpanda village with his uncle DW2. Trabo Singokolongo DW2 supported the accused's version. DW2 said that at all time from 28<sup>th</sup> October, 2016 to 8<sup>th</sup> December, 2016, the accused did not leave the place (Mpanda village) but DW1 told the court that at a time he left for his aunt at Vwawa. Further, DW1 told the court that he owned the mobile phone since 2013 but DW2 told the court that the accused had no mobile phone. DW2 said that on 8<sup>th</sup> December, 2016 he sent the accused to buy his fertilizer at Mlowo but he did not specify from which shop was the accused to buy it but the accused said that DW2 directed him to buy fertilizer from Mzee Kalonge. DW2 also said he did not know what the accused was doing for living at Tunduma. Having assessing his demeanour in dock and his evidence against the rest, I find DW2 an incredible witness and hence accord no weight.

In the event, after wholly analysing the evidence of both prosecutions and the defence, I dismiss the accused defence of alibi. On the basis of the testimonies of PW2, PW3 and PW7 as well as exhibits P1 (CDR for 255766198813) and P4 (CDR for 255762004977), I am of the strong opinion that the accused was at the scene of crime on 11<sup>th</sup> November, 2016, and was involved in murdering the deceased Zabron Mkeya.

In view of the analysis above, I part company with the gentlemen assessors for I find that the circumstantial evidence is cogent enough to ground the conviction. It irresistibly leads to an inference that the accused person was involved in murdering the deceased Zabron Mkeya.

In fine, I am satisfied that the prosecutions have proved the case against the accused beyond reasonable doubt. As such, I find the accused Julius Patson Mwampashi guilty of murdering Zabron Mkeya and consequently convict the said Julius Patson Mwampashi of Murder contrary to sections 196 and 197 of the Penal Code (Cap. 16 R.E. 2002].

  
**A.A. Mbagwa**  
**Judge**  
**04/10/2021**

**Prosista SA:** According to sections 196 and 197, the sentence for murder is death by hanging. I pray to Court to impose the sentence as per the law.


**Tumaini Amenje Advocate:** I pray the court to comply with the law for there is only one statutory sentence which is death.

### **SENTENCE**

Since the accused has been found guilty and convicted of murder, I hereby sentence the accused Julius Patson Mwampashi, in terms of sections 196 and 197 of the Penal Code, to suffer death by hanging.

Right of appeal is explained.



  
**A.A. Mbagwa**  
**Judge**  
**04/10/2021**