

THE HIGH COURT OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
AT NJOMBE
ORIGINAL JURISDICTION
(Iringa Registry)
CRIMINAL SESSION CASE NO. 28 OF 2019
THE REPUBLIC
VERSUS
1. EXAVERY S/O MTEGA
2. BARAKA S/O MDENDEMI

29/ &29/11/2021

JUDGMENT

MATOGOLO, J.

The accused persons in this case Exavery s/o Mtega and Baraka s/o Mdendemi, first and second accused respectively are facing the charge of murder contrary to Section 196 of and 197 of the Penal Code [Cap. 16 R.E. 2002].

It is alleged in the charge laid against them that on 10th day of November, 2013 at Yakobi village in the District and Region of Njombe the accused persons did murder one Enock Kihindo.

The accused persons pleaded not guilty to the charge. At the plea taking and preliminary hearing, which took place on 14/04/2021 the accused persons admitted only their personal particulars and the date of their arrest. The first accused was arrested on 17/11/2013 and the second accused was arrested on 28/11/2013.

During the trial in this case Mr. Andrew Mandwa learned State Attorney appeared for the Republic while the accused persons were represented by two advocates. Ms. Tunsume Angumbuke learned advocate appeared for the first accused while Mr. Innocent Kibadu learned advocate appeared for the second accused.

For purpose of proving their case, the prosecution fielded a total of five witnesses and tendered in court a total of five exhibits. Dr. Kiondo Solomon Kiondo (PW1) told this court that on 16/11/2013 at about 12:00 noon he was at home, he received a phone call from the hospital supervisor informing him that there was murder incident and the police were in need of a medical doctor for purpose of doing postmortem examination to the deceased body. As he was on duty on that date he left up to the police station where he joined a group of police officers and left to Yakobi village where the murder occurred. He conducted postmortem examination to the deceased body in which he described it to have decayed and parts of the body decomposed and emitting foul smell. He observed the body to be tied

on the neck with a rope which was also tied on the tree. The legs were tied together and also tied to the tree. He removed the rope from the corpse and conducted postmortem. He was told that the deceased was called Enock Kihindo. After postmortem, the deceased body was entrusted to relatives for burial. PW1 said he prepared a report which he identified after been shown in court. He tendered the same in court which was admitted as exhibit P1. In that report, PW1 opined that the cause of death was due to suffocation from hanging.

During cross-examination by Tunsume Angumbwike learned advocate, PW1 disclosed that the rope that he referred to have been found on the neck and legs of the deceased body were shoe laces and that he conducted external examination. He mentioned the areas of the corpse which were decomposed to be the stomach where he also found maggots. He said he did not examine his private parts. The corpse was in the stage of decomposing. While being cross-examined by Mr. Innocent Kibadu PW1 stated that in his report he did not record parts of the body which were not decayed. He said the deceased body was not hanging but it was lying on the ground horizontally but with its neck and legs tied up to the tree. He said although in the report he recorded that it was tied by a piece of cloth but what he actually found tied up on the neck and legs are shoe laces.

He found the body in clothes which they removed by tearing the clothes. Athanas s/o Lutali Lutungulu (PW2) told this court that, is the chairperson of Mhezela hamlet in Igominyi village, Njombe District.

On 10/11/2013 at about 8:00 am they had a ritual celebration for winding up a mourning (kumaliza arobaini). Almost all villagers attended. He said his house is along the road. He saw Baraka Mdendemi and Exavery Bosco Mtega (accused persons) passing along the road. He invited them for a "pombe" drink. But they told him they were in hurry as they were going to Njombe town although they were also residents of Igominyi village. PW2 stated further that on 11/11/2013 at about 07:00 am while going to the village office for a meeting upon passing at the house of Exavery Mtega, and Baraka Mdendemi, he saw Baraka Mdendemi washing a motorcycle.

On 17/11/2013 at 01:00 pm while at the pombe shops area he heard that Enock Kihindo has disappeared in unknown circumstance. He said he was a resident of Njombe who was hijacked and robbed of his motorcycle. While there one Fredrick Sanga the Village Executive Officer (VEO) told them to arrest Exavery Mtega and send him at the village office. Those who were so assigned were himself, Rudigel Mwageni and Daudi Mwageni. The said Exavery Mtega was there at the pombe shop area playing "bao". They arrested him as told. The VEO told him that he was suspected in connection with the death of "bodaboda" rider. Exavery kept quiet for about 15 minutes then confessed to the VEO but pleaded not to be reported at the police station.

PW2 stated further that the VEO went out leaving the said, Exavery Mtega in the village office together with persons who arrested him. He said they asked him if truly he was involved in such allegation. He agreed and said his colleague has left with the motorcycle. He said Exavery Mtega told them that on 10/11/2013 he hired a motorcycle rider at Sangamela area

Njombe township while together with Baraka Ezekiel to send them at Yakobi village. He mentioned the rider of that motorcycle to be Enock Kihindo. Upon arriving at a certain area towards Yakobi village, they started to beat up him using clubs and tied up him with ropes on the neck and legs. Then they returned. PW2 said Exavery Mtega told them that Baraka Mdendemi has absconded with the motorcycle to Ruvuma region. He said as the VEO was communicating with the police, they went there, and Exavery led them to his residence where they searched and found stickers of safety week, helmet of motorcycle and chest cover. He said the police listed those properties on a paper, the name of PW2 was also listed as a witness. He signed, Exavery Mtega also signed against him name. He said Exavery Mtega told the police officers that those properties which were seized at his home are properties of the deceased. He said the police officers left with Exavery Mtega. PW2 identified both accused persons in the dock.

During cross-examination, PW2 said the persons who went and witnessed the search at the first accused were himself, Fredrick Sanga the VEO, Ludgel, Athanas, Daudi and Exavery Mtega himself. The police officers whom he remembered was Peter and the driver. PW2 identified the seizure certificate (hati ya upekuzi) when shown to him. He said the police officers who were listed are Peter, Jackson and Adam. But Daudi Mwageni is not listed. In that document he said the name of Enock Kihindo is not recorded, nor does the document indicates that the properties found after the search were properties of the "bodaboda" rider who was killed. He said Enock Kihindo was not known to him before. He came to know him in

connection with this case. PW2 stated further that although they asked Exavery on his participation in the alleged murder, but it was not his duty to record what he told them, that was the duty of the VEO.

During cross- examination by Mr. Innocent Kibadu, PW2 stated that he was involved in the arrest of Exavery Mtega as a village council member and member of the militia. He said on 17/11/2013 the VEO called them to hear what he was asking Exavery. He said Exavery is the one who told them that they hired a "bodaboda" rider and stopped him on the way to Yakobi and beaten him using clubs (virungu) and tied up his neck and legs using shoe laces. PW2 stated further that he also heard that Enock Kihindo disappeared although he was not known to him. PW2 stated further that on 11/11/2013 while passing by the house of Exavery he saw him and Baraka washing a motorcycle. When shown his statement recorded at the police station it appeared that he stated that he saw the motorcycle at the house of Exavery parked. However he said he did not read its registration number and that Exavery told them that he participated in the crime although he cannot confirm that the properties found with Exavery at his residence after search were deceased properties. Rudgel Mwageni, PW3 told this court that he lives at Igominyi village. He said on 17/11/2013 during the day time he was told by the village Executive officer one Fredrick Sanga to arrest Exavery Mtega, they arrested him who was at the pombe shop area. PW3 was together with Athanas Lutungulu (PW2) and Daudi Mwageni. They sent him to the village office where they found Fredrick Sanga and Ezekiel Mdendemi. PW3 said the VEO told Exavery that he was arrested suspected to have been participated to kill Enock Kihindo

the "bodaboda" rider. PW3 said Exavery confessed and asked them to forgive him and the matter end there and that he should not be send at the police station. PW3 said the VEO knew about the death incident because Exavery Mtega went to Ezekiel Mdendemi and requested to be given medicine so that he should not be arrested. He wanted protective medicine because in the murder of Enock Kihindo he participated together with Baraka. He said that information was given to the VEO by Ezekiel Mdendemi. The VEO called at the police. Exavery continued to persuade them to forgive him. PW3 stated further that 1st accused told them that they killed the deceased using clubs (virungu) and tied up him with ropes on the neck and legs. He said while so interviewing the 1st accused Exavery, Baraka had already fled from the village. He said after the police have arrived they went to search 1st accused at his residence where they found helmet, sticker for safety week and chest cover. The same were listed in a paper where PW3 signed and all persons who witnessed the search signed.

During cross-examination, PW3 stated that at Igominyi village Daudi Mwageni was the CCM village security committee member and Athanas was CCM party leader as branch chairman. But PW3 said he had no any leadership position in their village. That while arresting the 1st accused they did not tell him the offence he was suspected for. But the VEO while going to arrest the 1st accused told them that he was suspected for killing Enock Kihindo who also told 1st accused while in the village office. When given his statement taken at the police station, PW3 said there is no name of Enock Kihindo. He heard that name at the scene of crime from his relatives.

However PW3 was not consistent as to when he first heard the name of Enock Kihindo between 07/11/2013 and 16/11/2013 at the scene of crime. PW3 stated further that Exavery signed a paper in the village office as a confession. The same remained with the VEO. PW3 stated further that following the search at the house of the Exavery the helmet was found inside the house. The chest cover was found outside at the banana plant. But when shown his statement he gave at the police station PW3 said inside the house they did not find anything, the properties, helmet and seat cover were found outside the house in the banana plants.

During cross-examination by Mr. Innocent Kibadu regarding criteria for been selected to go to arrest the 1st accused despite the fact that he is not a militia member PW3 he said the VEO trust him due to his wisdom.

In re-examination PW3 said Exavery told them that, the motorcycle Baraka was found possessing belonged to the deceased.

Ibrahim Kassim Lyandama (PW4) told this court that is the TRA officer. In 2018 and 2019 his working station was Njombe in the department of motorcycle registration. On 28/03/2019 he received a letter from the District Crimes Department (OCCID) Njombe District requiring him to give a report of the registration of two motorcycles, T. 416 CFV and T. 105 CPJ.

PW4 said he entered into the Central Motor vehicle Registration System (CMRS).

According to the report which he prepared following the police request which he tendered in court and admitted as exhibit P2, he discovered that the motorcycle with Reg. No. T.416 CFV is T better with chassis No. LZEPCCLA8C6813 286 and Engine No. ZJ162FMJC 2512946, the proprietor being N.A HOLDINGS COMPANY LTD with address 4245 Sinza Road Dar es Saalaam. The motorcycle with Reg. No. T. 105 CPJ is KINGLION type with chassis No. LTBPk82B 9DIC 18394 and Engine No. KL157 FM113J18094 the proprietor being KINGLION INVESTMENT CO. LTD of Address 16118 Msimbazi/Sikukuu Dar es Salaam.

During cross -examination by Tunsume Angumwike advocate, PW4 stated that when receiving a letter from the OCCID he did not see the motorcycles he was required to verify their information. He said in his letter it is indicated that the motorcycle was involved in the murder case of Enock Kihindo. But in his investigation he did not see Enock Kihindo as owner of the motorcycle. He said for transfer of ownership of motorcycle to be made one must have original registration card given to him after purchasing, EFD receipt, invoice, and identity card and a copy of TIN certificate. He must also write a letter for change of ownership of the motorcycle. He stated further that during transfer they look for the information of the motorcycle after the motorcycle in question was submitted to TRA. He explained further that if a person owner of a motorcycle sells it to another person without making transfer of ownership, TRA will recognize the former owner/ proprietor who appears in their system. He said the lawful proprietor for the motorcycle with reg. No. T. 416 CFV was N.A Holdings company Ltd, and the proprietor of motorcycle with Reg. No. T. 105 TPJ

was Kinglion Investment Co. Ltd. But PW4 clarified that sometimes those are importers.

A/Inspector Peter Makoye (PW5) told this court that he is now stationed at Wanging'ombe police station. In 2013 his working station was Njombe police station in criminal investigation department.

On 16/11/2013 during the morning time he was instructed by the OCCID one G.F Kamugisha to go to Kibena hospital to take a Medical doctor who was on duty so that he could accompany them to Yakobi village where there was murder incident. He collected one Dr. Kiondo Solomon Kiondo with whom they left to Yakobi Village together with the OCCID and other police officers. He said before arriving at Yakobi village, in between they found a big mob of people who stopped them and led them to the scene of crime. They went down words in a forest where they found a deceased body. PW5 said that, the body was decomposed particularly in the stomach and he observed maggots and flies on it. He also saw the deceased body tied up on his neck and legs to the wattle tree using shoe laces.

PW5 said he was assigned to draw sketch map of the scene of crime which he did. PW5 tendered in court the said sketch map which was admitted as exhibit P3. PW5 described the sketch map by reading its contents. While at the scene of crime PW5 was told by deceased relatives that, the deceased was called Enock Kihindo. He said before that date on 11/11/2013, a report was availed at the police station by deceased friend on the disappearance of the deceased and that, he was the "bodaboda" rider and the motorcycle is nowhere to be seen. PW5 stated further that he was told by other

"bodaboda" riders of Sangamela bar that, on 10/11/2013 while at that area, deceased was hired by two persons, since then he disappeared. On 17/11/2013 they received information from the village Executive officer of Igominyi village that there was a person who made a declaration in respect of the murder incident occurred at Yakobi village. That person (suspect) was held at Igominyi village office and the police were required to go to collect him. PW5 went there together with DC Jackson, they found the suspect held by the village Executive Officer. They arrested him and went to search at his residence. He mentioned the suspect to be Exavery Mtega whom he identified in the dock. They left with him to Njombe police station, PW5 stated further that on 02/12/2013 he received information from Yusto Modestus that there was a suspect arrested at Lusewa village Namtumbo District. The suspect was arrested having a motorcycle which was suspected to have been stolen. When asked about the Reg. Card he told the police that the same was with his father at Njombe. After he has given them the phone number of his father and called at him his father told them to withhold him as the motorcycle was involved in murder. On 06/12/2013, PW5 said he went to collect the suspect from Songea police station who was the 2nd accused and brought him at Njombe police station. They were also given the motorcycle type T. Better of red colour with plate No. T. 105 CPJ. PW5 said Yusto the owner of the motorcycle gave him copy of the registration card with No. T. 416 CFV. The said Yusto remained with the original card for further action. But he was still repaying the loan for purchasing the motorcycle. However he said Yusto is nowhere to be

seen. PW5 tendered in court a certified copy of Registration card of motorcycle T- 416 CFV the same was admitted as exhibit P4.

PW5 also tendered in court the motorcycle T. Better reddish in colour with plate No. T. 105 CPJ which was admitted as exhibit P5.

PW5 also told this court that he recorded cautioned statement of the 2nd accused, he to prayed to tender it in court but the same was not admitted following the objection which was raised by Mr. Innocent Kibadu advocate for the 2nd accused as the same was recorded in violation of the law the objection which was sustained.

In their defence the accused persons denied to have committed the charged offence.

The 1st accused, Exavery Mtega told this court that, he has never killed Enock Kihindo or any other person. He heard the name of Enock Kihindo for the first time while in court on 25/11/2013 when he appeared in the District Court for the first time.

He has never seen him before. Regarding his arrest by Athanas (PW2) and Rudgel (PW3) and that he confessed on 17/11/2013, 1st accused stated that, he was not arrested. On that date 17/11/2013 he received a phone call from Fredrick Sanga requiring him to go to the village office, he went there and met the Village Executive Officer alone. The Village Executive Officer told him that he called him because he participated in the murder of a person whose name was not

mentioned to him. He said while being told so they were only two. He said the evidence of Athanas and Rudgel is not correct because even at the time the Village Executive Officer asking him they were not present. Even the statement they alleged that he confessed to the Village Executive Officer was not tendered in court. Even the Village Executive Officer himself did not come to testify in this case. He is living at Igominyi village Monyango hamlet. Athanas is living at Mhezela hamlet and Rudgel is living at Kilangila hamlet. And the Village Chairman at that time was Erasto Mligo, the hamlet chairman was Angelus Mayemba and the ten cell leader was Stephania Njawike. 1st accused stated further that, after he has denied to have participated in the alleged murder the Village Executive Officer called at the Police Station. The police went to collect him. They went to search at his house but did not get anything as the investigator of this case told the court.

He said that, at the police station he wrote statement in which he denied to know the murder incident. He denied to be together with Baraka at Igominyi Village on 10/11/2013. He denied too that PW2 saw him while washing a motorcycle at his home. He said he had never been arrested having a motorcycle and that he has never given money to Ezekiel Mdendemi nor to ask him to look for a traditional healer to cleanse him. He said Ezekiel Mdendemi is just a peasant, he has never come in court and give evidence that he asked him to give him medicine to cleanse him.

1st accused denied too to have told people that, the motorcycle was taken by Baraka. He said he just met with Baraka in 2013 in the prison where he was detained as a remand prisoner. But he knew him before, he used to visit his father occasionally in their village one Ezekiel Mdendemi while coming from Iringa. He said he heard about the death of the "bodaboda" rider for the first time from the Village Executive Officer of Igominyi. But he did not tell him as to where he got such information. He stated further that there is no witness among PW2, PW3 and PW5 told this court that he identified the deceased body, they all said the body was badly decomposed. And that the witnesses who searched at his house they said they found a helmet, chest cover and sticker for safety week. But he did not know who put those properties outside his house. Those properties were not even tendered in court. 1st accused stated further that there is no evidence to show that the motorcycle was robbed from the deceased even Yusto who is said that he owns the same did not come to testify in court. He said the accusation against him are not correct he has never killed. He prayed this court to acquit him.

During cross-examination by Mr. Mandwa learned State Attorney, 1st accused stated that he has been living at Igominyi Village since his childhood and the relationship between him and the people of Igominyi is very good. He does not know why the Village Executive Officer linked him with the offence of murder. He had no grudges with Athanas and Rudgel.

Although they said he took the motorcycle from Enock being assisted by Baraka but there is a dispute on the arrest of Baraka at Songea. But according to PW5 the police brought Baraka to Njombe together with the motorcycle. He also said the last time he saw Baraka visiting his father at Igominyi village was in 2012.

The second accused Baraka Mdendemi on his part told this court that he lives at Wasa Sengelidete Village Iringa and is dealing with agriculture. He met with Exavery for the last time in October 2012 when he visited his father at Igominyi village one Ezekiel Mdendemi.

He used to see Exavery Mtega when passing along the road going to "Kijiweni".

Second accused denied to have been seen by Athanas on 10/11/2013 while together with Exavery and invited them for liquor. He denied too that on 11/11/2013 Athanas saw him at the house of Exavery washing a motorcycle. He said on 10/11/2013 he was at Songea at his brother one Emmanuel where he went to visit and assist him in agricultural activities. He said he was arrested at Lusewa village on 18/11/2013 for possessing property suspected to have been stolen. He said he was detained there for four days. He was transferred to Namtumbo police station where he stayed for three days.

On 24/11/2013 he was sent to Songea Central police station. He said from 18/11/2013 he was not told the suspected property was stole. He said he was brought to Njombe from Songea on 25/11/2013. He was locked in the lock up until 04/11/2013 when he was given statement and told to sign but

he did not know the contents nor did he read the statement, he said he signed the statement. He said the motorcycle he was found possessing is T. 105 CPJ T- Better red in colour.

DW2 identified the motorcycle which was tendered in court by the prosecution and admitted as exhibit P5. But he said some parts were missing. 2nd accused denied for the said motorcycle to belong to Yusto Modestus as he was given that motorcycle by Mengi Luhwagila and he was using it for farm work. It was given to him in 2012. He said Mengi Luhwagila has rice farms at Idodi Tarafani. But the latter is dead who died in 2013. DW2 said he know nothing about registration card of the motorcycle as he was just given to assist him in farm work.

He said he came to know that he was suspected for murdering Enock Kihindo on 12/12/2013 the date he was sent at the District Court for the first time. But he said he does not know Enock Kihindo and has never met or see him before. He also said he does not know Athanas Lutungulu (PW2) nor Rudgel Mwageni (PW3). He said there is no any prosecution witness who testified that he saw him while killing Enock Kihindo. He has never been sent by the police officer at the scene of crime. He went on stating that there is no any prosecution witness who said that, the motorcycle he was found possessing was of the deceased who was using it.

And that it is not an offence for him to be found with a motorcycle. T- Better red in colour. He said the late Mengi Luhwngila died in his hands and 2nd accused was claiming against him. 2nd accused denied to have told

the police after been arrested that, the registration card of the motorcycle he was found riding was with his father at Njombe.

The 2nd accused prayed to this court to acquit him and give him his motorcycle. During cross-examination by Mr. Mandwa learned State Attorney, DW2 said he went to Songea in August, 2013 and travelled from Iringa to Songea using the motorcycle. But he has never gone with it to his father at Igominyi. He said the motorcycle he had at Songea is what was tendered in court in this case (exhibit P5).

He denied for Yusto to own the motorcycle as according to TRA report the proprietor of the motorcycle is N.A Holdings Company Ltd. of Dar es Salaam and he has no doubt with that report. He said he cannot doubt even for the document which does not belong to him. He said he has no grudges with his father Ezekiel Mdendemi and he did not know of his father knew that, he was arrested at Songea.

With the foregoing evidence it has been disclosed that Enock Kihindo who was the "bodaboda" rider disappeared from 10/11/2013 and his body was found at Yakobi village in the forest on 16/11/2013 while already decomposed. According to PW5, he left at Sangamela bar "bodaboda" parking after being hired by two persons although he did not mention them.

According to PW1 who conducted postmortem examination, the deceased was identified to him by his relatives to be of Enock Kihindo and that the cause of death was suffocation. PW1 and PW5 together with PW3 told this court that they found the deceased body with neck and legs tied up with

shoe races at the wattle tree. With such evidence of PW1, PW2 and PW5 there is no doubt that Enock Kihindo is dead and that he did not die a natural death. There has been a dispute as to who killed him. The prosecution witnesses particularly PW2, PW3 and PW5 are pointing a finger to the accused persons to have killed him. All of them have said he was mentioned by one Fredrick Sanga the Village Executive Officer of Igominyi village who was also told by Ezekiel Mdendemi that the 1st accused approached him requesting him to give him medicine for cleansing himself so that he would not be arrested as he participated to kill the deceased. That evidence was refused by the accused persons. But another piece of evidence relied upon by the prosecution is that the 2nd accused was arrested at Lusewa village Namtumbo District possessing the motorcycle which they suspected to have been robbed from the deceased after been killed.

I must point out from the outset that in criminal cases including murder cases the burden of proof always lies on the prosecution side and the standard of proof is beyond reasonable doubt. In the case of **Julius Matama @ Babu @ Mzee Mzima vs. the Republic** Criminal Appeal No. 137 of 2015 CAT (unreported), at page 9 of its judgment the Court has this to say:-

"We begin our discussion by stressing the fundamental principle of law that the burden of proof in criminal trials lies squarely on the shoulders of the prosecution and it never shifts, the

standard of which is proof beyond all reasonable doubts”.

With that fundamental principle of law in mind let me now examine the prosecution evidence adduced if fits to that noble principle of law.

It is without doubt that there is no witness who testified in court and told this court that he was present and witnessed the killing.

What is available at large is circumstantial evidence, these include; 1st accused was reported asking for medicine to cleanse himself after the incidence. It is reported that he admitted to have committed the offence to Fredrick Sanga the Village Executive Officer of Igominyi Village. He was searched by the police and some properties found inside his house which he said were properties of the deceased, that is helmet, chest cover and safety week stickers. It was stated by Athanas Lutali Lutungulu (PW2), Rudgel Mwageni (PW3) and A/Insp. Peter Makoye (PW5) that 1st accused went to one Ezekiel Mdendemi and asked him medicine to cleanse himself so that he could not be arrested. However the said Ezekiel Mwageni did not come to testify in court. Their evidence therefore is hearsay which is inadmissible in law, But even the three witnesses PW2, PW3 and PW5 what they told this court is hearsay. They did not hear directly from the said Ezekiel Mdendemi but they heard from Fredrick Sanga who said was given such information by the said Ezekiel Mdendemi. The said Fredrick Sanga like Ezekiel Mdendemi did not come to testify. The first Accused Exavery Mtenga gave statement at the police station but according

to PW5 he denied to have participated in the commission of the crime. This is probably true as his cautioned statement was not tendered in court but even in his defence he denied to have committed the offence and denied to have gone to Ezekiel Mdendemi searching for medicine to cleanse himself as PW2, PW3 and PW5 had alleged.

But PW2 and PW3 said 1st accused named the 2nd accused at the time they went to search at his house and properties seized therefrom. First of all the alleged seized properties namely helmet, chest cover, and safety stickers were not tendered in court to show that it is true the 1st accused was searched at his evidence and those properties seized. The prosecution did not even tender in court the certificate of seizure which both PW2 and PW3 said was prepared and they signed as witnesses while search being conducted. There is no explanation given by the prosecution as to why such important document was not tendered in court. This court is entitled to draw inference adverse against the prosecution for their failure to tender such important evidence if at all properties which were said to be deceased properties were seized there. But there are also material witnesses who some were listed in the list of prosecution witnesses but they were not called to testify. These include the "bodaboda" riders at Sangamela bar where deceased is said to be hired by two persons. These were important witness as they could identify the two persons who hired the deceased. Others are Ezekiel Mdendemi, Fredrick Sanga the VEO of Igominyi Village and the police officer who arrested the

2nd accused at Lusewa village. Even the dispute on whether the deceased body was identified or not would be resolved by calling deceased relatives as witnesses but that also was not done. It was held in the case of ***Aziz Abdallah v. Rep. [1991] TLR.71***, that:-

" The general and well known rules is that the prosecutor is under prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts if such witnesses are within reach but are not called without sufficient reason being shown, the Court may draw an inference adverse to the prosecution".

But as I have pointed out above, there is no evidence /witness who testified in court to the effect that he was present at the scene and saw while the deceased being killed or even the prosecution witness who was present while the deceased being hired that night leave alone that he was hired by the present accused persons. Even if we assume that the accused persons hired him as alleged which they denied. There is no evidence to show that the accused persons are the very persons who killed him. He might have taken them to their destination, leave them there and on his way back he was killed by other persons. This assumption is not dispelled by the prosecution. The prosecution appears to rely on the motorcycle which is said was found possessed by the 2nd accused at Lusewa Village in Namtumbo District and who had no registration card of the same.

But no any witness testified in court and told this court that the motorcycle which 2nd accused was found possessing was the

property of the deceased or who was possessing the same. PW5 mentioned one Yusto Modestus to have reported at the police station on the disappearance of the motorcycle which deceased was riding. But firstly, it was not established whether that Yusto had actually reported at the police station about the disappearance of the motorcycle deceased was riding. There is no any document tendered in court by the prosecution to that effect. PW5 himself clearly explained in court that, Yusto did not tell him such information but reported at the CRO at the police station. There is no any person to whom such information was availed has come to this court to confirm such assertion. Even the said Yusto himself who said to have reported the disappearance of the motorcycle while being ridden by the deceased did not come to testify. What the prosecution are saying remains hearsay. PW5 was the Chief investigator of this case, he was expected to have full information relating to the case as he had opportunity of gathering information from different people and witnesses.

But it appears he did not do his job as an investigator properly such that there are several gaps in this case as there is broken chain of events

In order for this court to be satisfied that the present accused persons are those who killed the deceased, there must be unbroken chain of events leading to the conclusion that it is the accused persons and not any other persons who committed the offence as it was held in the case of ***Hamis Mussa Timotheo and Magid Mussa Timotheo vs. Republic (1993) TLR 125.***

PW5 told this court that Yusto gave him a copy of registration card in respect of the motorcycle with registration No. T. 416 CFV T. Better red in colour. But that card exhibit P4 shows that the proprietor is N.A Holdings Company Ltd. But he stated further that Yusto told him that he remained with the original card as he was still indebted as he purchased the motorcycle for a loan.

There are questions I am trying to ask myself as far as ownership of the motorcycle subject of this case is concerned;

Firstly, was Yusto the proprietor of the said motorcycle?, if so which document shows that he had purchased it himself or given by any other person. There is no any document to show that he purchased the motorcycle from N.A Holding company Ltd who appears in the Registration card as proprietor. There is no any EFD receipt or invoice to show how the motorcycle passed to Yusto from N.A Holding Company Ltd. There is no any evidence showing that he is the proprietor of N.A Holding Company LTD or have any share in that company. There is no any evidence showing that the property (motorcycle) passed from N.A Holding Company Ltd to Yusto. But even the document itself (exhibit P4) which PW5 tendered in court is not original document. It is a photocopy which was certified by a Resident Magistrate Njombe on 25/11/2021, the same day the document was tendered in court. There are also questions to be resolved here, normally to my understanding a copy is certified from the original document. Was the possessor (PW5) or any other person who went to certify a copy to the Resident magistrate Njombe had the original document from which the certified copy was obtained. If not from what

source the photocopy was certified. It is unlikely that PW5 who tendered the certified copy or any other person had the original document in his possession. Had it be that he would have tendered in court that original document instead of getting trouble of obtaining a copy and certifying the same.

I would not doubt had the document certified by TRA because I am sure they are custodian of information relating to Registration of motor vehicles as PW4 told this court, they are better placed to know the current proprietor/ owner of the motorcycle. By mere tendering a photocopy of the registration card which was issued way back on 24/12/2012 showing the name of the proprietor different to that claimed to have been owning it at the time of disappearance, cannot guarantee that Yusto Modestus who was mentioned by PW5 in his evidence is the actual owner/proprietor of the motorcycle in question as it is possible for it to have been changed ownership again and again.

As the available evidence is circumstantial, to form a conviction the same must irresistibly lead to the conclusion that it is the accused persons and no any else who committed the offence. The exculpatory fact must not be capable of any other interpretation than that the person in the dock is guilty of the offence charged.

In the case of ***Ally Bakari and Pili Bakari vs. Republic (1992) TLR 10 (CA)***, it was held:-

"(i) where the evidence against the accused is wholly circumstantial the facts

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

In the present case, the available circumstantial evidence does not irresistibly lead to the conclusion that only the accused persons did kill the deceased.

There are gaps or potholes which creates doubts as to whether the accused persons did actually commit the offence. The doubts include whether the accused persons actually hired the deceased to ferry them to Yakobi village using the motorcycle. There is no proof to that. But it was also not proved that the motorcycle which deceased was riding was of one Yusto Modestus, there is no proof if 1st accused admitted to Fredrick Sanga the village Executive Officer of Igominyi to have participated to commit the offence. Equally there is no proof that 1st accused went to Ezekiel Mdendemi asking for medicine for cleansing himself. And lastly there is no proof that the 1st accused was searched at his residence and a helmet, chest cover and safety stickers found at his house. All what was stated in respect of those facts is hearsay. It is a trite law, as a general rule that, oral evidence whenever adduced must be direct and not a third party account as happened to PW2, PW3 and PW5. This is the import of section 62(1) of the Evidence Act [Cap. 6 R.E. 2019]. This position was taken by this Court in the case of ***Lukondo Luseke v. Shukurani Lusato***, (PC)

Civil Appeal No. 19 of 2019. But generally hearsay evidence is inadmissible as it was held by the Court of Appeal in the case of ***Daimu Daimu Rashid @ Double D v. The Republic***, Criminal Appeal No. 5 of 2018, at page 11

I pointed out above that the prosecution relied on the evidence that second accused was found possessing the motorcycle which has been driven by the deceased on the date he met with his death. Firstly there is no proof that the motorcycle 2nd accused was found possessing when he was arrested at Lusewa village Namtumbo District is the one deceased was riding on the date of incident. The said motorcycle although had plate number with reg. No, T. 105 CPJ but upon verification by TRA it was found to have registration number T. 416 CFV property of N.A Holding Company Ltd. But according to PW5 one Yusto Modestus is the one he said owned it and gave deceased to use it for hire as "bodaboda". But there is not cogent evidence proving that as even Yusto himself did not testify where as he could be cross-examined on how he acquired the said motorcycle and gave it to the deceased. Had it there proof that the motorcycle which 2nd accused found possessing was the property of the deceased or that was property of the said Yusto who gave him the motorcycle to use it for "bodaboda" business then the 2nd accused would be required to explain as to whether or not he lawfully acquired that motorcycle. But such evidence is lacking instead 2nd accused asserted ownership to it although even himself did not tender any document to prove that ownership. However such weakness of his defence cannot be used to convict him as always an accused can be convicted on the strength of prosecution evidence and not on the weakness of his defence.

Now let me look at the law relating to the doctrine of recent possession if it can apply in this case.

In Alhaji Ayoub Msumari and Another vs. Republic, Criminal Appeal No. 136 of 2009 CAT (unreported) it was held that:

*"... before court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case.... It must be positively be proven **first** that the property was found with the suspect ,*

***secondly**, that the property is positively the property of the complainant.*

***Thirdly**, that the property was stolen from the complainant and **lastly** that the property was recently stolen from the complainant."*

(see also the case of ***Kashinje Julius v. The Republic***, Criminal Appeal No. 305 of 2015).

In the present case the issue of ownership of the motorcycle is in dispute, the same was not resolved, it has not been proved as from whom the motorcycle was stolen if at all it was so stolen. That doctrine of recent possession of stolen property cannot be invoked.

In the case of ***Ally Bakari Pili Bakari*** (supra) the court held further that:

"As PW2 could not with certainty show that the sewing machine (Exhibit P2) belonged to him the doctrine of recent possession could not be applied in this case".

In the cited case above there was a witnesses who testified in court and asserted ownership to the sewing machine but he did not show with certainty that the sewing machine belonged to him. But in the case at hand the person alleged to be the owner of the motorcycle did not at all testify in court to claim ownership of the motorcycle in question. Equally in this case the doctrine of recent possession cannot be invoked.

Then if this kind of evidence is not accepted which remaining evidence can this court act upon to convict the accused persons or any of them, definitely there is none. The prosecution has therefore failed to prove the charge of murder against the accused persons beyond reasonable doubt as there are doubts whether the accused persons did commit the offence. The doubts available are to be resolved to the accused persons benefit. The 1st and 2nd Assessors have opinion that the accused persons are guilty of murder, but 3rd Assessor opined that only 2nd accused is guilty of murder but 1st accused is not guilty. I partly agree with the 3rd assessor who found 1st accused not guilty. But I depart to their opinion that the accused persons are all guilty of murder. The reason is that they appeared to shift the burden of proof to the accused persons instead of the prosecution side. Always the burden of proof lies on the prosecution, cannot at any point in time shift to the accused person. That said, I find that the prosecution has

failed to prove the charge of murder against the accused persons to the required standard the same are hereby acquitted.

DATED at NJOMBE, this 29th day of November, 2021.




F.N. MATOGOLO

JUDGE.

29/11/2021

| | |
|------------------------------|---|
| Date: | 29/11/2021 |
| Coram: | Hon. F. N. Matogolo- Judge |
| For Republic: | Mr. Andrew Mandwa State Attorneys |
| For 1 st Accused: | Ms. Tunsume Angumbwike - Advocate |
| For 2 nd Accused: | Innocent Kibadu- Advocate |
| L/Assistant: | Blandina Mwenda |
| Accused Person: | Present under custody |
| Assessors: | 1. Hillary Mponji 2. Illuminata Mkongwa 3. Rose Kitomo |
| Interpreter: | Mr. Charles Mwasumbi, English into Swahili and Vice Versa. |

Mr. Andrew Mandwa - State Attorney:

My Lord I am appearing for the Republic. The 1st accused is present and represented by Ms. Tunsume Angumbwike advocate. The 2nd accused is represented by Mr. Innocent Kibadu advocate.

The case is for judgment on our part we are ready.

Ms. Tunsume Angumbwike – Advocate:

My Lord on the defence we are also ready.

COURT:

Judgment delivered.





F.N. MATOGOLO

JUDGE.

29/11/2021

Right of appeal explained.




F.N. MATOGOLO

JUDGE.

29/11/2021