

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL SESSION CASE NO. 03 OF 2018**

REPUBLIC

VERSUS

- 1. KELVIN ISSA MBWAGA**
- 2. LOTSON WILLION MBWAGA**
- 3. TATIZO MBONEYE**

JUDGMENT

Dated: 5th & 30th May, 2022

KARAYEMAHA, J

On 11/03/2017 around 22:00hours Mohamed Musa (the deceased) was found by Henry Nyandindi (PW7), Uswege Paulo Mwakalobo (PW8) and many other people residents of RRM at Isyesye area within the City and Region of Mbeya grievously harmed. In their respective testimonies, PW7 and PW8 informed this Court that they heard a "paaaa" sound (meaning a gunshot) at the road. When they gathered thereat they found the deceased leaning on the electric post agonizing and holding his head. On examining him they saw a gunshot wound. They then requested for a help from the car driver and took him to Ilomba Police Station to get a PF3. After getting it, they took him to Referral Hospital. Having handed

him to doctors they were allowed to leave but on the next day they were informed by *bodaboda* riders that the injured person died.

The deceased's death is confirmed by the Report on Post Mortem Examination (exhibit P1). In view of exhibit P1, the cause of death was head injury. It indicates further that there was a hematoma beneath the scalp, hemorrhage from the left ear, depressed fracture of the left temporo-parietal region and brain was lacerated. The death of the deceased is also proved abundantly through the evidence of Idd Daud (PW1) who gave the deceased a motorcycle to transport the passenger.

From the totality of the prosecution version, it cannot be doubted that, up until his demise on 11/03/2017, the deceased was a businessman operating a motorcycle. According to PW1, on the fateful date around 20:00hours the deceased's motorcycle (no evidence on its registration number but I think that is not relevant here) had some mechanical defects in the lights. Due to that, the deceased borrowed PW1's motorcycle with registration number MC 901 BLS make Kinglion red in colour which belonged to Nickson Mwaikambo to transport a passenger. The deceased set off but did not make it back to their parking area (*kijiweni*). After waiting for a long time for the deceased to return his motorcycle to no avail PW1 decided to return home. It turned out that PW1 was phoned by

an anonymous person and asked if he knew Kamba and shortly after he was informed that he was short and the motorcycle stolen.

On 18/03/2017 the Mabanzini *bodaboda* riders informed PW1 to have seen a motorcycle with similar registration number to the stolen one to be on sale. It is evident that by then the reported Motorcycle's registration number was MC 901 BNR. Following that discovery, he informed the *bodaboda* association leaders of a suspected motorcycle. They then initiated their own self-driven "investigations" by trying to call a person who was selling it but were unsuccessful.

It is further evident that after that report, the wheels of investigation led to a finding of the motorcycle at Infinity petrol station located at Soweto. Later Abdulahlatif was arrested by *bodaboda* riders. The arrest was facilitated by Ibrahim Seleman Msagama (PW4) a manager of Infinity petrol station at Isanga Darajani. On being interrogated by Inspector January Mahundi (PW3), Abdulahlatif mentioned Mohamed Haji Idd Ilunde (PW9) his brother to have instructed him to sell a Motorcycle with Registration number MC 901 BNR at price of Tshs. 1,400,000/=. Struggles to arrest PW9 were successful and on being interrogated by the police, PW9 confessed. He quickly mentioned that he bought the motorcycle with registration number MC 901 BNR make Kinglion red in colour at the agreed

price of Tshs. 650,000/= from the 1st and 2nd accused persons. He gave the police officers the 1st accused's mobile phone number. Later the 1st accused was arrested at Mwenge Street after making communication on 18/03/2017 and taken to Mbeya Central Police. It followed that the 1st accused mentioned the 2nd and 3rd accused persons. Shortly after, the 2nd and 3rd accused persons were arrested too and taken to Mbeya Central Police. They are now charged with murder **contrary to sections 196 and 197 of the Penal Code Cap. 16 of the R.E. 2002 [now R.E. 2019]**. The indictment is that on 11/03/2017 at Isyesye within the City of Mbeya and Mbeya Region the accused persons jointly and together murdered Mohamed Musa.

On summing up to assessors, I informed them that the prosecution evidence pegs on circumstantial evidence because none of the witnesses saw the accused killing the deceased. I similarly informed them that the accused persons are linked to the offence of murder because PW9 was found in possession of exhibit P4 which is believed to be stolen from the deceased by them after shooting him and caused his death. I informed them that the said motorcycle was sold to PW9 by the accused persons. In the same spirit, I informed them that PW9 being in possession of motorcycle recently stolen and proving that he bought it from the accused persons, the latter were properly charged for the aggravating crime of

murder and must give a reasonable explanation on how they came into possession of the motorcycle stolen soon after the deceased was murdered and sold it to PW9.

All two assessors unanimously entered a verdict of guilty on account that the prosecution proved the case beyond reasonable doubt. They also said that the accused persons leading witnesses to the scene of crime, connects them to the commission of the offence.

On the whole evidence, I am fully satisfied that the deceased died unnatural death. It was indeed a violent one. Malice can be inferred from the act of shooting on his head. Considering the evidence before me, there is no doubt that the assailant had malice aforethought. The issue for determination, therefore, is whether it was the accused persons who murdered the deceased.

Conspicuously, the evidence before me is circumstantial. As the evidence demonstrates, the accused persons are linked with the murder of the deceased because they sold to PW9 a motorcycle make Kinglion red in colour with registration number MC 901 BNR (exhibit P4).

As per the evidence, on the fateful night the deceased used exhibit P4, he borrowed from PW1, to transport a passenger from their parking area. The question that comes to the fore at this juncture, is how the

motorcycle with registration number MC 901 BLS Kinglion, red in colour related to a motorcycle with registration number MC 901 BNR make Kinglion red in colour.

Let us examine PW1's, PW3's, PW4's and PW10's evidence. PW1 testified categorically that in 2017 used to operate a motorcycle with registration number MC 901 BLS make Kinglion red in colour with which he plied the business of transporting people. The bike belonged to Nickson Mwaikambo who entrusted it to him to operate business at an agreed daily payback of a sum of shs. 10,000/=. Nickson Mwaikambo was not called to testify whether the bike belonged to him and assure this court that it was him who entrusted to PW1. It was because of that there was no proof of ownership of the bike. Worse still no any document was produced and tendered in evidence regarding the motorcycle with registration number MC 901 BLS make Kinglion red in colour. I have faced difficulties in my mind to establish whether that motorcycle ever existed. I am confused and I and over empowered by a dark cloud of doubts. In a fit case and serious case like this, the prosecution had to prove first, in my considered opinion, the existence of a motorcycle with registration number MC 901 BLS make kinglion red in clour before proving anything else. Thereafter, they were required to connect it with exhibit P4. But as evidence before me stands, there is nothing showing that a motorcycle with registration number MC

901 BLS make kinglion red in clour ever existed and was the property of Nickson Mwaikambo. PW1 has also failed to prove that he once operated the same for business purposes. He miserably failed to prove that he was entrusted the same by Nickson Mwaikambo by producing a contract.

Having found that there is no evidence proving the existence of that motorcycle, can we safely stand and proclaim that its registration number was changed, its chases and engine numbers erased/scratched. Unfortunately, a short answer to the question is in the negative. It is plain that anything that has never existed cannot be changed for God's sake. I shall intimorously venture to say that murder is a very serious offence which upon conviction attracts the death penalty. That being the case, I expected its investigation and eventual prosecution to be done with great care and seriousness. In this case I get an impression that apart from being incomplete, investigation was not seriously and carefully conducted. I say so because the investigating officers after failing to retrieve a blue card from Nickson Mwaikambo or even a photocopy from PW1, would take a step further by consulting with Tanzania Revenue Authority (TRA), the authority that has registration numbers of every motorcycle and motor vehicle in the system. I am led to believe that investigators would get full and viable details of the motorcycle with registration number MC 901 BLS kinglion. From those details its existence would be proved. They would as

well trace the existence of the motorcycle with registration number MC 901 BNR kinglion from TRA. This was not even considered in building this case. The consequence that follows is very fatal. It is that, the prosecution has failed to prove the existence of a motorcycle with registration number MC 901 BLS kinglion red in colour. It is my settled view, therefore, that there is no relationship between these two motorcycles.

Even in assuming that a motorcycle with registration number MC 901 BLS kinglion existed, still, the evidence before me does not indicate that it is linked with exhibit P4. Why? This is because the two are different and no proof that the former's registration number was changed. A close examination of PW1's evidence reveals a motorcycle he found at infinity petrol station had peculiar marks which resembled his because he was once involved in accident with it. He said that on inspecting it, he found out that its rear brake cable was folded and the fuel tank damaged and dented. He also found the iron holding sports lights bearing scratches likewise the front shock up. Also, the chassis numbers had been scratched and was by then with registration numbers MC 901 BNR. Sadly, PW1 neither mentioned the chassis and engine numbers of the motorcycle with registration number MC 901 BLS. He testified further that the motorcycle he found at Infinity petrol station had its battery and kick for starting it but exhibit P4 did not have these spear parts. He said adding that the one he

saw at infinity had no side mirrors and their holders but exhibit P4 had two holders. On his side, PW3 informed this court that when he inspected exhibit P4 he discovered that it had no side mirrors. On who scratched the chassis numbers, PW3 testified that Abdulahlatif admitted to be the one who scratched them. Similarly, PW10 said categorically that exhibit P8 does not indicate that the 1st accused stated to have changed the registration number and to have stolen a motorcycle with registration number MC 901 BLS. I have also closely examined PW9 evidence. He testified that after buying it, he made some repairs to add value to it because he wanted to sell it. It is not scanned anywhere in his evidence that it was him who fixed mirrors' holders or made some other changes apart from a normal service of changing oil. In addition, PW9 admitted that he bought exhibit P4 not a motorcycle with registration number MC 901 BLS. Reading PW9 evidence extensively, he did not see the chassis and engine numbers scratched.

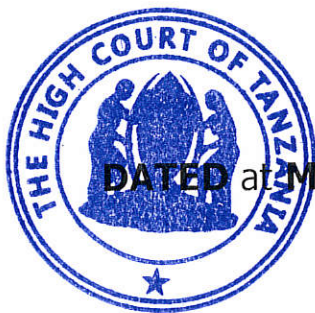
In their respective defences, the accused persons denied knowing PW9 and denied further to have sold a motorcycle to him. With respect to Mr. Almachius Bagenda, learned State Attorney, PW9 had to produce a sale agreement or any document intimating that it was the accused persons who sold exhibit P4 to him. What is gathered from his evidence is just a general statement that they were planning to reduce the sale

agreement into writing after procuring the documents. The tasking question is how on earth he could display the motorcycle for sale without its original documents. With this doubt, I am of the firm view that his credence is shaken by the defence evidence. A rule of the thumb is that every witness is entitled to credence except where there are good reasons not to do so as per the case of **Goodluck Kyando vs. Republic** [2006] TLR 362-363. In this case, as far as PW9 is concerned, I have good and overwhelming reasons to disentitle credibility to his evidence.

In sum, I am of the settled view the available evidence falls short of connecting the accused persons with the commission of the offence. In situations where the evidence is wholly circumstantial the requirement of the law is that to qualify as circumstantial evidence to be relied upon in linking the accused persons with the offence they are charged, the prosecution must establish circumstances which the Court considers to be so connected that they lead to no other conclusion than the guilt of the accused persons. See the case of **Republic vs. Kerstine Cameroon** [2003] TLR 105. In this case this is lacking. Their connection cannot also be traced from their respective cautioned statements (exhibits P5, P6 and P8 respectively) and extrajudicial statement (exhibit P2). I appreciate Mr. Bagenda's input during his final submissions and the issues he highlighted. However, he failed to establish the relationship between the two said

motorcycles and whether a motorcycle with registration number MC 901 BLS kinglion red in colour existed.

Following what I have discussed above, I am destined to a singular conclusion that the prosecution has failed to prove the case beyond reasonable doubt. This conclusion draws a difference with all assessors who were all of the settled opinion that the accused persons were guilty of the charged offence of murder. From the discussion above, I declare that I differ hugely with them. Accordingly, I find and hold that the accused persons did not murder the deceased. In the fine, I find them not guilty and acquit them of the charges of murder contrary to section 196 of the Penal Code Cap 16 of the R.E. 2019. Their liberty once lost, is henceforth restored.



DATED at MBEYA this 30th day of May, 2022

A handwritten signature in black ink, appearing to read "J.M. Karayemaha", is written over a horizontal line.

**J. M. KARAYEMAHA
JUDGE**