

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOBIA DISTRICT REGISTRY
AT NGARA**

CRIMINAL SESSIONS CASE NO. 10 OF 2022

**REPUBLIC
VERSUS
PETER PIUS @ GODFREY**

RULING

(IN TERMS OF SECTION 293 OF THE CRIMINAL PROCEDURE ACT, CAP. 20, R.E. 2019)

Date of Last Order: 07.06.2022

Date of Ruling: 08.06.2022

A.E. Mwipopo, J.

The accused person namely Peter Pius @ Godfrey is charged for the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16, R.E. 2019. It was alleged that on the 18th day of December, 2020 at Ngazisaba area of Ngarambe Village within Ngara District in Kagera Region the accused person did murder one Kitola Gwandiko. The accused person pleaded not guilty to the information and the prosecution summoned 11 witnesses and tendered 2 exhibits to prove its case.

Briefly, the evidence adduced by prosecution witnesses revealed that the deceased travelled from Gwarama Village where he was residing to Minzani Nyakahura Village to meet with the accused person. After deceased met with accused person, he is nowhere to be found as he disappeared and his phone was not available on air. Hadija Kitola - PW2 who is the deceased daughter and Felester Joseph - PW3 who is deceased wife reveal that on 18th December, 2020, the deceased travelled from Gwarama Village which is in Kankonko District to Minzani Nyakahura which is situated at Biharamulo District. PW3 said that deceased told her and some of his children on 17th December, 2020 that he is going to Minzani on the following day to meet with Peter Pius. The deceased went to Nyakahura from Gwarama Village by motorcycle of Paschal Liberatus PW9. According to PW2 and PW9, the deceased was wearing red round hat, green CCM jacket, white shirt and black trouser. Before going to Nyakahura, the deceased took a permit from Ernest Roman Nyamwelu - PW4 who is Village Executive Officer (V.E.O.) of Gwamara Village.

PW9 testified that he took the deceased in his motorcycle to Minzani Nyakahura where they found the person by the name of Peter Pius waiting for them at Utulivu Bar and Guest House. He said it was the first time to see Peter Pius. Peter Pius ordered meat and drinks for them. Later on PW9 returned to Gwarama Village and left the deceased at Utulivu Bar and Guest House with

Peter Pius who is the accused person. There at Utulivu Bar and Guest House, Fainess James - PW5 who is barmaid did show the deceased room no. 7 which was paid by the accused person. PW7 said that in the evening accused and deceased went out to buy chips. This was the last time the deceased was seen alive.

PW2 said that from the evening of 18th December, 2020, deceased phone was not available on air and they informed relatives including Ereneo Kitola - PW11 who is the elder son of the deceased. Efforts to trace the deceased commenced as there was rumours that the deceased is dead and his cemetery will not be found. PW11 testified that he traced the deceased Airtel and Vodacom phone numbers and he was able to get its printout. He observed in the printout that there are two numbers which mostly were in contact with the deceased. Those numbers communicated several times with the deceased between 15th and 18th December, 2020. One of the number which is from Halotel Company sent money to the deceased on 17th December, 2020.

As the said Halotel number was not available on air, PW11 traced through printout the number which was frequently communicating with it. He got the number which frequently was communicating the said halotel number is that of Faidha Ismail. He found and met with Faidha Ismail at Arusha where she told him that the halotel number which she was communicating frequently belongs to

Peter Pius. The said halotel number was not on air at that moment and the said Peter Pius was using another number. She gave them another number which Peter Pius was using. The trap was set to arrest the said Peter Pius by using Faidha Ismail and the accused person was arrested at Nyakanazi area on 25th January, 2021.

The accused person was taken to Nyakanazi Police Station where he was interviewed on the same date around 11:00 hours by D/Sgt Fredrick - PW10. PW10 said that he interviewed the accused person twice on 25th January, 2021, at 11:00 hours where he denied to know the deceased and at 19:00 hours where accused person confessed to kill the deceased. Rashid Laurent - PW6 and PW11 said they were present during interview. PW6 testified that the accused person denied to commit the offence during the first interview which was conducted at Nyakanazi Police Station soon after accused was arrested. On the other hand, PW11 said in his testimony that accused admitted to commit the offence during the first interview at the police station.

Thereafter, accused was taken to Utulivu Bar and Guest House where Fainess James - PW5 identified the accused person who was inside the car as the person who was with the deceased on 18th December, 2020. She said that accused and deceased left together to buy chips in the evening hours which is the last time the deceased was seen alive. Police officers returned to Nyakanazi

Police Station with the accused person and the cautioned statement of the accused person was recorded by PW10. The same evening, the accused person did lead police officers to where the deceased body was but due to darkness they returned back to police station before reaching the area.

On the next morning accused lead the team of investigators including Biharamulo OC CID, OCS Nyakanazi, PW8, PW10, PW6 and PW11 to Ngazisaba area. The accused person did show the valley where the deceased was dumped after he was killed. They found remains of human body to wit bones and skull, also they found a red hat, green CCM jacket, a trouser, shirt and identity card of Kitola Gwandiko. The said red hat, green CCM jacket, trouser and the shirt were tendered by No. F.3548 D/Cpl Deusdedith and were admitted collectively as Exhibit P1. The police called Hamlet Chairman of the area who came to the scene of crime and also they called a doctor who examined and collected the remains of the deceased. The said remains were taken to Nyakanazi Health Centre where they were kept in the mortuary. After two days the remains were handed to deceased relatives to be buried after the police has collected a sample from the remains and from deceased children. This is all about prosecutions evidence.

The evidence adduced by the prosecutions have proved that the remains of human being was recovered from Ngazisaba area on 26th January, 2021. PW9

and PW2 and PW3 identified the green CCM jacket and red hat which are part of Exhibit P1 as the one which were worn by the deceased on 18th December, 2020 when he was travelling to Nyakahura Minzani. PW9, PW10 and PW11 said that the identity card which was found with the deceased body was readable on 26th January, 2020 when the remains were found. They said that the identity card was bearing the name of Kitola Gwandiko who is the deceased and that he was a traditional healer. The said identity card could have not find its way to where the alleged remains of the deceased were found without being brought by its owner or somebody. By the time the identity card was tendered as Exhibit here in Court, it was damaged to the extent of not being readable. For that reason the Court did not admit it as prosecution Exhibit.

However, the oral testimony of PW1, PW6, PW10 and PW11 prove that the identity card bearing deceased name was found with the remains of human beings and clothes which the deceased wear when he went to Nyakahura from Gwarama on 18th December, 2020. Further, the evidence from testimony of Dr. Lilian Mbuni - PW7 shows that the remains which were stored at Nyakanazi Health Centre were human remains and she took part of leg bone and handled it to police officer who took it together with deceased children's' blood samples for further examination to the Chief Government Chemist Office. This evidence is sufficient to prove that the remains found at Ngazisaba area of Ngararambe

Village were of human being and that person is Kitola Gwandiko and nobody else. Thus, I find that Kitola Gwandiko is dead.

On the question whether the deceased died unnatural death, the available evidence shows that the last time the deceased was seen alive was at Utulivu Bar and Guest House in Nyakahura Minzani Village. He was in the company of the accused person who said his name is Peter Pius and they went out to buy chips together. The deceased was in good health and despite the facts that deceased rented a room at Utulivu Bar and Guest house, he did not return back to his room. His remains were found at Ngazisaba area more than a month later. The evidence in record does not suggest at all if the deceased had any reason to be at the scene where his body remains were found. It is either somebody took him there and killed him or he was killed somewhere else and his body was taken there. It is not the requirement of the law that the cause of death must be established in every murder case. In the case of **Mathias Bundala vs. Republic**, Criminal Appeal No. 62 of 2004, Court of Appeal of Tanzania at Mwanza, (unreported), the Court of Appeal held that death may be proved by circumstantial evidence even without the production of the body of the alleged dead. Similar position was stated in **Leonard Mpoma vs. Republic [1978] T.L.R. No. 58**. Thus, under the circumstances of this case I find that the deceased death was not natural.

The next question is whether the accused person is responsible for the death of the deceased. In this case, the prosecution relied on circumstantial evidence to prove its case. The said circumstantial evidence needed to be intact to lead to only one irresistible conclusion pointing to the accused's guilt. In **Hamida Mussa v. R [1993] T.L.R. 123**, the Court held, I quote:

"circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"

From above cited case, for circumstantial evidence to prove the case the evidence which establish the accused person is guilt it must not be capable of existing together with his innocence. The only explanation of the evidence must be that accused person is guilt of the offence. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused. This was stated by the Court of Appeal for Eastern Africa in **R. v. Kipkering Arap Koske and Another (1949) 16 E.A CA 135**.

The Court of Appeal set out 3 test to be satisfied by circumstantial evidence when the case rests on such evidence in the case of **Gabriel Simon Mnyele vs. Republic**, Criminal Appeal No. 437 of 2007, Court Appeal of Tanzania at Dar Es Salaam, (unreported). The Court held that:-

"It is common ground that for circumstantial evidence to found a conviction, it must be such that it irresistibly points to the guilt of the accused. From the authorities we are settled in our minds that when a case rests on circumstantial evidence such evidence must satisfy three tests:-

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

In this case, there are several pieces of evidence adduced by the prosecution witnesses which suggest that the accused is responsible for the deceased death. PW9 said in his testimony that he left the deceased with the accused person at Utulivu Bar and Guest House on 18th December, 2020 and PW5 testified that the accused person was the last person to be seen with the deceased alive when they went to buy chips together. The Court may convict relying on the last person to be seen with the deceased doctrine where there is no explanation from the accused person parting him away from circumstances leading to the death. In **Mathayo Mwalimu & Another vs. Republic** [2009] TLR 271, the Court held that:

"... if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer."

However, the last seen doctrine must be applied with caution as it was held in **Japhet Kalanga vs. Republic**, Criminal Appeal No. 332 of 2016, Court of Appeal of Tanzania at Mbeya, (unreported); and in **Nathanael Alphonse 16 Mapunda & Another v. Republic [2006] TLR 395**.

PW5 and PW9 testified that it was their first time to meet with the accused on 18th December, 2020. In such circumstances the police were supposed to conduct identification parade after the witnesses has provided description of the said Peter Pius. According to section 60 (1) of the Criminal Procedure Act, Cap. 20, R.E. 2019, identification parade is held by police officer investigating the offence for the purpose of ascertaining whether a witness can identify a person suspected of the commission of an offence.

In the present case, PW5 and PW9 who said that the accused person is the last person to be seen with the deceased made it very clear in their testimony that the day they saw accused person at Utulivu Bar and Guest House was their first time to see the accused person. PW5 even said in cross examination that it was OCS Nyakahura namely Edgar who told her that the accused name is Peter Pius. These identifying witnesses were supposed to

provide description of the suspect and the investigator had to conduct identification parade according to the law to ascertain if the witnesses identifies the suspect. In the case of **Juma Marwa and 2 Others vs. Republic**, Criminal Appeal No. 91 of 2006, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), it was held that:

"Failure to conduct an identification parade, as the appellants were apparently strangers to the witnesses, rendered the whole identification process untenable in law."

The omission of PW5 and PW9 to provide description of the suspect and failure to conduct an identification parade has watered down the testimony of PW5 and PW9 on the identification of the accused person as the last person who was seen with the deceased. Thus, there is no sufficient evidence to prove that accused person was the last person to be seen with the deceased.

Another piece of evidence which was connecting the accused person with the deceased death is the evidence from PW11 that accused frequently communicated with the deceased between 15th to 18th December, 2020, through his halotel number ending with No. "48" and that he sent money to deceased through deceased vodacom number. PW11 said that he was able to trace the accused after he got printout of deceased vodacom and airtel numbers. Also he got printout of the accused halotel number after he found that it was not available on air. Unfortunately, the said printouts were not tendered as

prosecution exhibit despite PW11 testifying that they were in his possession.

Further, PW1 testified that he was told by Faidha Ismail who was frequently communicating with halotel number which sent money to the deceased that the said halotel number belongs to Peter Pius. Faidha also gave them another number which Peter Pius was using at that moment. PW11, PW6, PW1 and PW10 said that Faidha was used to trap and arrest the accused person on 25th January, 2020 at Minzani Nyakahura. Unfortunately, the said Faidha Ismail was not called to testify. In such circumstances, there is no evidence whatsoever which connects the accused person with the alleged halotel number which was communicating with the deceased and which did sent money to deceased vodacom number.

The testimony from PW6, PW10 and PW11 shows that accused person confessed to commit the offence during interview. This is another piece of evidence which suggest that the accused person is responsible for the deceased death. PW10 tried to tender the cautioned statement allegedly recorded by the accused person at 19:00 on 25th January, 2021 but the said cautioned statement was not admitted for the reason that it was not voluntarily made. Despite the ruling of this Court that the cautioned statement was not made voluntarily, PW6, PW10 and PW11 testified that they heard oral confession of the accused person when he was interrogated at Nyakanazi Police Station on 25th January, 2021.

That, after confession the accused person led them to where the deceased body was thrown after he was murdered on the next day. Oral evidence is admissible, but the Court must be satisfied that the said oral confession was voluntarily made.

Unfortunately, the Court has ruled out that the said confession was not made voluntarily. The evidence from these witnesses contradict each other at the time when the accused admitted to kill the deceased. PW6 and PW10 testified that the accused person denied to kill the deceased in the first interview conducted around 11:00 hours on 25th January, 2021, but later on he admitted to kill the deceased in the evening around 19:00 hours after they come back to Nyakanazi Police Station from Nyakahura Minzani. PW11 testified that accused admitted to kill the deceased in the first interview. Moreover, PW10 testified that when he was interviewing the accused person he was alone with the accused person at OCS office at Nyakanazi Police Station. However, PW6 and PW11 testified that they were present when accused person was interviewed.

Generally, contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case as it was held in **Armand Guehi Vs Republic**, Criminal Appeal No. 242 of 2010, Court of Appeal of Tanzania, (unreported). It is the duty of the Court to determine whether the discrepancies are minor or goes to the root of the case. In **Dickson Elia**

Nsamba Shapwata vs. Republic, Criminal Appeal No. 92 of 2007, Court of Appeal of Tanzania at, (unreported), stated that:

"In evaluating discrepandes, contradictions or omissions it is undesirable for a Court to pick alit sentences and consider them in isolation from the rest of the statements. The Court has to decide whether the discrepancies or contradictions are only minor or whether they go to the root of the matter."

In the present case, the discrepancies are not minor since it raises doubt if the accused person did confessed at all and at what time he confessed. There is further doubt on the persons who were present and heard when accused person was allegedly confessing. In the case of **Robert Majengo vs. Republic**, Criminal Appeal No. 428 of 2017, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:-

"It is often been held by the Court that the evidence by any particular witness or among witnesses implicating the appellant which is tainted with serious and material discrepancies going to the root of the case and which may not be resolved by the Court impacts negatively on prosecution case by rendering it doubtful."

As the retracted confession was found to be involuntarily made and the Court find the contradiction goes to the root of the case, the Court could not rely on such evidence of oral confession.

PW6, PW8, PW10 and PW11 testified that the accused did lead them to

discovery of the remains of the deceased body. PW6 and PW11 said it was on 26th January, 2021 when accused led them to where the deceased body was thrown and PW8 and PW10 said it was on 27th January, 2021 when the accused person led them to the scene of crime. This is discrepancy in the evidence of these witnesses. These witnesses also differs on the distance from where they left cars at Ngazisaba to where the remains of deceased body was found. PW6 said that it was approximately 2 kms and they took approximately 30 minutes. PW8 said that it was approximately 200 m and it took them approximately 5 minutes by walking. Exhibit P2 also shows that the distance from the road to where remains of deceased body was found in 200 metres.

The testimony from PW6, PW8, PW10 and PW11 revealed that local authority leader was not involved when they were led by the accused person to the alleged scene of crime. It was after the deceased remains has been found when the police called hamlet chairman of Mavumbini Hamlet who came to the scene of crime later on. PW10 said that the reason for not taking the local authority leader when the accused was leading them to the scene of crime is that the houses were far away from the area. This explanation by PW10 has no basis since the testimony from PW11, PW8 and PW 06 shows the Hamlet Chairman of Mavumbini was later on called through phone by OC CID Biharamulo and he came to the area after the body was discovered. The

question is why they decide to go to the scene without taking the local authority leaders of the respective area of the scene of incident. Failure to take civilian witnesses with no interest to serve especially the local authority leaders of respective area make it possible for the said evidence to be fabricated.

In the unreported case of **Adriano Agondo vs. Republic**, Criminal Appeal No. 29 of 2012, Court of Appeal of Tanzania, it was held that:

"...it is beyond question that the civilian witnesses were not engaged in the search on the ceiling roof which was, apparently, an exercise conducted exclusively by the police. To this end, we cannot overrule the possibility that the items might have been fraudulently planted..."

The Court of Appeal took similar stance in the case of **Frank Michael @ Msangi vs. Republic**, Criminal Appeal No. 323 of 2013, Court of Appeal of Tanzania at Mwanza, (unreported). The evidence on the discovery does not overrule the possibility that it was fabricated. In such circumstances and taking all the irregularities and omissions available, the Court could not rely on the said pieces of circumstantial evidence as they do not prove without doubt that accused person was the one who led the police and deceased relatives to the discovery of the deceased body remains.

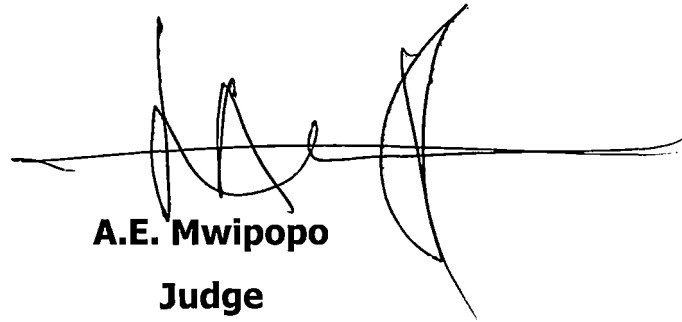
The only remaining evidence linking the accused person is the testimony of PW2 and PW3 who testified that the deceased told them he will be travelling to Minzani Nyakahura to meet with Peter Pius. These witnesses did not say if the

deceased provided them with further details of the said Peter Pius he was going to meet and if the said Peter Pius is the accused person. PW2 admitted that in the statement she recorded to the police immediately after the incident she did not state that the deceased told her he was going to meet with Peter Pius. She said she named Peter Pius to the police but they did not record the name. On the other hand, PW3 while answering question of defense counsel during cross examination she said that the first time she heard the name Peter Pius was after he was arrested. This raises doubt if deceased told PW2 and PW3 the name of the person he was going to meet at Nyakahura Minzani.

Therefore, I find that the circumstances from which an inference of guilt is sought to be drawn are not cogently and firmly established. The circumstances have failed to form a chain complete that conclude within all human probability that the crime was committed by the accused and none else. The circumstantial evidence available is not sufficient to prove that it was the accused person only and nobody else who has committed the offence of murder or any other offence of which, under the provisions of sections 300 to 309 of the Criminal Procedure Act, Cap. 20, R.E. 2019, he is liable to be convicted. Thus, I record a finding of not guilty against accused person namely Peter Pius @ Godfrey and he is acquitted.

Order:

The exhibit P1 collectively, which is clothes and Cap found with deceased remains, to be returned to the police for the purpose of destroying it as it is rotten. It is so ordered accordingly.

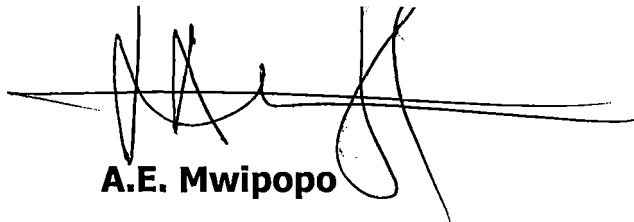
A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

A.E. Mwipopo

Judge

08/06/2022

The ruling was delivered in open Court this 08th June, 2022, in the presence of the accused person, the defence counsel namely Christian Byamungu and the Mr. Grey Uhagile, State Attorney for the Republic.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

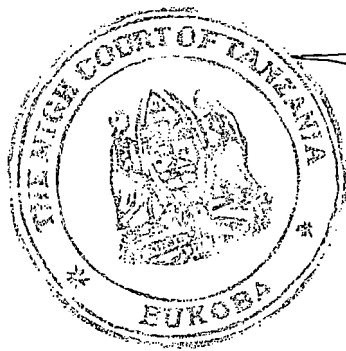
A.E. Mwipopo

Judge

08/06/2022

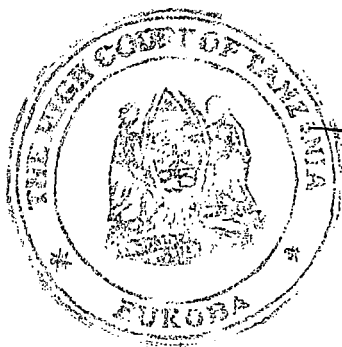
Order:

The exhibit P1 collectively, which is clothes and Cap found with deceased remains, to be returned to the police for the purpose of destroying it as it is rotten. It is so ordered accordingly.



A.E. Mwipopo
Judge
08/06/2022

The ruling was delivered in open Court this 08th June, 2022, in the presence of the accused person, the defence counsel namely Christian Byamungu and the Mr. Grey Uhagile, State Attorney for the Republic.



A.E. Mwipopo
Judge
08/06/2022