

**IN THE HIGH COURT OF TANZANIA
SHINYANGA DISTRICT REGISTRY
AT SHINYANGA
CRIMINAL SESSION CASE NO. 10 OF 2018**

REPUBLIC

VERSUS

1. TALANGE ROBERT @MACHIYA

2. PAUL JOSEPH @ SENDAMA @ NTUNGA

JUDGMENT

14th & 31th March, 2022.

S. M. KULITA, J.

The accused persons Talange Robert @ Machiya and Paul Joseph @Sendama @ Ntungwa stand charged with five counts of the offence of murder contrary to section 196 of the Penal Code [Cap 16 RE 2002]. The accused persons pleaded not guilty to the charge.

It is alleged that on 28th day of September, 2015 at Bugalama Village, within Maswa District in Simiyu Region, the accused persons did murder George Charles, Nchambi George, Amos George, Tuma George, and Mbuke John.

In this case the prosecution was led by Ms. Violeth Mushumbusi learned State Attorney, whereas Mr. Paul Kaunda Advocate, represented the accused persons.

In a bid to prove the case against the accused persons, the prosecution side summoned seven witnesses to testify in court. They are Robert Jabayi Machiya, SSP Joseph Ng'eve, Kezia Gerald Manyama, D/Sgt Jonas, Octavian Nyangala, D/Ssgt Laurent and Insp. Gilihonda Gesura. They testified as PW1, PW2, PW3, PW4, PW5, PW6 and PW7 respectively whose summary of their evidence is as follows;

PW1 one ROBERT JABAYI MACHIA testified that, the first accused, Talange Robert Machiya is his son who was living at Bugalama together with his wife. He said that he knows the victim George Charles who had a shop in their village. He narrated further that, it happened one day he went at the shop together with his friend namely Mwigulu Luhende to get drinks. As they were there, his son Talange Robert started a quarrel with one Jilungu. As a result, his son together with his accompany were punished for that by the "sungusungu" leader. He went on stating that, due to that punishment, his son promised something bad to George Charles who had corporated with the said "Sungusungu" to punish them. PW1 stated further that, on 27/9/2015 his son Talange Robert left the house after he had eaten the night meal. He added that, on 28/9/2015 at 0300 hours while asleep, he heard an alarm which he came to realise that it was calling from George's house. He went at the

scene and found George Charles together with his family members butchered.

The 2nd witness for Prosecution, SSP Joseph Ng'eve, who testified as PW2 stated that he is the one who arrested one Talange Robert after being spotted in Maswa at Unyanyembe street. PW2 told the court that it was Ngude Buluhayi and Christopher Kulwa who showed him who Talange Robert was. He stated that, he was at first overpowered by the accused who then ran away. However, he managed to rearrest him after he had got a help from the other people. He further testified that upon arresting him the accused asked whether he is arrested following the murder of those five people. The witness further stated that the accused, Talange went on telling him that he should know that at their (1st accused's) home premises there are three tombs too. He stated that, the accused wondered why being arrested by him (the arresting officer) for killing people who are not his relatives. PW2 went on testifying that at the police station Talange Robert told him the reason for the killing was that the wife of George Charles one Mbuke John had bewitched to death his three relatives whose tombs are there at his home premise. The witness also told the court that on the same day they managed to arrest Paul Joseph. He testified further that on the same day they got an information that another suspect, Dotto Kadala

was also arrested. On their way to fetch him, angry villagers killed him before they arrested him. For contradiction purposes, the statement of PW2 was tendered and admitted in court as Exhibit D1.

PW3 one Kezia Gerald Manyama, a retired Magistrate and Justice of Peace testified to have recorded the extra judicial statement of Talange Robert. She stated that that was on 2/10/2015. She stated further that, she started recording at 1306 and completed at 1341 hours. She added that, the accused was not inspected before adducing his statements as he himself denied. PW3 stated that, the accused told her the reason for the killing as one Mbuke had a witching habit. She added that, the accused said to have collected people whom he paid them for killing job. PW3 prayed to tender the statement in court as an exhibit. The same was received and admitted as exhibit P1. When cross examined PW3 stated that the accused did not want to write the statement by himself.

E 3076 D/SGT JONAS (PW4), 55 years old, testified that he is among the Police Officers who went to the scene of crime for investigation. He said that he inspected the scene, recorded witness statements and drew the sketch map. He told the court that, at the scene they were told that the wife of George together with one child had

been rushed to hospital in a try to save their lives. He stated that they had to go to hospital too where they found the two had died too.

While investigating on 1/10/2015 they got an information that the killers had arrived at Maswa ready for going to their home villages. He testified further that he together with ASP. Ng'eve went to arrest Talange Robert at Unyanyembe street in Maswa. He also told the court that soon after the arrest they got information on the whereabouts of the second accused one Paul Joseph and Dotto. He stated further that as they were heading to Bugalama village Paul Joseph (2nd Accused) saw the police car and started running. PW4 told the court that after a chase they managed to arrest Paul Joseph. He stated further that, while at the arresting scene, they got an information that Dotto was arrested by angry villagers and they were about to kill him. He narrated further that, they went thereto but failed to rescue him as villagers were many and angry. He added that, villagers killed Dotto and burnt his body. PW4 also said to have drawn the sketch plan of the scene with the help of one Ngude. He prayed to tender the said sketch plan as exhibit. It was received and admitted as exhibit P2.

When cross examined, PW4 said that while walking they took the accused Talange to the police station of Maswa. For the purposes of

contradicting the witness, his statement was tendered and admitted in court as exhibit D2. PW4 stated that they did not expose to the accused nor to the audience what was all about following his arrest for fear of raising people's anger. When re-examined he said that it was Ng'eve who arrested the accused.

PW5 one Octavian Nyangala a Doctor by professional testified that his duties among others is to conduct post mortem examination. He told the court that on 28/9/2015 he was needed by Police Officers to conduct post mortem examination on two bodies. Tuma George and Mbuke John were the victims' bodies he had attended. Tuma had a cut wound on her forehead which was covered with blood. Mbuke was cut into several parts of her body and her two fingers on her right arm were taken off. PW5 stated that, the victims' death was due to loss of blood. He went ahead showing that he then filed the post mortem examination and handled them to the Police Officers. He prayed to tender them to court as exhibits. The same was admitted as exhibits P3 and P4.

A police officer No. C 9598 D/Ssgt Laurent testified who testified as PW6 stated that on 2/10/2015 while at Maswa Police Station he was ordered to record the statement of Paul Joseph Sendama (2nd Accused). He told the court that, he gave the accused person his rights after which

he started recording his statement. In his narration PW6 told the court that the accused admitted to have been paid for the killing and he actually participated. He prayed to as exhibit tender to court the caution statement he had recorded. It was received and admitted as exhibit P5.

Insp Gilihonda Gesura (PW7) testified that he is among the Police Officers who went to the scene of crime together with a Doctor namely Mariam Terack. He said that, at the scene of crime, they went into the house and the said Doctor started examining the causes of deaths for the three bodies, that of George Charles, Nchambi George and Amos George. Thereby, the Doctor filled the post mortem reports and handled them to PW7. The witness added that, Doctor Terack is now nowhere to be seen. PW7 went on testifying that, on 2/10/2015 he was ordered to record the statements of Talange Robert. He stated that, he took the accused away from the custody and he informed him the reason for him being taken, his rights as well were explained. PW7 went on stating that the accused confessed to have planned, organised, paid and participated in killing George and his family. PW7 prayed to tender the post mortem reports as exhibits and they were admitted as Exhibits P5, P6 and P7. Again, PW7 prayed to tender caution statement of Talange in court as exhibit. The same was admitted as exhibit P8.

When cross examined by Mr. Kaunda Advocate the witness stated that he did not state the reasons behind his recording late the accused statement in his own statement. PW7's statement was admitted as an exhibit D2 for purposes of contradicting them.

On these seven witnesses as I said earlier, the prosecution case got closed. In terms of the provisions of section 293(2) of the Criminal Procedure Act (CPA), the accused persons were found to have a case to answer. After being addressed in terms of section 293(3) of the CPA, each accused person opted to testify alone on oath as **DW1** and **DW2**.

DW1 one Talange Robert testified that he was living at Maswana even before he was arrested. His father is Robert and his mother is Ester Mtegwa. In 2015 he was living at Maswana, he said. DW1 went on stating that he was living at their home. He said on 25/12/2014 he was at home Maswana and nothing wrong happened. He said that on that day his father was at his job premise as a Teacher in Singida. He said that on 28/9/2015 he was at home Maswana. He further said that Mwasai, Gudekwa and Bugalama are the villages located nearby a place he was living. He went on stating that it is a 30 minutes ride from where he was living to Bugalama. He further averred that it was 2014 when he went to Bugalama for the last time. He stated further that, he does not

know George Charles nor his family. Concerning the offence he is charged with, DW1 denied to have committed it. He said that Paul Sendama (2nd Accused) is just his co accused and that they met in 2015 regarding this case. He said that he was just arrested by Police at their home place, as Police officers have that duty of arresting people. He said that, he was arrested at 10:00 hours and sent to Maswa Police Station. He said again that, he was detained for three days, from 3rd to 5th of October, 2015. He narrated further that he was beaten at the police station, following that he had to confess so that he might not be killed.

When cross examined DW1 stated that he did not complain before that he was forced to confess. Again, he said that, he does not have any exhibit to prove that he was beaten. DW1 said also that he does not remember if he was recorded his statement at the police station. He stated further that he does not remember whether he stated at the police station that he lives at BugaLama. When asked by assessors he said he does not know PW1 and that Robert is the name of his uncle not his father. He said that his father is dead.

DW2 one Paul Joseph Sendama testified that he lives at Dodoma village in Maswa. He added that, he has been living in that village for

about 10 years. He said that on 25/12/2014 he was at Dodoma village in Maswa. He added that, on that day he was selling charcoal in Maswa town. He said that he uses a bicycle in his travels. He said that after he had finished selling charcoal, he just stayed at home. On 28/9/2015 he was at their home in Dodoma village. He mentioned their nearby village being Matalambuli. He told the court that, Talange Robert is just his co accused, they met each other regarding this case. He went on testifying that, he was arrested at Dodoma village as police have that duty of arresting. He said that at Maswa Police Station he stayed for a day and then taken to the investigation office for interrogation. He denied to have known any one among the victims.

When cross examined DW2 stated that, he tried to escape during the arrest as he used to drink alcohol during the prohibited hours.

That was marked the end of both parties' evidence. Counsels for both parties were given an opportunity of making final submissions. I will refer them in the course of determining the issues I have prepared to raise shortly.

In view of the above evidence, the following issues call for determination: -

1. Whether the victims were met with unnatural death (if yes)
2. Whether the accused persons are responsible for the death of the victims (if yes)
3. Whether the accused persons with intention/malice aforethought killed the victims.

According to the first issue, first it is not in dispute that George Charles, Nchambi George, Amosi George, Tuma George and Mbuke John are dead. According to the post mortem reports that were tendered and admitted in court as Exhibits P3, P4, P5, P6 and P7 the victims died following severe bleeding that was caused by multiple cut wounds on their bodies with sharp objects. This verifies that, the victims were met with unnatural deaths. As far as there is no evidence from the defense side that goes contrary to this finding, I find this issue answered in affirmative and I do not dwell much on it.

This takes me to determine the second issue, as to whether the accused persons are responsible for the murder of those five persons. In an effort to prove the case, the prosecution side relied on the following evidence; **first**, circumstantial evidence as testified by PW1, PW2 and PW4. **Secondly**, confessions the accused persons made as testified by

PW2, PW3, PW4, PW6 and PW7. In disapproving that issue, both accused persons raised the defense of *alibi*.

Assessors on their part opined that, both accused persons are responsible for the killing of the victims herein. Commenting on this opinion, I will come to it later after the following discussion below. On my side, in determining the issue, I will discuss the evidences of both sides in reliance, one after the other.

The court of appeal in the case of **Shabani Abdallah V. The Republic**, Criminal Appeal No. 127 of 2003 (unreported) stated that:

"The law on circumstantial evidence is that it must irresistibly lead to the conclusion that it is the accused and no one else who committed the crime."

The same position was underscored in so many cases. See, Also **Nkeshimana John @ Diodone V. The Republic**, Criminal Appeal No. 229 of 2005, **Seif Selemani V. Republic**, Criminal Appeal No. 130 of 2005 (both unreported), **Simon Musoke V. The Republic** [1958] E.A. 715 at 718 and **Tiper V. Republic** [1952] A.C 480, to name a few.

The main question is, does the available circumstantial evidence meet the test of the above cited principle of the law? On the testimony

of PW1, we were told that, he is the father of the 1st accused person. He testified to have witnessed the accused persons promising bad thing to the victim George Charles. That was on the day, when the accused persons were punished for disturbing customers at the victim's shop. PW1 also told the court that, he lives on the same compound with the 1st accused and that on the night of the incident, soon after meal, the 1st accused left for unknown place. He added that, at 0300 hours he heard an alarm after which he found that the victim together with his family were all butchered.

With this information, some questions ring on ears. One, if it is not the truth, why should a father testify a lie against his own son on an offence with a capital punishment? If PW1 lives with his son the 1st accused in the same compound, then why should the 1st accused leave the compound during the night soon after meal without saying bye and without returning back. Does this not convince this court to believe that, the 1st accused went to do something bad, that is why he did not say bye to his father? Does this not tell us that, the accused persons accomplished their bad mission, that is why for their own safety they decided to abscond themselves from the village?

To strengthen the evidence, PW2 also told the court that, after the crime act was done, the accused persons absconded themselves to unknown place. The place that later came to be known that, it was to the witchdoctor, in a try to cover the offence, PW2 added. PW2 stressed further that, when he arrested the 1st accused, he was overpowered by him and started to run until when the people helped him to rearrest.

With that evidence of PW2, the obvious question is, why the 1st accused person struggled and started to run away from the Police Officer who arrested him? The evidence shows that, the arrest of the 1st accused was done at a public place, Unyanyembe street in Maswa.

In his final submissions the defence counsel, complained that, the arrest was done by a Police Officer with no uniform and who did not introduce himself. But, the issue is, even if the arrest is taken to have been done by police with no uniform and who did not introduce himself, yet why should the 1st accused person try to escape from the arrest? If fear was due to the arresting officer having no uniform, are there no occasions in the village that "sungusungu", who always work with no uniform, arrest too? What actually caused his fear? Does this not tell us that, the 1st accused struggled and started running for fear of being prosecuted for murder of the victims?

Further, as according to the testimony of PW4, the 2nd accused person when he saw the police car he started running away. The obvious question one will ask is that, if the 2nd accused person has done nothing wrong, then why did he start running away in escape from just seeing a police car?

I know that both accused persons denied to have known the victims, and that on the date the crime was committed they were not in that village, and that they were carrying on their life at their villages they live.

The testimonies of the accused persons do not tell us whether they have grudges with either the police officers or the civilians who testified in court against them. Bad enough, one of the civilians, PW1 testified as a father of the 1st accused.

Taking into consideration that PW1 recorded his statement at the police station soon when the act was committed, and yet, PW1 actually came to court during trial and testified the same, this tells me that, all what PW1 testified was the truth. It follows therefore that, if PW1 had recorded a lie at the police station, he could have feared to come and testify so during trial. This is because he could have feared to meet the real father of the 1st accused person appearing to defend his son.

As for the second accused, admitted to have tried to escape by the time of arrest. He told the court that, it was because he uses alcohol during the prohibited hours, that is working time. But the same, he told the court that, during the time of arrest he was sober and that he was arrested at their home. This piece of evidence is still doubtful. The same question still remains, that if DW2 was sober and was at their home by the time of arrest, why fear of being arrested?

Upon comparing the evidences adduced by both parties to the case, I am compelled to believe the prosecution evidence. At this juncture I have to ask myself, as to what do all the raised questions tell this court? To me all the questions, that I have raised above leads to one possible conclusion, that these accused persons are responsible for the killing of the victims in this case. On that account, I am of the settled mind that, the circumstantial evidence adduced by the prosecution side in an effort to prove their case, has passed the test that has been set in the cited case of **Shabani Abdallah v. The Republic, Criminal Appeal No. 127 of 2003** (unreported).

As alluded earlier, the prosecution case also depends on the confessions made before PW2, PW3, PW6 and PW7. To these

confessions, both accused persons testified to have been tortured and forced to accept and agree to sign them.

I am aware with the position of the law that, this court has power to convict accused persons relying on the corroborated retracted/repudiated confessions. See, **Dickson Elia Nsamba Shapwata and Another v. Republic, Criminal Appeal No. 92 of 2007, Court of Appeal, Mbeya.**

"With respect, we agree with Mr. Mkumbe that, it is always desirable to look for corroboration in support of a confession which has been retracted/repudiated before acting on it to the detriment of the appellant."

Again, I am aware with the position of the law that, even when there is no evidence to corroborate the retracted/repudiated confession, still the court has power to convict solely on it, when it is satisfied according to the circumstances of the case, that the confessions are nothing but the truth. See, **Tuwamoi v. Uganda (1967) EA 84** in which it was held;

"The present rule then as applied in East Africa, in regard to retracted confession, is that as a matter of

practice or prudence the trial court should direct itself that it is dangerous to act upon a statement that has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied that in some circumstances of the case that the confession must be true. See also Hemed Abdallah v. Republic (1995) TLR 172" (Emphasis supplied).

In the case at hand, as long as the circumstantial evidence, as discussed above shows that, it is these accused persons who killed the victims, this alone suffices to corroborate the available confessions. On that account, I am of the strong view that, these accused persons are responsible for the killing of the victims.

In respect to the third issue, as to whether the accused persons killed the victims with malice aforethought, I have the following observations; Almost all the prosecution witnesses who saw the victims' bodies, testified that, they had multiple cut wounds. The post mortem reports show that, the multiple cut wounds, apart from other parties of the bodies, also involved the heads and necks which are the vulnerable parts of the human bodies. To sum up, the object used for cutting the

victims' bodies were sharp. These all were not disputed by defense side. This makes my mind settled that, the accused persons, on the material date, intended to cut the victims to death. On that account, this issue too is answered in affirmatively that, the accused persons killed the accused persons with malice aforethought.

All said and done, with this evidence, and for want of evidence from the defense to create reasonable doubt, I agree with the opinion of assessors that, the prosecution case has been proved beyond all reasonable doubts as required by the law.

In view thereof, Talange Robert @ Machiya and Paul Joseph @ Sendama @ Ntunga are hereby found guilty of the offence of murder of the five mentioned people, under the provisions of sections 196 and 197 of the Penal Code and they are accordingly convicted on all five counts.

 
S.M KULITA
JUDGE
31/3/2022

