

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT TARIME

CRIMINAL SESSIONS CASE NO. 117 OF 2021

THE REPUBLIC

VERSUS

SAMWELI S/O KOROSO SALIM @ GHATI BUHOKO

JUDGMENT

18th July 3^d August, 2022.

A. A. MBAGWA J.:

The accused herein one Samweli Koroso Salim @ Ghati Buhoko stands charged with the offence of murder contrary to sections 196 and 197 of the Penal Code.

It is alleged that the accused on the 12th day of October, 2017 at Nyamuhunda village within Tarime district in Mara region murdered one Rhobi w/o Busere Mwita (the deceased). When the accused was arraigned before this Court, he denied the charge hence the prosecution had to prove its case.

At the hearing of this case, the Republic was represented by Peter Iole, learned State Attorney whereas the accused had the services of Pili Otaigo Marwa, learned advocate.

The prosecution brought a total of four witnesses namely, PW1 PIUS CHACHA MWITA, PW2 LISO BUSERE MWITA, PW3 DEVOTA ERNEST KATUNZI and PW4 F8076 D/SGT ABDALLAH. The prosecution also, through PW3, tendered one documentary exhibit to wit, a post mortem examination report which was admitted and marked exhibit P1.

According to the prosecution evidence, the deceased Rhobi w/o Busere Mwita was, on 12th day of October, 2017 found dead under the trees at Nyamahunda village. Following the deceased's death, an alarm was raised to which the villagers responding by assembling at the scene of crime. Later the information was conveyed to the police who came at the scene of crime and took the dead body to Tarime District Hospital. On the following day, 13th October, 2017, the deceased body was examined. According to PW3 one Dr. Devota Ernest Katunzi, she observed bruises and swelling around the neck and cheek. It was therefore her conclusion that the deceased was strangled thereby confirming the deceased's unnatural death. PW3 tendered a post mortem examination report (Exhibit P1) in which she recorded her findings.

It was further the prosecution evidence through PW1 Pius Busere Mwita, the deceased's son that on the night before the deceased was found dead, the accused was with the deceased. PW1 stated that on 11th October, 2017 in the evening, her mother, the deceased left home to look for food. Later at around 20:00hrs, the deceased came back in the company of the accused who was her longtime lover. The deceased knocked the window and PW1 who was already asleep got up and opened the window. Then the deceased gave PW1 some rice and shoes through the window. The deceased then left with accused and never returned home on that night. PW1 stated that while giving him the items, her mother (the deceased) was crying/ sobbing whilst the accused was insisting her to hurry up. Further, PW1 stated that the deceased and accused had love relationship and more often than not the accused used to sleep at the deceased's home. PW1 clarified that the deceased was married to Busere Mwita through *nyumba mboke* rites (custom which allowed her to establish sexual relationship and have children with another man/men on behalf of her husband).

It was further the testimony of Pius Busere (PW1) that when he woke up in the fateful morning, he noted that his mother did not return home hence he went and informed his brother Liso Busere (PW2) of the deceased's absence and thereafter left for school. While at school, at around 10:00hrs he was followed by his uncle Charles Marwa who asked him to go back home. On returning home, he found a horrible incident of his mother's death.

The evidence of PW1 was corroborated by PW2 Liso Busere who told the court that before Pius Busere (PW1) left for school, he passed by him and told him that his mother (deceased), left with the accused last night but did not come back. PW2 continued to narrate that a little later, while in his farm, he heard an alarm to which he responded. Upon arrival at the scene, he found the deceased Rhobi w/o Busere laying under the trees while dead. PW2 also confirmed that the accused had love relationship with the deceased. He also identified the accused in dock. Moreso, PW2 told the court that after the demise of Rhobi w/o Busere, the accused disappeared in the localities until later after three years i.e., 31st August, 2020 when he was arrested by the deceased's relatives.

PW4's evidence was to the effect that the accused was arrested and brought to Sirari Police Station by the deceased's relatives in collaboration with the police on 31st August, 2020 after he was traced for long time to no avail.

In defence, the accused fended for himself under oath. Further, the defence brought in evidence one document namely, statement of Pius Busere (PW1) during cross examination of PW1.

In a nutshell, the accused denied the allegations. He disputed his presence at the deceased's home on 11th October, 2017 and refuted to have been with the deceased on the night before the fateful day. He further denied to have ever had love relationship with the deceased. The accused stated that from 11th October, 2017 he was busy attending his sick wife. He recounted that on 11th October, 2017 when he returned home in the evening from his routines, he found his wife one Joyce Samweli sick hence he took her on bicycle to Nyakubuterere Health Centre where she was admitted. He stated that he left Joyce at the hospital and returned home at night to take care of children who were left without a guardian. On the following day i.e., 12th October, 2017 he went back to visit his wife at Nyakubuterere but owing to

pregnancy complications which Joyce had, he was advised by the doctor to take her to Tarime District Hospital. The accused thus brought his wife to Tarime District Hospital where she was hospitalized and later operated. Unfortunately, the baby was delivered dead. He thus took the miscarried baby and went to bury it at his home village. The accused further stated that he briefly attended the deceased's funeral for about half an hour and left to take care of his wife who was still hospitalized at Tarime District Hospital. Further, the accused denied to have fled his home after the incident.

During final submissions, Ms. Pili Otaigo Marwa, learned counsel submitted that there was no dispute that the deceased died unnatural death but the question was who caused that death? The learned defence counsel said that it was incumbent upon the prosecution to prove the case beyond reasonable doubt whereas the accused's duty was just to raise reasonable doubt. Ms. Pili Otaigo Marwa relied on the case of **Longinus Komba vs Republic** 1973 LRT page 39 to fathom her argument.

The learned defence counsel contended that the whole prosecution evidence is circumstantial as such it ought to irresistibly lead to an

inference that it is no other person but the accused who committed the offence. On this, the defence counsel relied on the case of **Ally Bakari and Pili Bakari vs Republic**, 1992 TLR 10. Further, the learned counsel argued that in circumstantial evidence, the evidence of single witness is not enough to ground conviction. She cited the case of **Christina Kale and another vs Republic**, 1992 TLR 302 305 in support of her position.

In addition, Ms. Pili Marwa lamented that the prosecution seeks to rely on the principle of the last person to be seen with the deceased but it failed to establish as to when the deceased met her death as such it is not known whether there was another person who met the deceased apart from the accused. The counsel was opined that the prosecution was required at least to parade a witness from the pub at Mtimrabu where the deceased used to drink.

Furthermore, it was the counsel's submission that the evidence of PW1 Pius Busere ought to be corroborated and since there was no corroboration, given the circumstances in which he allegedly saw the accused and the deceased at night, it cannot be said that there was proper identification of the accused.

Ms. Pili Marwa concluded that the prosecution did not prove the case against the accused to the hilt hence she prayed the court to find the accused not guilty and consequently acquit him.

Mr. Iole, learned State Attorney, on behalf of the Republic, told the court that the whole case is based on the doctrine of the last person to be seen with the deceased. He said that considering that the accused was with the deceased at night as testified by PW1, it goes without saying that the accused is responsible for the deceased's death in absence of plausible explanations. Mr. Iole expounded that PW1 extensively explained the circumstances in which he identified the accused and maintained the same version during cross examination. He was thus opined that there were favourable conditions for proper identification.

With regard to the credibility of PW1, Mr. Iole beseeched the court to consider the oral testimony of PW1 who stated that his statement was recorded at the time when he still had sorrow for his mother's death and that he did not know to write and read at that time.

In addition, the learned State Attorney invited the court to take into account the conducts of the accused after the incident. Mr. Iole said that

PW1, PW2 and PW4 testified that after the incident, the accused disappeared. He also claimed that the accused's demeanour was highly shaken during cross examination, as he failed to answer some of the questions and most of time, he was turning his head down. Mr. Ilole added that DW1 also admitted that he did not go to visit the deceased's relatives after the funeral ceremony though it was their norm.

Further, the learned State Attorney prayed the court to find PW1 reliable as he timely reported the deceased's absence to PW2.

On the strength of the prosecution evidence, Mr. Ilole was of the strong views that the prosecution case was proved beyond reasonable. As such, he beseeched the court to find the accused guilty and consequently convict him.

To start with, there is no dispute in this case that the deceased died unnatural death. What is contested is the responsible person for the death.

Again, as rightly submitted by both counsel, there is no direct evidence in this case. The whole case is dependent on circumstantial evidence in particular on the principle of the last person to be seen with the deceased. PW1 and PW2 both testified that the accused and the deceased are

longtime lovers and that the accused, sometimes, used to stay at the deceased's home. PW1 clearly told the court that on the night preceding the fateful day, the accused was seen with the deceased. PW1 clarified that the accused went at their home with his mother (deceased) and then left together but the deceased did not return home. According to the prosecution evidence, the last person to be seen with the deceased is the accused.

I had an advantage of observing PW1 while testifying. Indeed, he was composed and consistent throughout his testimony. I thus believed him that the accused and deceased were together on the night preceding the fateful day. The law on the doctrine of a last person to be seen with deceased is to the effect that where 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. See **Mathayo Mwalimu and another vs the Republic**, Criminal Appeal No. 147 of 2008, CAT at Dodoma.

In this case, the accused did not provide any explanation let alone plausible one on the circumstances leading to the deceased's death. Instead, he denied being with the accused person.

The evidence of PW1 was further corroborated by PW2 Liso Busere Mwita who confirmed that before PW1 left for school he told him that on the last night the deceased left with accused and did not return. In addition, the accused's conducts after the incident augmented PW1's evidence. It was the prosecution evidence that the accused disappeared immediately after the deceased's death. Admittedly, his conduct of disappearance was incompatible with innocence.

Ms. Pili Otaigo invited this court not to rely on PW1 in that his evidence was not corroborated. Pili further tendered the witness statement (defence exhibit 1) in a bid to show contradictions between his testimony and previous statement particularly on the source of light that enabled PW1 to identify the accused when he went at PW1's home with the deceased. The learned defence Counsel said that PW1 stated at police that he saw the accused by the aid of moon light whereas in his testimony he testified that there was solar light.

In rebuttal, Mr. Iole, learned State Attorney replied that there were favourable conditions which enabled PW1 to properly identify the accused. Further, Mr. Iole insisted that PW1 was firm and consistent throughout his testimony, as such he deserved credence.

It should be understood that not every difference between the testimony and the witness previous statement injures the witness credibility. It depends on the nature and extent of disparity as well as the circumstances under which his statement was recorded. In **Abdallah Rajabu Waziri vs the Republic**, Criminal Appeal No. 116 of 2004, CAT at Tanga, it was held that where a witness testifies what he did not say at police, such anomaly is not necessarily fatal as he may not have been asked such question at police. I had an opportunity to navigate through the witness statement (defence exhibit 1) but I could not see monumental difference. The statement is so brief and PW1 testified that he was recorded at the scene of crime when he still had fresh sorrow of his mother's death. It is very likely that PW1, given his age at that material time, was not interviewed in details on what aided him to identify the accused. In view thereof, I find the inconsistency to be minor.

With regard to corroboration of PW1's evidence as contended by the learned defence counsel, it is important to note that there is no rule of law, statutory or case law that requires corroboration of PW1's evidence. As I said above, I assessed the demeanour of PW1 during his testimony and I was satisfied that the witness was telling truth. I therefore believed his testimony that the accused was the last person to be seen with the deceased and since the accused failed to offer plausible explanations of the circumstances leading to the deceased's death, he is presumed the killer of the deceased Rhobi w/o Busere Mwita.

That said and done, I find the accused Samweli Koroso Salim @ Ghati Buhoko guilty of the offence charged and consequently proceed to convict him of murder contrary to sections 196 and 197 of the Penal Code.

It is so ordered.

Right of appeal is explained.




A. A. Mbagwa

JUDGE

03/08/2022