IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT TARIME

CRIMINAL SESSIONS CASE NO. 84 OF 2021

THE REPUBLIC

VERSUS

1. **PAULO S/O CHACHA @ MWITA**
2. **OCHIENG S/O MAGWEGA @ CHACHA S/O MARWA**

JUDGMENT

11th July & 3rd August, 2022.

A. A. MBAGWA J.:

The accused persons namely, PAULO CHACHA MWITA and OCHIENG MAGWEGA @ CHACHA MARWA were jointly arraigned and charged with one count of murder contrary to sections 196 and 197 of the Penal Code.

The particulars of information are to the effect that the accused persons on 22nd day of May, 2020 at Mbalageti river within Serengeti National Park in the district of Serengeti and Mara region murdered one Donald Masumbuko Saidi.

Upon their arraignment before this Court, both accused persons denied the charge hence the matter proceeded to a full trial.

To establish the allegations, the prosecution paraded five witnesses namely, PW1 E3076 D/SGT JONAS, PW2 EMMANUEL HERIEL MRISHA, PW3

OMARY ALLY NYALE, PW4 H3104 D/C ELIKUNDA and PW5 DR. LEAH FURAHINI MNANGO. In addition, the Republic tendered two documentary exhibits namely, caution statement of the 2nd accused and post mortem examination report which were received and marked exhibits P1 and P2 respectively.

In brief, the prosecution account was to the effect that on the 22nd day of May, 2020 at night the deceased one Donald Masumbuko together with other park rangers including **PW2 EMMANUEL HERIEL MRISHA, PW3 OMARY ALLY NYALE** were conducting patrol at Mbalageti river area within Serengeti National Park. In the course, they observed torch light which they decided to pursue suspecting it to come from poachers. They thus advanced towards the light. While approaching the area, they suddenly heard a gunshot to which they responded by exchanging the firearms. In a few seconds they realised that that their fellow Donald Masumbuko, the deceased had been shot and injured. It was the testimony of PW2 and PW3 that following the shooting of their fellow, they did not further pursue the suspected poachers instead they concentrated on rendering assistance to their injured fellow. They thus, ferried Donald Masumbuko to the police station to obtain a PF3 and later submitted him to

Bunda Designated District Hospital. As the situation persisted, Masumbuko was referred to Bugando hospital and later to Muhimbili National Hospital where he met his death. According to the evidence of PW5 Dr. Leah Furahini Mnango, a pathologist at Muhimbili National Hospital who conducted post mortem examination of the deceased, the deceased death was caused by severe anaemia, septicaemia post leg amputation due to gunshot. PW5 tendered a post mortem examination report (exhibit P2) in which she recorded her findings.

PW2 and PW3 clearly stated that they did not identify their assailants at the scene of crime because it was dark. However, it was the prosecution's contention that the 2nd accused confessed the offence and mentioned his co-culprits. PW4 H3104 D/C ELIKUNDA told the court that on 15th day of July, 2020 he interviewed Ochieng Magwega (2nd accused) and recorded his statement. PW4 tendered the caution statement of Ochieng Magwega and the same was received and marked as exhibit P1.

In the said caution statement (exhibit P1), Ochieng Magwega states that on 22nd day of May, 2020 he, in the company of Paul Chacha, Muhili Magwega and one Mgembe went for poaching within Serengeti National Park while equipped with two bicycles, torch and a gun which was carried

on by Muhili Magwega. He further states that, in the course of poaching between 03:00hrs and 04:00hrs they suspected some people were tracing them as such, Muhili Magwega decided to shoot towards the direction where the park rangers were suspiciously standing. Consequently, the park rangers responded by firing at them. Following the exchange of gunfire, they ran away while leaving their equipment aside.

In defence, the accused persons who are brothers fended for themselves without calling other witnesses. They denied the allegations and raised a defence of *alibi*. Further, they strongly disputed the testimony of PW4 H3104 D/C ELIKUNDA as well the contents of the caution statement (exhibit P1).

DW1 Paulo Chacha Mwita stated that he was arrested on 23rd day of May 2020 at Malunde pub within Lamadi and later taken to Serengeti National Park. While at Serengeti National Park, he was brought some papers and asked to sign them. He said that he refused to sign the papers but he was threatened to be shot hence he forcibly signed the papers. DW1 told the court that he did not go to school as such, he is illiterate. Further, he testified that the 2nd accused Ochieng Magwega Chacha Marwa is his brother but he never mentioned anywhere that they are the ones who

killed the deceased. It was the DW1's evidence that having been forced to sign the papers he was locked in a room until at around 20:00hrs when he was removed and taken to Bariadi Police Station. In fact, DW1 denied to have been in the National Park on the fateful day as alleged by the prosecution. He said that he spent the whole night of 22nd May, 2020 at his home in Lukungu village.

Similarly, DW2 Ochieng Magwega Chacha Marwa vehemently denied the allegations and raised a defence of ***alibi.*** He testified that he spent the whole night of 22nd May, 2020 at his home in Lukungu village. He stated that he was arrested on 15th July, 2020 at night while at his home Lukungu village within Busega district in Simiyu region. He said that upon his arrest, he was conveyed to Lamadi Police Station where he spent the night and on the following day i.e., 16th July, 2020 he was submitted to Bunda Police Station. While at Bunda Police Station at around 22:00hrs, he was taken to the interrogation room and forced to sign the papers. He disowned the caution statement (exhibit P1) stating that he was forced to put his thumb print on the papers without knowing its contents. DW2 specifically stated that he spent the whole night of 22nd May, 2020 at his home.

Upon closure of the case for both prosecution and defence, the learned counsel for both sides had an opportunity to make their final submissions.

Mr. Paul Obwana, learned counsel for the defence was opined that the prosecution case was not proved to the required standard. He said that of all five prosecution witnesses, no one saw the accused killing the deceased. He further contended that the whole prosecution case rested on circumstantial evidence but the same was too scanty to ground conviction. The counsel pointed out that the only piece of evidence which somehow implicates the accused is caution statement of the 2nd accused, Ochieng Magwega @ Chacha Marwa but he was quick to remark that the caution statement seriously suffers fundamental anomalies which critically dent its probative value.

The learned defence counsel argued that the caution statement (exhibit P1) was taken under section 58(4) of the Criminal Procedure Act but the evidence tells it all that it is the police officer who followed the accused in the remand and took him to record the statement. The counsel contended that section 54(4) requires the accused/suspect to voluntarily initiate the process himself i.e., the suspect should be the one to tell the police that he needs to record the statement but, in this case, the counsel lamented that

it is the police officer who compelled the accused to record the statement. In that regard, Mr. Obwana submitted that the caution statement should be disregarded as it was taken contrary to the mandatory dictates of the law.

Still assailing the caution statement, Mr. Obwana told the court that section 53(b) of the Criminal Procedure Act requires a police officer to inform the suspect of the offence and law under which he is charged but in exhibit P1 this requirement was not complied with. He said, exhibit P1 is blank on the space where the accused was to be informed of the offence charged.

Mr. Obwana submitted that the prosecution ought to prove four elements; one, that the deceased died, two, that the death was unnatural, three, that the deceased was unlawfully killed and four, that it is the accused in this case who intentionally killed the deceased. It was the strong view of the defence counsel that the prosecution failed to prove the fourth element to wit, that it is the accused who murdered the deceased.

In fine, the defence counsel submitted that the prosecution side has failed to prove the case beyond reasonable doubt hence he prayed the Court to enter an acquittal verdict for both accused.

In reply, Mr. Peter Ilole, learned State Attorney for the Republic was confident that through five witnesses and two documentary exhibits, the prosecution case was proved to the hilt. The learned State Attorney submitted that it is undisputed that the deceased, Donald Masumbuko died unnatural death and the cause of death came from the incident of 22nd May, 2020.

Mr. Ilole contended that the prosecution proved the case against both accused through a caution statement (exhibit P1) in which the 2nd accused Ochieng Magwega confessed the offence and mentioned his confederates including the 1st accused Paulo Chacha Mwita. Mr. Ilole cited sections 27(1) and 33(1) of the Evidence Act and implored the Court to use the caution statement to convict the accused. Mr. Ilole elaborated that section 27(1) permits a confession statement before the police officer to be used in court. He further argued that in terms of section 33(1) of the Evidence Act, exhibit P1 is capable of grounding conviction against the 1st accused.

Replying to the complaint that the 2nd accused was not informed of the offence and the law under which he was charged in exhibit P1, the learned State Attorney submitted that section 53(b) of the Criminal Procedure Act

only requires a suspect to be informed of the offence but not the section and law.

With respect to the attacks in relation to section 58(4) of CPA, Mr. Ilole responded that it was a total misconception for the mentioned provision as it does not talk about the suspect volunteering the statement rather, it is section 58(1) which requires a suspect to volunteer the statement. Mr. Ilole concluded that there was nothing wrong in citing section 58(4) in the caution statement (exhibit P1).

The learned State Attorney argued that there is no dispute that the 2nd accused was arrested immediately after the incident and that according to exhibit P1, the 1st accused fled after the incident. Further, Mr. Ilole criticized the evidence of the 2nd accused stating that apart from his oral testimony, there is no corroboration as to where he was before the arrest.

Mr. Ilole was therefore of the view that based on the evidence of five witnesses and upon considering the circumstances obtaining in the case, the case was proved beyond reasonable doubt. He clarified that although the accused were not the ones carrying gun, the incident occurred in the same transaction hence they are both responsible for the offence.

Having appraised the evidence of both sides and upon considering the submissions by the learned counsel, the germane question for determination is whether the prosecution has proved the case to the required standard against the accused.

It is common cause that there is no direct evidence in this case as such, the whole prosecution case is dependent on circumstantial evidence. Whereas circumstantial evidence is acceptable, it should meet certain conditions in order to be relied upon. In the case of **Awadhi Gaitani @ Mboma vs the Republic,** Criminal Appeal No. 288 of 2017, CAT at Dar es Salaam, the Court recapitulated the following conditions for basing conviction on circumstantial evidence;

i. *That the circumstances from which an inference of guilty is sought to be drawn must to be cogently firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused and that 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 non-else (See* ***Justine Julius and Others vs Republic,*** *Criminal Appeal No. 155 of 2005 (unreported).*

ii. That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no existing circumstances which would weaken or destroy the inference [See, ***Simon Msoke vs Republic*** *(1958) EA 715A and* ***John Magula Ndongo vs Republic,*** *Criminal Appeal No.18 of 2004 (unreported)].*

iii. That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. (See ***Mathayo Mwalimu and Masai Rengwa vs Republic*** *(supra).*

iv. That each link in the chain must be carefully tested and, if in the end it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. (See ***Samson Daniel vs Republic*** *(1934) E.A.C. A 154).*

v. That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person (See ***Shaban Mpunzu @Elisha Mpunzu vs Republic,*** *Criminal Appeal No. 12 of2002 (unreported).*

vi. That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See ***Ally Bakari vs***

Republic *(1992) TLR 10 and* ***Aneth Kapazya vs Republic,*** *Criminal Appeal No. 69 of 2012 (unreported).*

In the instant case, the only incriminating piece of evidence is the caution statement of the 2nd accused (exhibit P1). The defence counsel assailed the caution statement stating that the accused was only informed of the offence without mentioning the provision of law under which he was charged. Mr. Obwana strongly submitted that this was contrary to section 53 of the Criminal Procedure Act. In contrast, Mr. Ilole countered the argument. Ilole submitted that it is not a requirement of law to mention the section under which the offence is created instead what is required is to inform the suspect of the offence he stands charged. He concluded that since the accused was informed that he was accused of murder, the caution statement is in all fours of the law. Section 53(b) of the Criminal Procedure Act provides as follows;

> *'The person has been informed by a police officer, in a language in which he is fluent, in writing and, if practicable, orally, of the fact that he is under restraint and of the offence in respect of which he is under restraint; and....'*

From the foregoing provision, it is very clear that there is no express requirement to mention the section under which the offence is created.

What is required by law is for the recording officer to inform the suspect of the offence he stands accused. In the caution statement (exhibit P1), there is no gainsaying that the recording officer at page 2 duly informed the accused that he was suspected of committing murder.

In the event, I agree with the State Attorney that section 53(b) was duly complied with.

Further, Mr. Obwana challenged the caution statement on the ground that it was taken under section 58(4) of the Criminal Procedure Act whereas the accused did not volunteer to give his statement. In reply, Mr. Ilole, the learned State Attorney said that there was no fault in citing section 58(4). I have carefully read the caution statement (exhibitP1) and indeed, I am of the considered view that the statement was properly recorded under section 58 of the Criminal Procedure Act. This is because, according to the statement, it is the accused himself who offered the information. There was no solicitation by the recording officer. Mr. Obwana's complaint would have been maintainable if the statement had been taken by way of questions and answers. Since the statement is in a narrative story, this connotes that it was wholly volunteered by the accused. See the case of **Festo Mwanyangila vs the Republic**, Criminal Appeal No. 225 of 2012,

CAT at Iringa and **Yustas Katoma vs the Republic**, Criminal Appeal No. 242 of 2006, CAT at Mbeya.

The 2nd accused, during his defence, retracted the statement (exhibit P1). He said that upon his arrest and while at Bunda Police Station he was forced to sign the papers of which contents he did not know. With due respect, this complaint cannot be entertained because it was not raised at the right moment. In fact, the defence ought to have raised it during the admission of the statement so that the court could have conducted trial within trial in order to ascertain the truth of the allegation. Retracting the statement during defence is an afterthought. See the case of **Azizi Mohamed and another vs the Republic**, Criminal Appeal No. 15 of 2006, CAT at Mtwara.

As hinted above, the only evidence implicating the accused is the caution statement (exhibit P1). Now, the next issue I find relevant to address is whether it is sufficient and safe to ground conviction based on the lone statement.

The 1st accused, in his testimony, denied to have been arrested within Serengeti National Park. He stated that he was arrested at Malunde Bar which is within Lamadi in Busega district on 23rd May, 2020 and thereafter

he was taken to Serengeti National Park. He maintained that on the alleged fateful day i.e., 22nd day of 2020 he was at the farm harvesting rice. The prosecution did not see the need to bring an arresting officer at least to tell the court at what time, place and circumstances in which he arrested the 1st accused person. Further, DW1 was not cross examined on the date and place of arrest. Moreso, when asked by the court, PW3 OMARY ALLY NYALE said that on the following day after the incident, the park rangers recovered phone and bicycles which were allegedly abandoned by the assailants at the scene of crime. Surprisingly, these items were not brought before the court to corroborate the contents of the caution statement (exhibit P1) nor was DNA tested to link them with the accused.

Owing to the circumstances obtaining in this case as explained above, I find it unsafe to convict the accused based on the caution statement (exhibit P1).

In the event, it is my findings that the prosecution has failed to prove the case beyond reasonable doubt. As such, I find both accused persons not guilty of the offence they stand charged and consequently, I acquit both PAULO CHACHA MWITA and OCHIENG MAGWEGA @ CHACHA MARWA of murder.

It is so ordered.

Right of appeal is explained.

A. A. MBAGWA

JUDGE

03/08/2022

This judgement has been delivered this 3rd day of August, 2022 in the presence of Ms. Monica Hokororo and Peter Ilole for Republic, Ms. Frida Makaya holding brief for Obwana, learned defence advocate and both accused.

A. A. MBAGWA

JUDGE

03/08/2022