

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

(AT SONGEA)

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO 23 OF 2022

REPUBLIC

VERSUS

TWAIBU MOHAMED NGINDO.....1ST ACCUSED

SADALA SHABANI MCHOPA.....2ND ACCUSED

MUSA ZUBERI AMURI KATANJE.....3RD ACCUSED

JUDGEMENT

Date of last Order: 29/08/2022
Date of Judgement: 28/09/2022

MLYAMBINA, J.

The Accused persons, Twaibu Mohamed Ngindo (first Accused), Sadala Shabani Mchopa (second Accused) and Musa Zuberi Amuri Katanje (third Accused) are jointly charged with the offence of murder contrary to *sections 196 and 197 of the Penal Code [Cap 16 Revised Edition 2019]*. It was stated in the particulars of the offence that; on 12th September, 2020 at Lutheran Church-Majengo Area within Songea Municipality in Ruvuma Region the Accused persons did murder one Rashidi Ally Machupa. Upon

been arraigned before this Court, the Accused persons pleaded not guilty to the charge.

At the date scheduled for the hearing of the case Mr. Lugano Mwasubira, Senior learned State Attorney appeared for the Republic while the first Accused person was represented by Mr. Makame Sengo learned Advocate, second Accused represented by Mr. Lazaro Simba, learned Advocate and Ms. Neema Nyagawa, learned Advocate appeared for the third Accused person. The prosecution paraded nine (9) witnesses and tendered eight (8) documentary evidence to prove their case, on the other hand the Accused persons defended themselves.

The deceased workmate one Godfrey Martine Nanga (PW1) testified that; on 12th September, 2020 he was on duty at KKKT Songea Town with Rashid Machupa, the deceased. The later was stationed at the Kindergarten area holding a gun while PW1 remained at the main gate using a wooden club (kirungu). Around 00:00 hours, PW1 went to the Kindergarten area but he did not see the deceased. When he reached at the meeting hall, he saw the deceased clothes scattered on the ground. While wondering, he saw three people running away. Later, one of them started to chase him. He managed to escape while screaming for help.

Furthermore, PW1 added that the guards who were guarding out of the KKKT wall went to help him. Few metres from the meeting hall, they found Rashidi Machupa dead already. There were injuries on the deceased's head. Beside him, there was a triangle shape stone and one side was stained with blood. The gun was one pace from where the deceased was lying. They informed the Evangelist one David Kamnyoge who phoned the leader of the security guard. Later on, Police Officers arrived, they inspected the scene of crime and took away the deceased and the stone.

PW1 evidence was supported by Laban Wilson Kamnyoge (PW2) a KKKT evangelist who told this Court that; on 12th September, 2020, he was awoken by PW1 and got informed that they were invaded and his co worker was killed. He got out and saw the deceased body lying. The deceased had injuries on his head and blood was spready around the area. Beside the deceased body, there was a triangle shaped stone stained with some blood. He said that the deceased was hit by a stone at his head. He informed the Ilonges Security Guard Office and the Central Police Station. They recorded their statement to the Police Officers. The deceased and the stone were taken by the Police Officers.

G 8051 D/CPL Tryphone (PW3), a Police Officer working at Songea Central Police as an exhibit keeper and picked up properties "mali za kuokota" testified that; on 12th September, 2020, he received a stone linked with a murder case No. SO/IR/3330/2020. The stone had a triangular shape and blood stain at one side. He registered the stone in PF 16 Court Exhibit Register and assigned it as Exhibit No. 348/2020. He stored the stone to date. On cross examination, PW3 added that; he does not know if the blood stain at the stone was a human blood; and that it was PC Ramadhani who brought the stone to him.

PW4 H 4680 DC Zawadi, an investigation Police officer affirmed that; on 21st October, 2020 he was summoned by OC CID ASP Kulwa Misogalya and been ordered take the Accused persons to the Justice of Peace for confession. The Accused were Sadala Shaban Mchopa (second Accused) and Twaibu Mohamed Ngindo (the first Accused). He was accompanied by D/C John now CPL John. They took them to Honourable Goodluck Kelvin Ndimbo (PW5). His evidence was corroborated by PW5 who told this Court that; on 21st October, 2020 while at his working place at Mfaranyaki Primary Court, he received and recorded the confession of the first and second Accused separately. They told him that no one forced the Accused persons to confess. The confession was at their own will.

Through the extra judicial statement, the Accused persons confessed to kill the deceased.

Furthermore, PW6 Assistant Inspector Omary, testified that; on 15th October, 2020 he was summoned with DC Benson to the OC CID who ordered them to go at Njombe to arrest the persons who were involved on murder case at KKKT Lutheran Church Songea. They brought the Accused Persons on the same date.

PW7 E 8161 D/Sgt Musa, told this Court that; on 26th February, 2021 while at his working place, Musa Zuberi was brought by the citizen who accused him for theft. He recognised him to be the one mentioned by Twaibu Ngindo and Sadala Shaban that he was involved in murder case No. SO/IR/33/30/2022. He locked him up. He knew the third Accused by face and name.

PW8 E 5154 D/Sgt Timoth Philimon Mabuga testified that; he was one among the Police Officers who arrested the first and second Accused at Njombe. Upon interrogation they confessed to be involved into house breaking. They explained further that they were three but one of them was arrested by Civilian and he was burnt, unfortunately he died during treatment. On 15th October, 2020 they received an information that the Accused whom they arrested had a murder case at Songea.

PW9 Assistant Inspector Said Madila testified that; on 12th September, 2020 night hours while on duty, he received an information from one Laban Wilson Kamnyoge, Evangelist at Songea KKKT Lutheran Church, that there was a murder incident which happened at their Church. He informed OC CID and went to the scene of crime. While there, they saw a dead body behind a meeting hall. The deceased had a big wound at the head and behind the body there was a big stone stained with blood. PW9 was the one who drew the sketch map of the scene of crime. They took the body to the Hospital and headed to the Police Station.

Moreover, PW9 was the one who recorded the Accused person's caution statement. He recorded their cautioned statements by their own free will as per *section 58 of the Criminal Procedure Act [Cap 20 Revised Edition 2019]*. During cross examination, PW9 replied that; he received the Post mortem examination report from Dr. Renatus Massawe but he was absent when the post mortem was conducted.

On defence side, the Accused persons testified as DW1, DW2 and DW3 respectively. The Accused persons denied to be involved in killing the deceased person. While being led by Mr. Makame Sengo learned Advocate, DW1 told this Court that, he was arrested at unknown Street at Njombe as a wanderer "Mzururaji" on 6th October, 2020. He was kept

under custody until 15th October, 2020 when he was joined with unknown person then transferred to Songea Central Police Station.

DW1 testified further that; on 16th October, 2020 he was taken to detection office where he claimed to be tortured and threatened to be killed with a gun so that he confessed to kill the deceased. He admitted to be taken to the Justice of Peace but he did not confess. Instead, he told the Justice of Peace that he was tortured severely by the Police Officers. He denied to know his Co- Accused but admitted to have seen them at Prison in 2021. During cross examination, DW1 said that, he was arrested alone. He was not interrogated; they just took his particulars before been compelled to sign.

DW2 one Sadala Shabani Mchopa told this Court that; he was arrested on 6th October, 2020 at Milango Minne Njombe Region due to the fight. He stayed at Njombe Police Station for ten days. On 15th October, 2020, he was joined by the first Accused (DW1) and they were transferred to Songea Central Police Station. On 16th October, 2020, he was taken to the Interrogation room where he claimed to be tortured. On 21st October, 2020 they took him to the Justice of Peace where he never confessed. He even never gave his statement at Police Station. He refused to know the first and third Accused. During the cross examination, DW2

insisted that he was not involved in the killing of the deceased; and that he was living with his brother at Njombe since 5th April, 2020.

DW3 one Musa Zuberi Hamuli @ Katanje while led by Ms. Neema told this Court that; on 26th February, 2021, while at his home, six people invaded at his house and arrested him on theft case. They took him to the Central Police Station and opened a charge of theft against him. At Police Station, he gave his particulars before been returned to the rock up. On 30th March, 2021 he was joined by the first and second Accused and arraigned to the Court where information of murder was read to them. He insisted not to be responsible for the murder of the deceased.

After scrutinizing the whole evidence paraded by both parties, this Court is of the finding that; the issues to be determined in this case are: *First*, whether the Accused persons are the ones who killed the deceased. *Second*, whether the Accused persons killed the deceased with malice aforethought. The offence of murder requires the standard of proof beyond reasonable doubt as per *section 3 (2) (a) of the Evidence Act [Cap 6 Revised Edition 2022]*. This was insisted by the Court in the case of **Hamisi Mbwana Suya v. The Republic** [2017] TLR 160. In the case of **Hemed v. Republic** [1987] TLR 117, the Court stated that:

...in criminal cases the standard of proof is beyond reasonable doubt..

Furthermore, that burden rests on the prosecution shoulders. This was the position in the case of **Antony Kinanila and Another v. The Republic**, Criminal Appeal No. 83 of 2021, Court of Appeal of Tanzania at Kigoma (unreported), where the Court had this to say:

It is trite that, the prosecution is required to prove all the ingredients of murder in order to win a conviction. The said ingredients which the prosecution must prove beyond reasonable doubt are:

- i) That the deceased is really dead.*
- ii) That the death was caused by someone unlawfully.*
- iii) That there was malice aforethought and*
- iv) That the Accused person directly or indirectly took part in commission of the murder.*

In the light of the afore principle, the Court is of the findings that Rashid Ally Machupa is real dead. He was unlawfully killed by someone who did that with malice aforethought. From the record, the deceased died after being hit by a stone at his head. The weapon used and part of the body upon which the injury was inflicted explain clearly the intention

of the killer. See the case of **Bakari Rajabu Bakiri v. Republic**, Criminal Appeal No. 292 of 2021, Court of Appeal of Tanzania at Mtwara (unreported). The vital question is; who killed the deceased.

From the evidence gathered from the prosecution side, this case relied solely on cautioned statements (Exhibit P7 and P8) of the Accused persons. The Court on different occasion has warned itself on the danger of grounding the conviction based on repudiated or retracted confession of an Accused person. In the case of **Tuwamoi v. Uganda** (1967) EA 84, the Court held that; the trial Court should accept a retracted or repudiated confession after being satisfied that what is contained in the statement is nothing but the truth. It would be much better if the said cautioned statement could be corroborated though it is not mandatory.

More so, in the case at hand, there is no any direct evidence which link the Accused person with the murder of the deceased. The Accused persons confessed to have killed the deceased in their extra judicial statements. During the hearing of the defence case, the Accused persons on a different occasion alleged to be tortured and threatened to be killed. In order to serve their life, they confessed to have been involved in the killing of the deceased. They tendered no any tangible evidence to cast doubt on the prosecution evidence. Furthermore, the first and second

Accused persons did not object the tendering and admission of the caution statements as exhibits to support the prosecution evidence.

Apart from the cautioned statements, the first and second Accused persons confessed to kill the deceased before the Justice of Peace (Exhibit P3 and P4). They mentioned the incident of being tortured by Police Officer during the interrogation. But, they still confessed to kill the deceased. The relevant law regarding the admission of Accused confession is; any statement/confession is presumed to be voluntary recorded unless the defence side objects it for been made involuntarily or not made at all. The same position was reached in the case of **Nyerere Nyague v. The Republic**, Criminal Appeal No. 67 of 2010, Court of Appeal of Tanzania at Arusha (unreported).

The Accused Persons were afforded the opportunity to challenge the admissibility of the Caution statements and extra judicial statements but they denied their own right. The law requires that; in absence of any objection to the admission of statement during its admission, the Court can not hold the inquiry *suo motto*. This was the position in the case of **Stephene Jason and Another v. Republic**, Criminal Appeal No. 79 of 1999 (unreported); **Selemani Hassani v. Republic**, Criminal Appeal No. 364 of 2008, Court of Appeal of Tanzania (unreported) as cited in the case

of **Enock Beni @ Mbogo v. Republic**, Criminal Appeal No. 217 of 2021, High Court of Tanzania at Dar es Salaam (unreported). Indeed, if an accused intends to object to the admissibility of a statement or confession, he must do so before it is admitted, and not during cross examination or during defence See: **Shihoze Seni v. R**, (1992) TLR 330); **Juma Kaulule v R**, Cr. Appeal No. 281/2006 (unreported).

In this case, as alluded earlier on, both the first and second Accused persons did not object admission of their caution statements and extra judicial statements. They could therefore not object during cross examination or at defence stage.

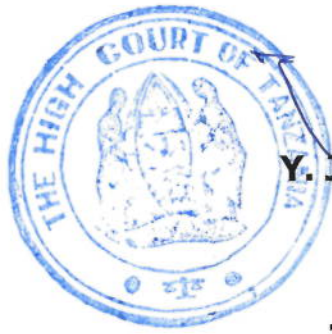
More so, the first and second Accused while being interrogated, they mentioned the third Accused to be their accomplice. Also, they explained on how they killed the deceased and the role played by each other during the commission of the offence. They stated that; they hit the deceased by a stone on his head to death, the statement which was supported by the Post Mortem Examination Report that the deceased had a big wound at his head and buttressed by the evidence of PW1 and PW2 who saw the deceased body immediately after his death.

The first and second Accused testified that; the third Accused was stationed out of the KKKT wall. But the third Accused denied to such

allegation and there is no any other evidence to implicate the third Accused. None of the prosecution witnesses has brought evidence to implicate the third Accused with the charged offence. There is even no reason stated as to why the third Accused was not recorded his caution statement.

In the premises of the foregoing, the Prosecution herein proved their case beyond reasonable doubt as against the first and second Accused person only. That, the deceased was killed unlawful by the first Accused person, Twaibu Mohamed Ngindo and second Accused person, Sadala Sabani Mchopa. Therefore, the first and second Accused persons are guilty as charged. But the prosecution has not proved their case as against the third Accused person, Mussa Zuberi Amuri Katanje.

In the circumstances, I hereby convict the first Accused person, Twaibu Mohamed Ngindo and second Accused person, Sadala Sabani Mchopa for the offence of murder contrary to *sections 196 and 197 of the Penal Code [Cap 16 Revised Edition 2022]*. Consequently, I hereby acquit the third Accused Person, Mussa Zuberi Amuri Katanje on the offence of murder contrary to *section 196 of the Penal Code [Cap 16 Revised Edition 2022]*. He should be released from the custody unless otherwise held for other offences.

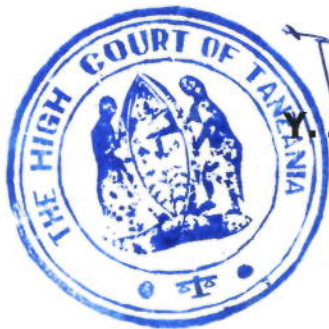


Y. J. MLYAMBINA

JUDGE

28/09/2022

Judgement pronounced and dated 28th day of September, 2022 in the presence of Senior State Attorney Tumaini Ngiruka, learned State Attorneys Generosa Montano, Frank Chonja and Venance Mkonongo for the Republic, the Accused Persons and their Counsel Makame Sengo for the first Accused, Lazaro Simba for the second Accused and Neema Nyagawa for the third Accused. Right of Appeal fully explained.



Y. J. MLYAMBINA

JUDGE

28/09/2022

PREVIOUS RECORDS

VENANCE MKONONGO, STATE ATTORNEY:

The Republic has no previous records of the two convicts. Since they have been convicted on the offence which has no alternative sentence, We pray they be sentenced as per the law.

MITIGATION

MAKAME SENGO, ADVOCATE:

Since the first Accused has been convicted on the offence which has no option on sentence, we have no any mitigation.

LAZARO SIMBA, ADVOCATE:

We have no mitigation because the second Accused has been convicted on the offence which has no alternative sentence.

SENTENCE

Having considered the previous records and the mitigation factors, and bearing in mind that the first and second Accused Persons are convicted on the offence of murder which has no alternative punishment; I hereby sentence the first Accused Person Twaibu Mohamed Ngindo and the second Accused Person Sadala Shabani Mchopa to Death by Hanging. Order accordingly. Right of Appeal explained.



Y. J. MLYAMBINA
JUDGE

28/09/2022