

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

(ORIGINAL JURISDICTION)

CRIMINAL SESSION CASE NO. 07 OF 2020

REPUBLIC

VERSUS

ORESTUS MBAWALA @ BONGE 1ST ACCUSED

COSMAS SIMON MBENA 2ND ACCUSED

JUDGEMENT

Date of last Order: 19/08/2022
Date of Judgement: 28/09/2022

MLYAMBINA, J.

The Accused Persons are charged with the offence of murder contrary to *section 196 of the Penal Code [Cap 16 Revised Edition 2019]*. It was stated in the particulars of the offence that; on 11th June, 2016 at Making'inda Area within Songea Municipality, Ruvuma Region the Accused Persons did murder one Christopher Ndimbo. Upon been arraigned before the Court, the Accused Persons pleaded not guilty to the offence.

During hearing, the Court was assisted by a Lady and Gentleman Assessors namely; Ms. Johari Kasongoro and Mr. Manfred Hyera. On the side of the parties, the Republic was initially represented by Mr. Shabani

Mwegole assisted by Ms. Tulibake Juntwa learned Senior State Attorneys and later by Mr. Hebel Kihaka, the learned Senior State Attorney assisted by Mr. Lugano Mwasubira, State Attorney and Tumpare Lwarence State Attorney. The first Accused person was represented by Mr. Alex Nyoni, learned Advocate while the second Accused enjoyed the service of Mr. Makame Sengo, learned Advocate.

To prove the offence laid against the Accused Persons, the prosecution called twelve (12) witnesses and tendered ten (10) documentary evidence and one (1) physical evidence. While the Accused Persons defended themselves.

The deceased wife one Jesca Albert Kiswaga (PW1) testified that; her husband was a Primary School Teacher who involved himself with motor cycle business as a rider. On 11/06/2016, after working hours at 5:00 pm, her husband left for his motor cycle business as usual but he never returned. She informed the deceased relative and reported the incident to the Police Station for help. They looked for him everywhere including at Police station but all was in vain. On 12/07/2016 they went to Voda shop to locate his phone, while there they were informed that the deceased phone was switched off at Bombambili Area at 08:00 pm.

They kept looking for him until on 14/07/2016 at 06:00 pm where his body was discovered at Making'inda Area within Songea Municipality.

PW1 evidence was supported by PW2 George Eligius Ndimbo and PW10 John Eligius Ndimbo who happened to be the deceased relative. PW10 was involved on searching of the deceased till the date when his body was discovered. Their evidence was cemented by PW3 Restuta Filbert Mwageni, a Medical Doctor who examined the deceased body and assured this Court that Christopher Ndimbo faced unnatural death. The reason for his death was a wound inflicted on his head.

Furthermore, PW11 was one E 8161 Mussa, Police Officer working at Songea Police Station, Ruvuma Region. He told this Court that; Detective Victor discovered a phone make ITEL which was noticed to be used at Njombe and later at Songea. The phone was related with the Case No. SO/IIR/1689/2016. They made a follow up, as a result they arrested one Pendo Orestus Mbawala at Mpitimbi within Songea Municipality in possession of the said phone. She revealed to be given the phone by her father one Orestus Mbawala @ Bonge.

They went to Njombe accompanied with Staff Sergeant Lukuba, Detectives Mwinga, Benson, Patrick and the said Pendo Orestus Mbawala. They reported at Njombe Police Post before headed to

Matarawe Street where Orestus lived. At the time they reached at Orestus Mbawala's House, he already eloped from his house. Luckily, they managed to arrest him at Kipengele Guest House early in the morning on the following day after being assisted by his wife. Such evidence was corroborated by PW7 one Francisca Romward Mgeni, a receptionist at Kipengele Guest House.

PW11 explained further that after they arrested the first Accused person, he took them to different places where they were selling motor cycles robbed after killing the motor cycles riders including the deceased in this case. They found some spare parts only.

Moreso, PW12 was D/Staff Sargent Joseph John Lukuba, a retired Police Officer with Force No. D44229. He was assigned to record the Cautioned statement of the first Accused Person, Orestus Mbawala @ Bonge on 20/07/2016. He started recording at 1515 hours and finished at 1630 hours. He informed him the charged offence and his legal rights including of giving his statement voluntarily. PW12 informed the first Accused Person that his statement would be used against him before the Court. However, Orestus was aware of his right and he was ready to give his statement without any witness, a friend or relative.

According to PW12, the first Accused Person confessed to had killed not only the deceased in this case but also other three people. Also, he mentioned a person to whom they sold the stolen motor cycles and phones. He further mentioned the 2nd Accused person as his accomplice on murdering the deceased. The evidence of PW12 was similar with that of PW11 who told this Court that a day after he confessed, the first Accused Person, Orestus Mbawala took them to a person known as Isaack Kilamlya where he sold the deceased phone. Such statement was backed off by the evidence of PW5 one Ibrahim Mlengule who was with Isaack Kilamlya when the first Accused sold the phone.

Also, PW6 saw the phone when the Police Officer went to take a deceased phone from Ibrahimu. It was a smart phone, make voda phone, black in colour with IMEI No. 354459061489570. It is the phone which was used by a deceased before his disappearance. PW4 Henry Nyondo, a Head of Ethics and Compliance at Vodacom Company insisted that, the phone had the same IMEI number applied by the RCO for inquiry.

PW8 Yasin Hashim Ndauka was the Making'inda Street Chairman. He saw the 1st Accused Person and heard when the 1st Accused was

explaining to the Police Officer at the scene of crime where he was called to witness. The first Accused elaborated on how he killed the deceased and confiscated his motor cycle and a phone (properties).

On their side, the Accused person testified themselves as DW1 and DW2 respectively. DW1 while led by Mr. Alex Nyoni learned Advocate denied not only to have killed the deceased but also to know him. He remembered to be arrested on 20/06/2016 at Ramadhani Street Njombe. He was taken to Njombe Central Police Station. They wanted him to show the stolen motorcycles. They shifted him to Madukani Police Station. They tortured him so that he could agree to kill people and took their properties but he refused. On 24th June, 2016 they took him to Songea. He was sent to the RCO with the second Accused Person. They denied to know anything about the motorcycle disappearance. On 24th June, 2016 they were taken to the scene of crime. The first Accused denied to know the second Accused Person. He saw him for the first time at Police Station.

DW2 on his side, denied to participate anyhow in the killing of the deceased. He told this Court that; he was arrested on 17th June, 2016 on his way to work together with his friend known as Juma. They were using a motorcycle. They were taken to the Police Station at Songea,

where they stayed from 17th June, 2016 up to 26th June, 2016. He came to know Bonge at Police Station on 26th June, 2016 when they were taken to the scene of crime. He thought the reason for being arrested was lack of licence to his friend. His friend was released. He remained in custody because he failed to fulfil the Police request. At the end of trial, the learned Counsel from both sides did not intent to file final submissions.

The evidence from the parties was summed up to the Assessors so that they could give their opinion from the evidence and the facts relating to the law adduced as to; whether the accused persons are guilty of the offence levelled against them. At the end they came up with a unanimous opinion that the accused persons are not guilty of the offence facing them before this Court.

After considering the evidence adduced by the parties in this case, the glaring issues to be determined in this case are:

1. Whether the 1st and 2nd Accused are the ones who killed the deceased person, one Christopher Ndimbo.
2. Whether the 1st and 2nd Accused Persons killed the deceased with malice aforethought.

As it can be grasped from the evidence of both side before this Court, there is no dispute that Christopher Ndimbo suffered unnatural death. His body was discovered at Makingi'nda Area after his almost three days disappearance. His motorcycle and handset smart phone make voda phone, black in colour were robbed. PW3, a Medical Doctor proved before this Court that Christopher Ndimbo suffered unnatural death. The issue in dispute is; *whether the 1st and 2nd Accused are the one who killed the deceased.*

It is undeniable fact that the deceased body was discovered on 14th day of June, 2016 at Makinginda Area. It had already started to decompose. Yet the deceased body was discovered to have a scar at forepart of his head. The Medical Doctor (PW3) confirmed that the reason for the deceased death was due to the wound on his head. No one witnessed when the deceased was killed. Before he disappeared, the deceased was in a possession of the motorcycle and his smart phone make voda phone black in colour.

The Police Officers supported by the Officers from Vodacom Company, managed to trace the deceased phone through its IMEI No. 354459061489570 and they discovered that the said IMEI No. was switched off on 11th June, 2016 at 08:00 hours at Bombambili area

Songea Municipality, the day when the deceased disappeared. Then there was another phone number which used the same IMEI Number. The new number was 0742 557361 registered in the name of Lulu Mapile. It was used at Njombe. Police Officers went to Njombe and arrested the 1st Accused Person. In his cautioned statement, the first Accused Person confessed to kill the deceased. He further took the Police Officers where he sold the deceased phone.

In the light of the foregoing, there is no doubt that this case is based on circumstantial evidence and the doctrine of recent possession. There is none who saw the one who killed the deceased. To start with the circumstantial evidence, it is a cardinal law that in a case depending conclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the exculpatory are incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of guilty. This was the position in the case of **Simon Musoke v. Republic** (1958) EA 718.

Moreover, the law requires that in order to rely on circumstantial evidence for conviction, those circumstances should be of a definite tendency unerringly pointing to the guilty of the accused. 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. This was the position in the case of **Justine Julius and Another v. Republic**, Criminal Appeal No. 155 of 2005, Court of Appeal of Tanzania at Mwanza (unreported).

From the record, the deceased disappeared on 11th June, 2016, his phone with IMEI No. 356052065552730 was switched off on the same day at 8:00pm, Bombambili Area within Songea Municipality, Ruvuma Region. Later the phone was discovered to be used with another person with phone number 0763 726 995 registered as Lulu Mapile at Njombe Region. The first Accused person was arrested at Njombe Region in relation to the Case No. SO/IIR/1689/2016. Upon interrogation, he confessed to kill four people, one of them is Christopher Ndimbo, the deceased in this case.

During hearing of the case, the Accused person objected the cautioned statement to be admitted to form party of the prosecution evidence on the ground that it was recorded involuntarily. *Section 27 (1) of the Evidence Act [Cap 6 Revised Edition 2022]* requires that, only the cautioned statement which was recorded voluntarily can be proved against the maker. If it was alleged that the confession was made

involuntarily the onus of proof that it was made voluntarily lies on the Prosecution side. This is provided for under *section 27 (2) of the Evidence Act (supra)*. The same position was reached in the case of **Lutamla Basu @ Ivinzi v. Republic**, Criminal Appeal No. 128 of 2008, Court of Appeal of Tanzania at Tabora (unreported). As such, the trial within a trial must be conducted.

Moreover, the law requires that any caution statement which was retracted or repudiated has to be corroborated by an independent witness to prove the voluntariness of the cautioned statement. This was the position in the case of **Buswelo Busalu v. The Republic**, Criminal Appeal No. 297 of 2009, Court of Appeal of Tanzania at Mwanza (unreported). During trial within a trial, the Accused failed to cast doubt on prosecution evidence that the caution statement was recorded voluntarily. The Accused person did not deny to give the statement but claimed to be tortured. There was no any evidence to justify the torture allegation. As such, the Court is of the findings that the content contained in the cautioned statement of the first Accused person is nothing but the truth. As a result, a cautioned statement was admitted and formed party of the prosecution evidence.

Furthermore, the day after confession, the first Accused led Police Officer where he sold the deceased's phone. The phone was identified to be the one which was owned by the deceased before he was found dead. There is no any other explanation as to how the Accused person possessed the phone which belongs to the deceased immediately after his death.

It is the finding of this Court that; the deceased phone was not found directly with the first Accused. But there is enough evidence that the first Accused transferred the said handset to another person namely Issack Kilamliya. As such, the first accused remain to be the one who took the phone direct from the deceased. Unlike Issack Kilamliya, the first Accused person has no any reasonable explanation as to how the deceased phone came into his possession. The prosecution through its witnesses told this Court that the first Accused is the one who killed the deceased and robbed his properties including the said phone handset. In the cases of **Mustapher Maulidi Rashidi v. The Republic**, Criminal Appeal No. 241 of 2014, Court of Appeal of Tanzania at Mtwara (unreported); **Ally Bakari and Pili Bakari v. The Republic** [1992] TLR 10; also, the case of **Mkubwa Mwakagenda v. The Republic**, Criminal Appeal No. 94 of 2007, Court of Appeal of Tanzania at Mbeya

(unreported), the Court has this to say in relation of the Doctrine of recent possession:

Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction it must be proved, *first*, that the property was found with the suspect, *second* the property is positively proved to be the property of the complainant, *third* that the property was recently stolen from the complainant and *lastly* the stolen thing constitute the subject of the charge against the accused...

Being guided by the afore quoted decision, this Court is of the following findings: *First*, the deceased phone handset was technically found with the first Accused as he was the first person in possession after the deceased. He has no any different explanation apart from what the prosecution told this Court. *Second*, the phone was identified physically and electronically to be the phone which was possessed by the deceased before he disappeared and found dead. *Third*, the phone

was recently stolen from the deceased. It was proved that the handset phone number registered by the name of Lulu Mapile was used by the first Accused person. The said simcard was identified to be the one which was used by the deceased few hours from when the deceased was murdered. *Fourth*, the deceased phone constituted the subject of the murder case laid against the accused.

All the evidence adduced before this Court mentioned the first Accused person as a culprit of the offence laid against them. The second Accused person was not mentioned by any of the witnesses except the Making'inda Street Chairman. Even though his evidence did not disclose on how the second accused was involved in the offence. All his explanation was based on how the first Accused killed the deceased. Even the first Accused person denied to know the second Accused.

In the light of the evidences of this case, this Court is of the findings that the prosecution failed to prove their case beyond reasonable doubt that the second Accused person one Cosmas Simon Mbeni was involved in any way into killing the deceased. However, the prosecution proved the case beyond reasonable doubt, as required by the provision of *section 3 (2) (a) of the Evidence Act [Cap 6 Revised*

Edition 2022], that the deceased was killed and his properties were robbed by the first Accused, Orestus Mbawala @ Bonge.

Section 298 (1) of the Criminal Procedure Act [Cap 20 RE 2022] requires the Trial Judge at the conclusion of the hearing of the evidence from both sides to sum up the evidence to Assessors on the facts in relation to the law. It is not mandatory but a long established practice. The Assessors opinion are not binding on the trial Judge as per *section 298 (2) of the Criminal Procedure Act (supra)*. The same position was stated in the case of **Shadida Issa @ Rasta and Another v. Republic**, Criminal Appeal No. 125 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported). If the trial Judge disagree with the opinion of the Assessors, he has to give a reason for his dissenting decision. That was the position in the case of **Abdalah Bazamiye and Others v. Republic** [1990] TLR 42 at page 45.

From the record, the Assessors who assisted the Court in the trial of this case opined that the prosecution did not prove their case beyond reasonable doubt that the accused persons herein are the ones who killed the deceased. To the contrary, after careful consideration of the evidence, it is the finding of this court that, the prosecution has proved their case beyond reasonable doubt through the circumstantial evidence

adduced before this Court that the first Accused person is the one who killed the deceased. Such position is backed up with the case of **Justine Julius and Others v. Republic**, Criminal Appeal No. 155 of 2005, Court of Appeal of Tanzania at Mwanza (unreported). Also, the first Accused person failed to cast doubt on how the deceased phone came into his possession immediately after the death of the deceased, as a result a doctrine of recent possession binds him.

Needless, this Court is of the findings, as rightly as opined by the Assessors, that the prosecution failed to prove their case beyond reasonable doubt that the second Accused was involved in any way in the killing of the deceased.

Coming to the second issue; whether the first Accused person killed the deceased with malice aforethought. The law requires that for the killing to be illegal it has to be committed without any legal justification. That, the Accused had an intention to cause death or grievous harm to a person or had knowledge that the act or omission would probably cause death. The same position is reflected under *section 200 of the Penal Code [Cap 16 Revised Edition 2019]*. Also, in the case of **Bakari Rajabu Bakiri v. Republic**, Criminal Appeal No. 292 of 2021, Court of Appeal of Tanzania at Mtwara (unreported), the

Court quoted with approval the case of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994, where the Court held *inter alia* that:

Usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors including the following; the type and size of weapon, if any used in the attack, the amount of force applied in the assault, the party(s) of the body the blow were directed at or inflicted on, the number of blows although one blow may depend upon the facts of a particular case be sufficient for this purpose, the kind of injury inflicted ...

From the record, no one witnessed the killing of the deceased. No one identified the type of a weapon which was used during the attack. But through the post-mortem examination report, the Court was able to grasp as to what kind of a weapon was used by the first Accused to complete his evil intent. The deceased died due to the injury which was inflicted at his head, a very sensitive and vulnerable part of the human body. More so, the first Accused intention was to steal the deceased property. Therefore, it is the view of the Court that the first Accused

person intended to kill the deceased so that he could not be exposed to his evil act. Reference can be made to the case of **Mustapha Maulidi Rashidi** (*supra*).

In the circumstances, I hereby acquit the second accused person, Cosmas Simon Mbena on the offence of murder contrary to *sections 196 and 197 of the Penal Code [Cap 16 Revised Edition 2019]*. He should be released from the custody unless otherwise held for other offences. Ostensibly, I find that Orestus Mbawala @ Bonge is guilty as charged. Hence, I hereby convict the first Accused person one Orestus Mbawala @ Bonge for the offence of murder contrary to *sections 196 and 197 of the Penal Code [Cap 16 Revised Edition 2019]*. Order accordingly.



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 Person and their Counsel Alex Nyoni for the

first Accused Person and Makame Sengo for the second Accused Person.
Right of Appeal fully explained.

 **Y. J. MLYAMBINA**
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PREVIOUS RECORDS

TUMAINI NGIRUKA:

The Republic have previous records of the Accused. He was convicted on murder in *Criminal Session No. 9 of 2019 at High Court of Iringa seating at Njombe*. The Accused was sentenced to suffer death by hanging for killing a Bodaboda driver. As per the law, murder cases' conviction attracts death by hanging. We therefore pray the Accused be sentenced as per the law.

MITIGATION

ALEX NYONI, ADVOCATE:

On our part, we have heard the previous records. The Accused had been in Prison since 2016. It is six years now. Also, the Accused has

a family of six dependant. We pray the Court to apply its wisdom because he has been already condemned in another case.

SENTENCE

The Court has considered the previous records of the Accused, in particular, the fact that the first Accused Person has already been condemned to death by hanging in *Criminal Sessions Case No. 9 of 2019 High Court of Tanzania of Iringa at Njombe*.

The Court has further considered the mitigating factors advanced by Counsel Alex Nyoni. However, death by hanging is the only sentence as per the law to whoever convicted on the offence of murder.

I therefore, sentence the first Accused Person Orestus Mbawala @ Bonge to suffer Death by Hanging. It is so ordered. Right of Appeal explained.



Y. J. MLYAMBINA

JUDGE

28/09/2022