

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 33 OF 2022

REPUBLIC

VERSUS

MUDI SHIMBA @ KUSUNDWA

JUDGEMENT

Date of Last Order: 06/09/2022
Date of Judgement: 29/09/2022

MLYAMBINA, J.

The Accused person, Mudi Shimba @ Kusundwa and the deceased, Anna Shirima were lovers before the deceased disappeared with the Accused money at the tune of TZs 5,000,000/= (Five Million Tanzanian Shillings Only). In consonant with a saying "absence makes love grow fonder", after a while, the deceased called the Accused and disclosed her whereabouts. On 21st February, 2022 the Accused decided to visit his lover thinking that she was still in love with him. He was warmly received by the deceased at her shop. Later, the deceased took him at her room. It was alleged that while in the room, a quarrel occurred between them during the night which made the Accused strangle the deceased until she became weak. Thereafter, the Accused ran away.

The Accused person was arrested and arraigned before this Court for the offence of murder contrary *to sections 196 and 197 of the Penal Code [Cap 16 Revised Edition 2019]* allegedly that; on 21st February, 2020 at Mkongo Nakawale Village within Namtumbo District in Ruvuma Region the Accused Person did kill one Anna Shirima.

During hearing, the Republic was represented by Mr. Lugano Mwasubila assisted by Mr. Venance Mkonongo learned Advocates while the Accused Person enjoyed the service of Mr. Kitara Mungwe learned Advocate. To prove their case the prosecution called eight (8) witnesses and tendered six (6) documentary evidences and two (2) physical evidences.

PW1 Elenzian Steven Kassian, a Ward Executive Officer (WEO) testified that; on 22nd February, 2020 around 0900hours, he was called by Militiamen and informed about the murder incident which occurred at one of the rented houses at Nakawale Village. While accompanied by the Hamlet leaders they entered into the house and saw the deceased body lying by its back, the leg was hanging and she was bleeding from her nose. He identified the deceased to be the one who was working at the Pharmacy.

PW1 testified further that; when the Police Officers arrived, they searched the room and found a small black phone make TECNO which

was switched off. They switched on and discovered that the last person to communicate with the deceased was a person with the name of Mjinga. The phone had two lines; Tigo and Vodacom. He signed certificate of seizure. He added that; the deceased friend one Felista told him that they received a visitor the day before whom the deceased introduced him as her boyfriend. When he was cross examined, PW1 testified that; he knew the deceased since 2019.

Mr. Florian Sebastian Komba (PW2) who happened to be a Medical Doctor at Songea Regional Hospital confirmed to have examined the deceased. He discovered that the deceased neck had lacerations and hematoma. She died due to the suffocation which was caused by Cardiac arrest. When he was cross examined by the Defence Counsel, PW2 added that heart attack can also cause Cardiac arrest.

PW3 Deborah George Semkiwa, Justice of Peace recorded the Accused person's Extra judicial Statement. She averred that; on 27th May, 2020 the Accused person was brought before her by a Police Officer known as Yona. The Accused told her that no one forced him to confess. The Accused had a scar at the upper part of his right eye which was a result of bicycle accident that happened long time ago. He was arrested on the same date. She told him that the statement will be used against

him before the court. She read the statement to the Accused. Thereafter, they both signed.

PW4 was PF 24591 George Elias Nkinga a Police Officer working at Namtumbo Police Post as an exhibit keeper. He testified that; on 22nd February, 2020 he received a small Phone make TECNO T349 which was connected to the Murder case No. NBG/IR/50/2020. The phone had two lines; Tigo and Vodacom. On 16th March, 2020, he received another phone which was Smart phone make TECNO black, RA7 which was related to the same murder case. It had two sim cards. He registered the phone into the Court Exhibit Register Book. On 30th August, 2020 H 6022 D/C Yona took the phones to forensic investigation. He returned the Phones on 2nd November, 2020. PW4 stored the phones to date. When he was cross examined, PW4 denied to know in whose name(s) the lines were registered.

PW5 was F. 2229 Surgent Victor a detective working in the RCO Ruvuma Cyber Crime Department. Apart from other duties, he receives exhibits for forensic at the Head Quarters or gives opinion to the District Detectives. On 30th August, 2020 he received two exhibits from D/C Yona for forensic investigation. These were two mobile phones; small Techno make T349 with two lines which are Tigo and Vodacom, as well as a smart Phone Techno RA7 with two lines too, Tigo and Vodacom. He took the

exhibits to the forensic Laboratory at Dar es Salaam. Various messages were extracted from the exhibits. On 2nd October he returned the exhibits to exhibits keeper D/C Yona. During cross examination, PW5 explained that, they did not involve a Service Provider due to the fact that the required information can be seen by eyes.

PW6, Assistance Inspector Morris the one who conducted the forensic investigation corroborated the evidence of PW5. The RCO later requested the forensic investigation from the two phones specifically on the message sent and received between 01/01/2020 to 01/03/2020. After the investigation, he analysed the information as it was requested. Apart from a machine automatic report, he also prepared a personal report for clarification.

When he was cross examined, PW6 added that all the messages he read did not indicate that the sender was the one who killed the deceased.

PW7 A/Inspector Yona was one among the Police Officers who were ordered by the OCCID to go to the scene of crime at Mkongo Nakawale. At the scene of crime, they saw a deceased body lying by her back, her leg was hanging and she had blood stain at her nose. She had laceration on her neck. Beside her body there was a small phone. Upon perusal to the phone, he discovered that the last number communicated with the

deceased was number 0743 02 82 35 saved as Mjinga and registered by the name of Tatu Mgaki. He also drew a sketch map of the scene of crime.

Furthermore, PW7 testified that they recorded the statement of Felister Antony who was a deceased's best friend. PW7 was told by Felister that; on the fateful day, the deceased received a visitor whom she introduced him as her boyfriend from Milonji Village, Majiwe Ligera Ward. But around 7:00 hours, Felister left the deceased with her visitor. However, on 22nd February, 2020 Felister did not see the deceased beyond the time they used to open their shop and a lot of customers were waiting. Her phone was not reachable. She decided to go to her room. She saw the deceased lying on her bed by her back and her legs were hanging. She remembered that the deceased visitor was tall and not much black "maji ya kunde".

On 16th March, 2020 one person called Bahati went to Namtumbo Police Post and claimed that he was in relationship with the deceased. He received a mockery message (ujumbe wa kejeli) on the death of the deceased. The message was sent from Phone No. 0743028235. PW7 discovered that it was the number which was saved as Mjinga in the deceased phone and registered as Tatu Mgaki. He took the phone and filled the certificate of seizure. On 29th May, 2020 through Cyber investigators, they got information on the where about of the person who

killed the deceased. They went at Majiwe Village and arrested the Accused. He also recorded the Accused cautioned statement. After being informed of his right, he gave his statement voluntarily and signed before PW7. The latter authenticated it. He also took the Accused to the Officer of Peace.

When he was cross examined, PW7 replied that they were informed by the Accused that he registered the number by the name of Tatu Mgaki when he was at Tabora.

PW8 Felister Antony Ndoa, the deceased friend testified that; on 21st February, 2020 while living at Mkongo Nakawale, her friend (the deceased) told her that she will have a visitor who is her boyfriend. After a while the visitor came and the deceased introduced to her as her boyfriend. At 07:00 pm she left the deceased with her boyfriend. However, on the next day she did not see the deceased and her shop was closed. She tried to reach her through her phone but she was not reachable. She went to her room and found the deceased body lying on her bed by her back, blood was clotted into her nose and laceration on her neck. She informed the leaders.

When she was cross examined, PW8 said that; she left the deceased with the Accused at deceased shop. She does not know the exact time when the deceased died and she was with whom. On the next day, she

found her already dead. In re-examination, Anna added that; the deceased introduced her boyfriend to her. PW8 recognised such man in the dock (Accused Person).

On defence, the Accused Mudi Shimba @ Kusundwa testified as DW1. He denied not only to commit the crime but also to have known the deceased. DW1 told the Court that during the identification parade which was conducted at Namtumbo Police Post, PW8 did not identify him but one of the Police Officers holding a gun pointed to him, then PW8 identified him. PW8 was asked if she knows his name, she denied to know the accused name.

DW1 testified further that; he stayed at the Songea Police Station for two weeks for the accusation of stealing cows. He denied to be found with either a phone or a line not registered in his name at the time of his arrest. He also denied to have been at Mkongo Nakawale. Further, he denied to have given his statement at Police nor confessed to the Justice of peace. He admitted to have been arrested at Namanguli Kidali Village, Namtumbo District while at his home. He also admitted to know Yona. The later used to buy chicken from him and knows where he lives. DW1 denied the statement that Police Officers used a cyber investigator to detect him.

When he was cross examined, DW1 added that he saw the Justice of Peace during the identification parade assisting PW8. Further, DW1 told the Court that no one tortured him. After his arrest, they went and parked at Mtwara Pachani. He insisted that PW8 identified him by the help of Yona, a Police Officer.

It is pertinent at this stage to determine whether the Accused person in this case committed the offence of murder as charged. As one of the criminal offences, its standard of proof has to be beyond reasonable doubt. The requirement of proving a criminal case beyond doubt is not invention of the Court but rather the requirement of *section 3(2)(a) of the Evidence Act [Cap 6 Revised Edition 2022]*. The burden of proof lies on the shoulders of the prosecution. The same has been stressed in a number of cases, to mention a few, the case of **Godfrey Paulo and Others v. The Republic** [2018] TLR 486; **Director of Public Prosecutions v. Ngusa Kaleja@ Mtangi and Another**, Criminal Appeal No. 276 of 2017, Court of Appeal of Tanzania at Mbeya (unreported); **Antony Kinanila and Another v. The Republic**, Criminal Appeal No. 83 of 2021, Court of Appeal of Tanzania at Kigoma (unreported), where the Court stated *inter alia* that:

In any criminal trial, the prosecution bears the burden to prove beyond reasonable doubt not only that the

offence was committed but also it was committed by the Accused person or that he participated in the commission of the offence to the extent or degree as prescribed by the law.

In the light of the foregoing, the issues to be determined in this case are: *First*, whether the Accused killed the deceased, and; *second*, whether the Accused killed the deceased with malice aforethought. As it can be noticed from the evidence adduced by the parties, there is no dispute that the deceased was found dead at her room. She died unnatural death as depicted in Exhibit P1.

To start with the first issue, whether the Accused is the one who killed the deceased. The prosecution relied on circumstantial evidence as no one saw the Accused murdering the deceased. It is settled in our jurisdiction that, where the case is founded on circumstantial evidence, the conviction stand only if it is the Accused and not any other person who committed the crime. This was the position in the case of **Hamida Mussa v. The Republic** [1993] TLR 123 where the Court held that:

Circumstantial evidence justify the conviction where inculpatory fact or facts are incompatible with the innocence of the Accused and incapable of explanation

upon any other reasonable hypothesis than that of his guilty.

I will consider the applicability of the last seen together doctrine with respect to the murder of the deceased person. As testified earlier, PW8 was a deceased best friend and the two were working nearby. She told this Court that; on 21st February, 2020, she left the deceased with her boyfriend (Accused Person) around 1900hours. There is nothing in evidence to link in the chain of circumstances to conclusively establish that the accused person murdered the deceased.

Even if, I believe the evidence of PW8 that he saw the Accused Person in the company of the deceased going to the shop of the deceased around 1900hours, there has been a time gap of about thirteen (13) hours when the Accused and the Deceased were seen together and when the dead body of the deceased was found around 0800hours. There has been no evidence led by the prosecution to prove that there was no possibility of any other person who slept with the deceased at night.

Additionally, no one saw the Accused Person when committing the murder. All the evidences in this case is circumstantial. It is a cardinal law that, for the circumstantial evidence to be relied on conviction the evidence must be irresistible to the commission of the offence by somebody else apart from the accused person. This was the decision in

the *inter alia* cases of **Matinda Lesaito v. The Republic** [TLR] 457 and **Shabani Mpunzu @ Elisha Mpunzu v. The Republic**, Criminal Appeal No. 12 of 2002, Court of Appeal of Tanzania at Mwanza (unreported).

Apart from the evidence of PW8, the Prosecution relied on cautioned statement and extra judicial statement which were tendered and admitted by the Court during the hearing as exhibit P2 and P3 respectively. I had ample time to go through the cautioned and extra judicial statements and discovered the following: *First*, there is contradiction as to exact time in which the Accused arrived at the deceased shop. Though may be seen as a minor contradiction which cannot go to the root of the case, however, for a proper identification, time is one among the crucial factors to be ascertained.

In this case, PW8 said that the Accused arrived around 1600hours but in the cautioned statement, it was recorded that the Accused arrived at the deceased shop around 1700 hours while in extra judicial statement it was recorded that the accused arrived at the deceased shop around 1800 hours. *Second*, PW1 averred that, when they switched on the deceased phone they discovered that the last number interacted with the deceased through her phone was the number which was served as Mjinga. This assertion was supported by PW8 who told this Court that the Accused was the last person to be seen with the deceased the statement which

she retracted during cross examination by saying that she does not know who was with the deceased when she met her demise.

Apart from the above, PW8 managed to identify the Accused during the identification parade. But the prosecution did not tell this Court if PW8 gave the Accused description before the identification parade was conducted. Description is the most important aspect which has to be complied with and failure to do so renders the identification parade unworthy of credit. The same position was reached in the case of **Muhidini Mohamed Lila and others v. The Republic** [2018] TLR 236 where the Court of Appeal has this to say:

It is a trite law that, for the evidence of an identifying witness to be credible, such witness must have given the description of the suspect before he made identification at identification parade ... contrary to that the evidence obtained from the parade is unworthy of credit.

Furthermore, it is evident that the Accused person confessed to have killed the deceased before the Justice of Peace and PW7. But there is no corroboration of such retracted evidence. In the case of **Muhidini Mohamed Lila and Others** (*supra*) the Court of Appeal went further and held that:

It is a trite principle that confession evidence which has been retracted or repudiated cannot be acted upon to found conviction unless the same is corroborated by independent evidence...the evidence required corroboration and the evidence which itself requires corroboration cannot corroborate the retracted or repudiated confession.

From the record, the Accused retracted his confession and for that reason for the Court to act upon the confession there has to be independent evidence to corroborate so as to add value on the same. Apart from PW8 evidence, no any other evidence from other witnesses which qualify to be independent evidence capable of supporting the confession of the Accused person. PW8 evidence is unworthy too. She was not familiar with the Accused. Worse, PW8 is uncertain if the Accused was the last person to be with the deceased before her death.

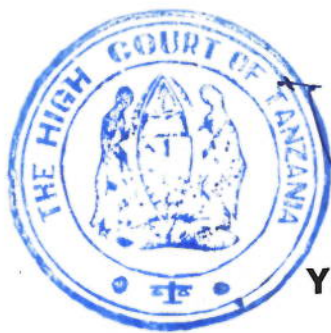
Further, there is evidence that the deceased asked the Accused to leave the room before her husband returned as he was on his way back. Such evidence was not denied by the prosecution.

Murder case is one among the serious criminal cases which attract intensive punishment which is death by hanging. That means the live of the Accused is at stake. It is upon this Court to make sure that the

prosecution proved their case beyond reasonable doubt. In the case of **Mohamed Haruna @ Mtupeni and Another v. The Republic**, Criminal Appeal No. 259 of 2007, Court of Appeal of Tanzania at Tabora, it was held *inter alia* that:

... an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.

It is the finding of this Court that the prosecution failed to prove the case beyond reasonable doubt of involvement of the Accused in commission of crime of murder of the deceased one Anna Shirima. In the premises I hereby acquit the Accused person, Mudi Shimba @ Kusundwa for the offence of murder contrary to *section 196 of the Penal Code [Cap 16 Revised Edition 2019]* laid against him. The Accused person has to be released from custody unless he is being held legally for another offence.

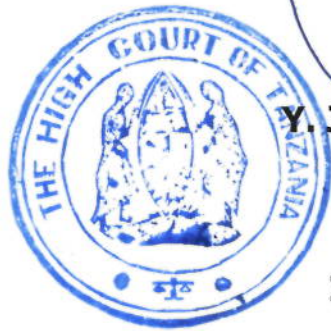


Y. J. MLYAMBINA

JUDGE

29/09/2022

Judgement pronounced and dated 29th day of September, 2022 in the presence learned State Attorney Hellen Chuma for the Republic, the Accused Person and his Counsel Kitara Mugwe. Right of Appeal fully explained.



Y. J. MLYAMBINA

JUDGE

29/09/2022