

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

SITTING AT BARIADI

CRIMINAL SESSION CASE NO. 111 OF 2012

THE REPUBLIC

VERSUS

KANUDA S/O DAUD @ BODOLO

JUDGMENT

Date of last order; 30/08/2022

Date of Judgment; 12/09/2022

S.M. KULITA, J.

The accused person herein, Kanuda s/o Daudi @ Bodolo stands charged with Murder, contrary to section 196 of the Penal Code [Cap 16 RE 2002].

It is alleged that on the 2nd day of June, 2011, at Luguru Ward within the District of Bariadi in Shinyanga Region, the accused person did murder one Daniel s/o Ayoub @ Makulilo.

When the charge was read over and properly explained to him, the accused person pleaded not guilty and disputed facts which implicated him with the murder of Daniel s/o Ayoub @ Makulilo.

Briefly the facts of the case from the prosecution's perspective are as follows; that the accused and the deceased were close relatives and friends. While the Accused person is residing at Inalo village within Bariadi District, the Deceased was living in Mwanza. That on 1/6/2011 Daniel Makulilo who was temporally residing at his father's resident at Inalo in Bariadi District by then, now Itilima District in Simiyu Region informed his father Ayoub Makulilo (PW1) that he would go back to Mwanza on the next day. Daniel left and came back with his uncle Kanuda Daud Bodolo (Accused). They were on a motor cycle ridden by the Accused. The accused had hired the said motor cycle from one Kulwa Simiyu (PW3). They then left for their uncle's (Masanja s/o Msolondenge - PW5)'s resident to take sweet potatoes and chicken for the deceased and his family at Mwanza. They actually went to PW5's resident which is located within the same village, Inalo.

At their uncle's place the deceased was given five hens and one bag containing sweet potatoes. According to PW5 they left his home at about 1700 hours. They were in motorcycle driven by the accused. They carried the said hens and that bag containing sweet potatoes. This piece of evidence is not challenged by the defense. The only explanation offered by the accused is that he dropped the late Daniel together with his

luggage behind a coffee stall and thereafter he didn't know which direction he took.

Regarding the motorcycle, it is the evidence of Kulwa s/o Simiyu (PW3) that the accused approached him and hired his motorcycle on self-drive arrangement at a consideration of Tsh 5,000/= on agreement that he would return it at 1800 hours of the same day. However, the Accused didn't return it as agreed. According to PW3 he went to trace the Accused at his residential premise but he didn't see him. He was not there at home till the next morning on 2/6/2011 at around 0600 hours when he returned it and agreed to pay Tsh. 8,000/= instead of the agreed hire price of Tshs. 5,000/=. The accused admitted to have hired PW1's motorcycle on that 1/6/2011 and returned it in the morning of 2/6/2011. The reason behind according to him is that when he came back home he was tired.

As well, there is evidence of Ayoub s/o Makulilo (PW1) to the effect that the accused picked Daniel from his home on 1/6/2011 at about 1600 hours, but they never returned home while the deceased was about to leave for Mwanza on the next day from his home. According to this witness, when he asked the accused during the night as to the whereabouts of Daniel who was to be at his (PW1's) resident by that time before his journey to Mwanza, the accused replied that he doesn't know.

He added that they had left each other at Luguru Ginnery Centre where he (Accused) stayed taking coffee while the deceased took his luggage and left for the direction that the he (Accused) didn't know. The father (PW1) was actually worried, he reported the matter to police. The accused was arrested and interrogated on the matter.

According to PW1, on that 1/6/2011 the Accused told him that he was together with the deceased but separated each other at 1800 hours, where he dropped Daniel at Luguru Ginnery Centre and left towards the place known to him while he (Accused) went to have a cup of coffee thereat Ginnery Centre. PW1 further alleged that the Accused further told him that he then went straight to his second wife's residential premise where he remained till he was arrested on 2/6/2022.

PW1 also stated that when the accused was asked by the police during the arrest, about the whereabouts of the Daniel s/o Ayoub (i.e. the deceased), he denied to have been with him in the previous day. This answer worried PW1 even more because he knows that the accused was in the company of Daniel in the previous day ie. 1/6/2011 and PW2, the militia met them at Luguru Centre area nearby Luguru Police Station where he works while leaving for his home place.

PW5 one Masanja Msolandege who is the also the deceased's and accused's uncle testified that on 1/2/2011 at about 1700 hours the said persons were at his residential premise located in the same village with Ayoub Magulilo (PW1), Inalo. Thereat they were given five hens and one bag containing sweet potatoes for Daniel (deceased) who was about to leave for Mwanza on the next day. Thereafter, they left with a motor cycle which was ridden by the Accused.

According to PW2 one Ntemi Malisha who is a Militia at Luguru Police Station, located at Ginnery Centre area, he met the Accused and the Deceased on the motor cycle at about 1900 hours on 1/6/2011 over that area while he was leaving the working premise for home. He said that he had an opportunity to talk to them as they are his relatives. On the next date, 2/6/2011 while at his working station, Luguru Police Station, Ayoub Magulilo (PW1) arrived at the Police Station complaining that his son, Daniel Magulilo was missing. They went to trace him in the 1st Accused's resident in vein, the same applied to the 2nd Accused's resident where they found the Accused person and arrested him as he was the last person to be seen with the deceased before he was missing.

According to the Police Officer who was the Investigating Officer E 5943 D/Sgt Godfrey (PW4), on 6/6/2011 they got the information that the

deceased's body was recovered, it was seen floating on River Simiyu at Lalang'ombe area. When some volunteers dived into the water for purpose of rescuing it, they discovered that the deceased's body was soaked in the water by using a big stone which was tighten with his neck by using a rope. However, the body was retrieved from the water.

The Post-Mortem examination was conducted by the Doctor thereat the scene and the Post-Mortem examination Report (PMR) was then filled. The said PMR which was tendered to court by the Investigator (PW4) established that the cause of death was haemorrhagic and suffocation/asphyxiation.

There are matters which are not disputed in this case. First it is not disputed that Daniel s/o Ayoub @ Makulilo is dead and that he died unnatural death. It is also undisputed that on 1/6/2011 at the daytime, around 1500 hours the accused hired a motorcycle from Kulwa s/o Simiyu (PW3) for initial self-driving agreement from that time to 1800 hours but the Accused returned it on the following date, 2/6/2011 at 0600 hours. Thereafter the deceased had never been found until his dead body was recovered floating over River Simiyu at Lalang'ombe area on the 6/1/2011.

Further to that, it is not disputable that on 1/6/2011 the accused and Daniel s/o Ayoub @ Makulilo went to their uncle Masanja Msolandege (PW5), where Daniel was given a bag of sweet potatoes and five hens as presented. It is furthermore not in dispute that at around 1700 hours the accused and Daniel s/o Ayoub @ Makulilo left PW5's home in a motorcycle which was being ridden by the accused. In that motorcycle they carried the said five hens and a bag containing sweet potatoes for the deceased. That was the last time Daniel s/o Ayoub Makulilo was seen alive. Finally there is no dispute that on 6/6/2011 the body of Daniel s/o Ayoub was retrieved from Simiyu River at Lalang'ombe area where it was seen floating with a big stone tied around his neck.

That being the position the only question before me is whether or not on the evidence available, it is the accused person who murdered the late Daniel s/o Ayoub @ Makulilo.

The Accused person denied to have committed the offence. One may contend whether the circumstantial evidence relied by the prosecution side points the accused person as the actual killer of the deceased.

Before I analyses the available evidence, let me set in motion the ingredients of murder as provided by the law which have to be proved

beyond all reasonable doubts by the prosecution. The said ingredients are the following;

1. Death of human being;
2. That the death was unlawfully;
3. That the death was as a result of malice aforethought;
4. That the accused is the person who caused the death of the deceased.

Starting with the first ingredient, there is no dispute that Daniel s/o Ayoub Makulilo whom hereinafter I will refer to as the deceased is dead. Similarly, cause of his death is not disputed. According the Report on Post-Mortem Examination (Exhibit P1), it is Haemorrhage and Suffocation (Asphyxiation). All the prosecution witnesses on record alluded to the fact that Daniel s/o Ayoub Makulilo is dead. Even in his defense the accused did not deny that the late Daniel s/o Ayoub is no more.

The second ingredient is whether the death of the deceased was unlawful. In that regard the death is always presumed to be unlawful unless it is caused by accident or in defense of property or person or by an act of God [See Uganda case of **R. V. Gusambizi s/o Wesonga (1948) E.A.C.A. 65**]. The above presumption is, however rebuttable and it is upon the defense to rebut it by showing that death was caused by any

other thing, like being bitten by a snake, dragged into deep water by crocodiles or in other word by some accident or any other excusable reason. However, the standard of proof required by the accused to discharge that duty is very low [see the case of **Festo Shirabu s/o Musungu V. R (1955) E.A.C.A 954**].

In the case at hand the Post Mortem Report (Exhibit P1) which was tendered by the Investigator (PW4) revealed external injuries of amputation of fingers which led to the loss of blood (Haemorrhage) and Suffocation/Asphyxiation, that is being deprived of oxygen. Thus, the report which was dully signed by a District Medical Officer at Bariadi District Hospital transpires that the death was not natural.

Again according to the evidence of PW1 and PW4, which was not challenged, the deceased's body was deepened into water by using a big stone connected to it with a rope tied around the deceased's neck. In the circumstance, I find and hold that the death was neither caused by accident not by an act of God. Whoever assaulted the deceased and caused his death was not authorized to do so under the law.

I now turn to the third ingredient, which is malice aforethought. The term Malice Aforethought is defined under **section 200 of the Penal Code [Cap 16 RE 2002]** as follows;

"Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances;

- (a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- (c) An intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence."*

Malice aforethought being a mental element of the offence of murder is difficult to prove by direct evidence. It can be inferred from the surrounding circumstances of the offence, such as;

- i. The nature of the weapon used (lethal or not);
- ii. The part of the body aimed (vulnerable or not);

- iii. The manner in which the weapon was used (whether repeatedly or not) and;
- iv. The conduct of the assailant before, during and after the attack.

In the present case there is evidence that after his death, the deceased's fingers were found amputated and the body being tied with a big stone by using a rope around his neck and soaked into water which made him to suffocate and die. These are the acts compatible to malice aforethought. I accordingly find and hold that the third ingredient of malice aforethought has been proved beyond reasonable doubts.

The last ingredient of the offence charged is whether it was the accused who directly caused the death of the deceased. According to the evidence that have been adduced by the prosecution side, its case depends on the circumstantial evidence. The court can only ground a conviction on circumstantial evidence if it is satisfied with the following;

1. That, the circumstantial evidence available is incapable of more than one interpretation;
2. That, the facts from which an inference of guilt or adverse to the accused is sought to be drawn must be have proof beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred;

3. Evidence must irresistibly points the accused as the actual killer of the deceased.

The principle as regards to the application of circumstantial evidence was enunciated in the case of **R. Vs Taylor & Donovan (1921) 21 CR. APP. Reports 20** in the following words:-

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that is circumstantial."

In the case of **Hamidu Mussa Thimotheo and Majidi Mussa Thimotheo [1993] TLR 125**, the two appellants were charged with and convicted of murder of their father one Mussa Thimotheo. There was no direct evidence linking the appellants to killing. Their conviction rested solely on circumstantial evidence which the trial court considered irresistibly point to their guilt.

Briefly, the fact of that case were that; the deceased Musa Thimotheo who was an employee of the Tanzania Railway Corporation and lived in the Railway Quarter at Tinga Tinga village in Mwanga District. His sons, who are the two appellants in that case lived in a separate house outside

the Railways Quatres, but having no utensils of their own, they used to take their meals at the deceased's house. On 2/1/1985, after working hours he left the camp on his bicycle telling his working mates that he was going to the shopping centre at Handeni. This was the last time that he was seen alive and he never returned to the camp. Two days later his friend(s) became concerned for the no-appearance of the deceased, both at his residence and at work.

They therefore reported the fact of the deceased's disappearance to their superior at work. A search alarm was raised and search for the deceased began. The appellants were asked as to the whereabouts of their father. They both denied to have knowledge. They were therefore arrested and handed over to the police. Later on the same day the body of the deceased was seen floating in the nearby River and recovered. The postmortem examination revealed multiple cut wounds. The cause of death was certified to be haemorrhage and shock. Police partly on the suggestion of the deceased's relatives passed over the appellants' house and conducted a search which was witnessed by neighbors and some relatives. In the said search they recovered two bicycle tyres, one bicycle stand, five spanners and one machete which had blood stains. The

appellants admitted that the machete was theirs but they gave different explanations regarding the blood on it.

In their respective defenses, both appellants denied any involvement in the killing of their father. In its judgement, this court (Mushi J, as he then was), held that although there was no direct evidence linking the two appellants to the death of the deceased, the circumstantial evidence adduced by the prosecution against them was such that it only pointed to their undoubted guilt. The appellants were dissatisfied and they appealed to the Court of Appeal. In its judgment the Court of Appeal held that the chain of circumstantial evidence linking the appellants to the death of their father was unbroken and therefore leads to no other conclusion, but that the appellants were responsible for the death of their father.

In the present case the question is; is there any unbroken chain of circumstantial evidence which points none other than the accused person as the killer of the deceased? In their circumstantial evidence adduced before this court the prosecution side tried to show its weight and I hereby analyze it as follows;

The first link in the chain of circumstantial evidence is the conduct of the accused person prior and after the disappearance the deceased. First, despite the fact that initial hire period was agreed to be three (3) hours

from 1500 hours to 1800 hours, the accused didn't return the motorcycle as he had promised, instead he returned it early in the morning of 2/6/2011 for the reason that he was tired as he had gone to collect his debt from somebody at Ikungulipu village, whom he didn't mention the name until he was cross-examined by the Prosecutor. For no reason, the Accused never called that said person as a witness to prove that he actually met with him at Ikungulipu on that material date.

Another link in the chain of circumstantial evidence implicating the accused with the disappearance of the deceased person is that the deceased was a close relative of the Accused. They left together from PW5's home in a motorcycle driven by the accused.

The 3rd link in the chain of circumstantial evidence linking the accused with the disappearance of the deceased comes from PW1 and PW5. According to Ayoub s/o Makulila (PW1), who is the deceased's father on 1/6/2012 during morning hours his son (deceased) was at home. The deceased informed him that he was expecting to travel to Mwanza on the following day i.e on 2/6/2012. He said that Daniel left and later on came back with the Accused who was riding a motorcycle. PW1 saw the deceased boarding the accused's motorcycle. The accused then sped off. He then never seen his son alive again.

This piece of evidence is well connected with the evidence of Masanja s/o Msolandege (PW5), who is a maternal uncle of both the accused and the deceased. According to this witness, the accused accompanied by the deceased left his home at around 1700 hours. They were in a motorcycle driven by the accused. In the motorcycle they were carrying five hens and a bag containing sweet potatoes which the deceased took from his (PW2's) home. That was the last time for PW2 to see the deceased alive.

On the following morning, 2/6/2011 the Accused was asked by PW1 if he had seen the deceased, as he was not finding him through the mobile phone, the accused replied negatively. But according to PW1 the deceased left his home in the company of the accused on the previous day at around 1700 hours with a promise that he would come back home for the 2/6/2011 journey to Mwanza. PW1 said that on the material day they were together for almost the whole day. According to the accused himself, he dropped the deceased behind a coffee stall at Luguru centre.

In the case of **Mathayo Mwalimu and Masai Rwengwa V. R. Criminal Appeal No. 147 of 2004** the Court of Appeal held that if an accused person is alleged to been the last person to be seen with the deceased, in absence of a plausible explanation to explain away the circumstances leading to the death, he or she shall be presumed to be

the killer. In the present case the accused's explanation that he dropped the deceased and his properties, hens and potatoes at Luguru Centre without him (accused) knowing as to where he was going to, does not make sense. Under that circumstances I am satisfied that the Accused is the one who killed the deceased.

The last link is the motive. It is in evidence of PW1 that the deceased who was businessman buying grains and particularly maize in Itilima and sell them in Mwanza has good money about 18,000,000/= which he intended to use to buy maize. It is also in the evidence of PW1 that before the deceased had arrived from Mwanza the accused was frequently asking him to ask the Deceased to go to Inali to buy the maize as they were about to be scarce in the market. According to PW3 during that very period the accused was in financial problems and he was heavily indebted to various people, but on 2/6/2011 he settled some debts to some people including Malongeta Taji Tsh. 400,000/=, Nhandi Tsh. 300,000/= and one other person Tsh. 1,000,000/=. I have no reason to doubt the evidence of PW1 regarding the deceased's business and the possibility that on the material day and time he had some cash which was intended for buying maize. PW1 couldn't have invented this story which has connection with

the accused person being with the deceased and immediately thereafter, the disappearance and consequently death of the deceased.

In the case of **Robert Edward Moringe @ Kadogoo V. Republic Criminal Appeal No. 196 of 2004, CAT at Arusha (Unreported)**, the Court stated that where the accused is the last person to be seen with the deceased under circumstances which could not easily be explained away, he has a duty to give an explanation of how they parted.

In the matter at hand, what was the accused's explanation of how he parted way with the deceased's? As stated hereinbefore, the accused denies to have killed the deceased. He does not deny being with the deceased on 1/6/2011 at their uncle's home and eventually leaving with him at 1700 hours. In this context, he does not therefore dispute the prosecution's version that he was the last person to be seen with the deceased. His explanation was that after they left their uncle's home they went towards Luguru Ginnery Centre where he dropped the deceased with his luggage, and he stayed at a coffee stall where he had a cup of coffee.

The strange thing the accused alleged that he didn't know the deceased's destination thereafter while they were accompanied together at all the time before, whereby they left together from the Deceased's father (PW1). They were also together at their uncle's (Msolandege's-PW5)

resident where they took sweet potatoes and hens for the deceased to take them to his resident in Mwanza. The said Daniel Ayoub Makulilo was later on found dead on 6/2/2011. Under that circumstance, the Accused was rightly inquired on the whereabouts of the deceased as he was the last person to be with him, the fact which the Accused has failed to dispute. It doesn't make sense that the person who is his friend and relative, whom they were together in on the motor cycle ridden by him drops from the motor cycle without his (accused's) knowledge as to where the said person had gone.

All in all, it is without doubt that the accused planned and executed a criminal transaction with utmost precision and in the process terminated the life of his brother for reason best known to himself. The prosecution has proved beyond reasonable doubt that the accused Kanuda s/o Daudi is responsible for murder of the deceased. I therefore find him guilty as charged and I convict him accordingly.




S.M. KULITA
JUDGE
12/09/2022