

**IN THE HIGH COURT OF TANZANIA**  
**(MTWARA DISTRICT REGISTRY)**  
**AT MASASI**  
**ORIGINAL JURISDICTION**  
**CRIMINAL SESSION CASE NO. 19 OF 2020**  
**THE REPUBLIC**  
**VERSUS**


**THOBIA MICHAEL.....ACCUSED**

**JUDGMENT**

**Muruke, J**

Thobias Michael, resident of Utende village, Mtwara rural District, is charged with an offence of Murder contrary section 196 of the Penal Code. Prosecution alleged that, on 14<sup>th</sup> September 2019, at around 15:00 hours Thobias Michael (accused) was together with Mustapha Hassan Vicent (deceased). At around 17:00 hours accused went to set birds trap at the forest accompanied with deceased. Along the way they met Riziwan Rajab Lichenjele and Alphone James Mbomila. Deceased, Mustapha Hassan Vicent did not return home. Upon being asked, accused denied to have gone with deceased to the forest, later, he admitted to be followed with deceased, but chased him to return home.

The matter was reported to the Village authorities, search started on the same day, without any success. On the next day, 15<sup>th</sup> September 2019, search resumed in which deceased body was found lying in the bushes with head injuries and faces in the trouser. Village Authorities informed Mtwara central police station. Police officer accompanied by Dr. Herry

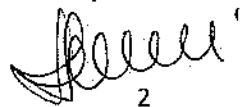
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Suleman Nyamvi, examined the deceased body. Post mortem report revealed that, cause of death was due to severe haemorrhage. Accused was then charged with current offence in which he pleaded not guilty.

Prosecution, called six witnesses to prove their case, namely Dr. Herri Sulemain Nyamvi, **PW1**, Alphone James Mbumila, **PW2**, Joakim Tiago Mkeka **PW3**, Swakina Edward Dimaka **PW4**, G. 5536 Detective Coplo Imani, **PW5** and Betina Vicent Alwis **PW6**. In totality prosecution tendered, Post-mortem Report and Sketch map of the scene, **exhibit P1** and **P2** respectively.

In short, **PW1** medical doctor who tendered exhibit **P1**, conducted post mortem examination of deceased body and revealed that, deceased head had injury of 3cm width to 2cm deep. Cause of death was severe bleedings on the cut wound. **PW1** further revealed that, deceased died more than twelve and half hours by the time he was conducting post mortem around 12 noon. **PW2 Alphone James**, testified that at around 4 pm, while at his veranda of his house, he saw accused accompanied by deceased, going to the forest (mashambani). Later in the night, he was told that Mustafa Hassan Vicent, accompanied Thobias Michael (accused) did not return. And on the following day, he was told that the child has died. **PW2** visited the area where the body of deceased was, together with other villagers, in the presence of police and Doctor who examined deceased body.

**PW3** Joakim Tiago testified that, deceased Mustapha Hassan came to visit his family during school vacation. On 14<sup>th</sup> September 2019, he left deceased with his children at home, went to shamba. When came back, and during evening meal, deceased was not around. They started looking for him, but could not find him. He reported to the village leaders upon

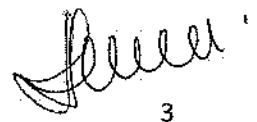


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being told that the child left with Thobias Michael. The following day, the child was found dead at the forest.

PW4 Swakina Edward Dimaka, testified that, she sent deceased to the market to buy tomato for her at around 4 pm, on 14<sup>th</sup> September 2019. Later in the evening she was told by her grandchildren that deceased is nowhere to be found. They started searching from 21 hours to 2am, but could not find him. Following day, they found deceased body in the morning lying in the forest, with sign of being dragged. PW4 saw stone with blood close to deceased body who had the same cloth that he had when she sent him to the market. Deceased had short green in colour and red t- shirt.

PW5 G. 5536, Defective Coplo Imani, is the one who drew the sketch map where deceased body was found. Same was admitted as exhibit P2. PW6;- Betina Vicent Alwis, deceased Aunt, she testified that on 14<sup>th</sup> September 2019, she was at her home with deceased and her other kids, when accused sent deceased to collect fire, for preparation of birds trap. She left deceased and accused at home at around 4 pm, when she went to fetch water. When she came back did not find deceased, upon asking she was responded by Alfonse James Mbumila that deceased and accused have left to the forest (mashambani). She went to Thobias Michael to look for deceased, at around 20 hours but deceased was not around. When she insisted accused replied that, deceased followed him to the forest, but he chased him to return home. PW6 reported the matter to the village leaders in which accused was arrested. They searched for deceased on that night, but in vain. The following day, deceased was found dead at the forest. PW6, is the only witness who identified accused at the dock, as the person whom he left with deceased on 14<sup>th</sup> September 2022 at around 4 pm.

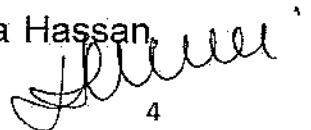


On his defence, DW1 Thobias Michael, 24 years said his parents lives at Pande village, close to Somanga, Kilwa District, Lindi Region. At Utende village, he came to visit his grandparents, Mzee Rashid Chintemba and Bibi Badi, thus he has no any other witnesses apart from himself. He has known deceased for one year in the cause of deceased visiting his relative Betina Vicent Alwis PW6. On the date of incident he asked Mustapha (deceased) to bring fire for home to make rope for bird trap. On his way to the forest to set birds trap he was followed by Mustapha the deceased, but he asked him to return back home which Mustapha did. He went alone at shamba, and came back at around 20 hours when asked about Mustapha. He denied, to have gone with Mustapha, but was arrested by Linyanje and taken to village leaders, then to police station. He denied to have caused death of Mustapha (deceased). While cross examined by prosecution counsel, he replied that at the time was asking Mustapha to return home it was where their village houses end, before entering the forest. DW1 insisted that, when he was chasing deceased to return home, there was a lady, whom he cannot remember her name. He also told this court that, at shamba there were other people in their cashewnuts farms. In totality he denied to have killed Mustapha (the deceased)

On final submission prosecution counsel Meshack Lyabonga articulated two issues for consideration.

- (i) Whether Mustapha Hassan died**
- (ii) Whether, it is the accused who caused death.**

On issue number one, Learned State Attorney submitted that, Exhibit P1, post mortem report and evidence of PW1 Dr. Herry Suleman Nyamvi proved that death was unnatural. Exhibit P1 shows that deceased is Mustapha Hassan Vicent, while charge sheet reads Mustapha Hassan,

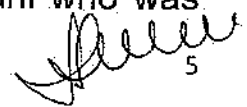


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but is the same person. PW3 Joakim Tiago is the one who identified the deceased body to PW1. In court PW1 testified that person named in charge sheet to have been killed is the same person whom he identified in exhibit P1. Thus, there is no dispute that, deceased died unnatural death insisted.

On the second issue whether it is the accused who has caused death, Learned State Attorney admitted that, no one saw accused killing deceased. Evidence arranged by prosecution is that of circumstantial, mostly, evidence of PW2 Alfonce James and PW6 Betina Aloice, who saw deceased and accused together, before going to the forest where deceased met is death. The last person to be seen with deceased has to give reasonable explanation if not then he/she is responsible for the death, citing case of **Makungire Mtani vs R, 1983 TLR page 179**, in which Court of Appeal insisted on the principle that, the last person to be seen with deceased is responsible for the murder if no reasonable explanation is offered. The two witness PW2 and PW6 saw deceased with accused before they both left to the forest (mashambani) is circumstantial evidence that proves accused is responsible for the murder of Mustapha Hassan (deceased) insisted Meshack Lyabonga for the prosecution.

Defence counsel on the other hand submitted that, evidence paraded by prosecution cannot ground conviction of murder against the accused person. Circumstantial evidence available does not point finger at accused person. PW6 said she left deceased with accused at her home at around **4pm**, while PW2 said he saw deceased and accused at around **3pm**, going to the forest. None of them said how accused looked like, when he was with accused for the last time. Identification of accused being day time or night as set out in famous case of Waziri Amani, Vs. Republic was not complied with. The two witness mentioned Ridhiwani who was



with deceased, but such witness was not called to testify in court, and no explanation given for failure to call witness mentioned, citing case of Abdallah V.R 1991 T.L.R page 91, where it was held that, court may draw negative inference against prosecution for not calling relevant witness.

Advocate Steven Lekey, submitted. further that, PW1 who tendered exhibit P1 told court that he did examination after twelve and half hours from time death occurred. He said that he conducted post mortem at around 12:30 noon as also seen in **exhibit P1**. Thus time of the death must be in the midnight. Different of time is too much to reach to the conclusion, that it is the accused who killed deceased. It is not known what real happened to the accused, no evidence lead to that effect. Counsel for the accused insisted that there is inconsistence amongst the prosecution evidence, on the death of the deceased, that their evidence should not be relied. Citing case of Awadh Abraham Waziri vs R. Criminal Appeal no 303/2014, unreported at page 6 in which it was held that,

*it is trite law that, where evidence is in consistence or where it is contradictory it cannot be relied upon.*

In totality, defence counsel Mr. Lekey argued this court to see that, prosecution have failed to prove their case beyond reasonable doubts.

Having heard evidence from both parties, 'gone through exhibit tendered and final submission, issues for determination are as correctly raised by prosecution in their final submission, namely **whether deceased died unnaturally and whether it is the accused who killed the deceased, and if the answer in the second issue is in the affirmative, whether he killed with malice afore thoughts.**



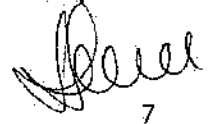
There is no doubt that the prosecution case relied heavily on circumstantial evidence as there was nobody who witnessed the accused committing the offence. Therefore, it is necessary to restate the basic principles governing reliability of circumstantial evidence.

The law is settled that, where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. This position of the law was insisted in the case of **Mark Kasimiri vs R**, Criminal Appeal No. 37 of 2017, CAT (unreported) when the Court of Appeal restated the principle governing reliability of the circumstantial as follows:

**One:** That the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilt 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.

**Two:** 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 ex – existing circumstances which would weaken or destroy the inference this was the principal discussed in the case of **SIMON MSOKE VS REPUBLIC (1958) EA 725A.**

**Three:** That the accused person is alleged to have been the last person to seen with the deceased in absence of a plausible explanation to explain



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away the circumstances leading to death, he or she will be presumed to be the killer.

**Four;** 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, the principal was discussed in the case of **SAMSON DANIEL VS REPUBLIC** (1934) E. A. C. A. 154].

**Five:** That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person, the principal was discussed in the case of **SHABANI MPUNZU @ ELISHA MPUNZU VS REPUBLIC**, Criminal Appeal No 12 of 2002 (unreported).

**Six:** 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. This principal was discussed in the case of **ALLY BAKARI VS REPUBLIC** (1992) TLR, 10.

It was insisted by Meshack Lyabonga Learned State Attorney that; the prosecution case is based on the circumstantial evidence; the accused person was last person to be seen with the deceased. And where the accused person is alleged to have been the last person to be seen with deceased, he is presumed to be the killer unless a plausible explanation to explain away the circumstance leading to death is adduced by him.

Looking at the evidence of PW2 and PW6 who testified to have seen accused with deceased for the last time, following issues are noted: -

**One:** PW2 said he saw accused and deceased at around 3pm leaving their house going to the forest, while PW6 said she left to fetch water at around 4pm leaving accused and deceased at her home. These two principal witnesses contradict each other on the issue of time accused and





deceased seen for the last time, is a serious anomaly in circumstantial evidence.

**Two:** PW1 said that, when conducting post mortem of deceased person, at around 12 noon he realized that, death had occurred twelve and half hours ago. By simple calculations, death must have occurred at mid night or more.

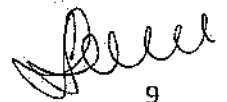
**Three:** PW6 testified that, when she was looking for the deceased at around 20 hours, he asked accused about whereabouts Mustapha, and replied by accused that, he was followed by deceased on his way to the forest but chased deceased to return home. From the above piece of evidence by PW6, when accused met death at around midnight.

**Four:** Prosecution failure to call Ridhiwani who wa together with accused and deceased, who told PW3 and PW4 that he saw accused and deceased going to the forest is fatal. He was an important witness to testify. Since Ridhiwani did not testify and his whereabouts was not stated by prosecution, the court has to draw an adverse inference against the prosecution, as was started in the case of **Aziz Abdallah v. Republic, (1991) TLR 71**, when the Court of Appeal was faced with a situation like the one at hand and went on to hold that:

*"... the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question/ are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown the court may draw an inference adverse to the prosecution.*

In totality, although, PW6 and PW2 testified to have seen accused with deceased for the last time, yet,

*1). the circumstances from which an inference of guilty is sought to be drawn, is not cogently and firmly established, that it is the accused Thobias Michael.*



2). *Circumstances not definite tendency unerringly pointing towards the guilt of the accused Thobias Michael.*

3). *All the circumstances taken cumulatively, has not formed a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused Thobias Michael and no one else."*

The rest of prosecution witnesses just told the court that they were told that deceased and accused left together to the forest. Although they are traces of evidence that accused was the last person to be seen with deceased, this court cannot rule out conclusively that, he is the one responsible with the Murder of deceased. Chain of circumstantial evidence to prove the case at hand was mandatory, which there is none as there is no link of evidence of PW1, PW2 and PW3. In short, there is no link chain that lead to irresistible conclusion of the accused's guilty.

Thus, accused before this court is not guilty, he is accordingly acquitted.



  
**Z. G. Muruke**

**Judge**

**10/10/2022**

Judgment delivered in the presence of Nancy Mushumbusi, learned State Attorney and Steven Lekey, learned advocate for the accused.



  
**Z. G. Muruke**

**Judge**

**10/10/2022**