

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT TARIME

CRIMINAL SESSIONS CASE NO 50 OF 2022

THE REPUBLIC

VERSUS

- 1. SIMON S/O KILES SAMWEL @ K**
- 2. SAMWEL MARWA MAHENDE**
- 3. JIMMY SOSPETER MNIKO**

JUDGMENT

18th & 21st NOVEMBER, 2022.

BEFORE F.H. MAHIMBALI, J.

The accused persons, namely **Simon Kiles Samwel @ K, Samwel Marwa Mahende** and **Jimmy Peter Mniko** (First, second and third accused persons respectively) have been arraigned before this court charged with one offence of Manslaughter contrary to section 195 and 198 of the Penal Code [Cap 16 RE 2019] (the Penal Code). It has been alleged by the prosecution that on 14th May, 2021 at Starehe Street within Tarime District in Mara Region, Simon Kiles Samwel @ K, Samwel Marwa Mahende

and Jimmy Peter Mniko unlawfully caused death of one Johnson Kagusa Msirambo. The accused persons denied the charge levelled against him.

Since the duty to prove a criminal charge always lies on the prosecution and the standard is beyond reasonable doubt, the prosecution called a total of four witnesses with one exhibit (PE1 – Post Mortem Examination Report of the deceased).

The prosecution's witnesses were Mwita Meki Mbagi (PW2) the eye witness; Masiaga Joseph Chacha (PW1) Doctor who attended the deceased first before he died and the one who conducted the Post Mortem Examination of the deceased, WP PC Ester (PW3) Police Officer who received the deceased at Police from the accused persons and Assistant Insp Elly (PW4) who did investigation of the Police Case File in respect of this killing.

The evidence adduced by the above prosecution's witnesses was as follows:

The deceased person in this case one Johnson Kagusa Msirambo was arrested by PW2 while stealing from the store owned by the first accused person in the building owned by Mr. John Makanya. He saw him in the

store of the first accused person having stolen two cartons of Jambo juice and one carton of Azam juice. PW2 says he being Mtaa Chairperson of Starehe, on the material date he had an early assignment at his office in which building the store of the first accused person also situates. The deceased person was also a barber man in one saloon which also situates in the same building. With that early assignment he had in the said office on that day of 14th May 2021, made him arrive at the said office around 06.30hrs. Reaching there, he was astonished to have seen the barber shop open that early morning, however he could not quickly spot a person therein. As he opened the entrance main door leading to the door of his office, he wondered further to have seen the door in which the store owned by the first accused is open. In his wonder, he inquired as who was there. None responded. As he went nearer, he saw the deceased person trying to hide against the door to the kitchen. He inquired from him as what was wrong with him there in someone's store. The deceased then replied, "he was sorry, just Satan went with him". He apologized, promising he won't repeat as if the said Satan won't enter him again. By that time, he had already seen him with three cartons of juice (one for Azam and two for Jambo). How he entered there, the deceased person seemed to have

forged master keys. Seeing this, PW2 detained him, informed the 3rd accused person by his cell phone who then came with the 2nd accused. He showed their thief who then started beating him on allegation of the said theft. Later on, the owner (first accused person) came and joined force the two (2nd and 3rd accused persons) in punishing the said thief compelling him to mention others he was collaborating with in the said stealing. As he could not mention and that following the said beating being intensive, he intervened and ordered them to stop beating him. By that time, Mr. Gweso (Manager of the said building) had already come and seen the said thief who was their employee at the barber shop operating in the same building. Others who were with this PW2, were Boazi Solomoni Ongello who is his Mtaa Government Member whom he directed him to write a letter to police station referring the said thief. The said letter was then given to Mr. Jimmy (3rd Accused person) in the presence of Mr. Samwel Marwa Mahende (2nd Accused person) and Mr. Simon Kiles Samwel @ K (1st accused person). The said thief then was taken by the 2nd and 3rd accused persons into Bajaji where they left with him around 09.00hrs. He testified that the first accused person had then left by his car, while himself and Mr. Boazi had remained into the office going on with other official duties. That later on,

he came to know from the first accused person that the said thief had died. He wondered as what had befallen him.

So, in his testimony, he essentially witnessed the said thief stealing from the store of the first accused person, informed amongst others the 3rd accused person who then came with the 2nd accused person who upon their arrival, they started beating him for the said stealing while witnessing it. Later, the 1st accused person joined force and had also beaten the said thief by use of hand brooms. What else he did was to give the said thief to 3rd accused person for purposes of referring him to police. The beating he witnessed was on his back, hand and buttocks.

The testimony of PW1 (Mr. Masiaga Joseph Chacha – Examining Doctor) is this, on the 14th day of May 2021 around noon time (between 13.00 and 14.00 hrs), while at Tarime Government Hospital, he received the deceased being brought by Police Officers on allegation that he was beaten. As he had just seen him, he took him to the emergency room but shortly died while in the course of subjecting him in treatment. He clarified the said person/patient when he had received was so tired and exhausted. He had a fresh cut wound on his right hand (palm) which was bleeding.

Other wounds were on buttocks, head and shoulder. The whole body then looked swollen with blood clots.

That on the next day, he was ordered to conduct the post mortem examination, in which he did by clinical examination (Observation) and established that the deceased died of excessive internal bleeding, brain injury caused by blunt objects (PE1 exhibit). He concluded his testimony by saying that as per nature of this body, as everything was vivid just by observation, the surgical examination was not necessary and that even if done, would not have different results.

WP PC Esther who testified as PW3, her testimony is to the effect that on the 14th May 2021, she was on duty at CRO – Police Tarime where she had received the 1st, 2nd and 3rd accused persons in this case with their thief suspect (the deceased). The said thief suspect was carried into Bajaji and could not walk by himself, so was being aided by the 2nd and 3rd accused persons leading him to police cells. At CRO, it was the third accused person by name of Jimmy Sospeter who reported how the thief was caught at their store stealing. By that time, it was around 09.45hrs. The said police report was made, and recorded as TAR/IR/1885/2021. Accused person was then taken to police cells.

No sooner had they put the said thief suspect into Police Cells (who had introduced himself as Jackosn Alexander) than when he reported to them that he was not well as he was so beaten. Report was then made to police Tarime superiors where then the said suspect was taken to Tarime Government Hospital for medication. That, later she got news that the said person (thief suspect) died in the course of treatment.

Assistant Inspector Elly of Police Tarime, testified as PW4 in this case, whose testimony is to the effect that, he was an investigator of the case after being assigned the case file by the OC-CID for investigation on the 15th May 2021. In his investigation, he had established that originally, the deceased person was being accused of stealing from the store of the 1st accused person on 14th May, 2021 around morning time. The said thief suspect was caught ready handed by PW2 stealing the said goods of the first accused person. He was then subjected to torture by the 1st, 2nd, and 3rd accused persons. The complaint regarding that theft accusations are as per TAR/IR/1885/2021. That when the said suspect was taken to police station, he was later taken to Hospital for medication after he had complained of severe pains on his body. When taken to hospital, the said suspect died in the course of getting medication at Tarime Government

Hospital on the same date of 14th May, 2021 around noon time. Following this death incident of this thief suspect, the episode then changed from theft claim to manslaughter.

What might have caused the death of the said suspect of theft, in his investigation, he met PW2 who told him the full story how the said suspect was caught by the said PW2 stealing from the store of the 1st accused person and how he communicated the said information to the 3rd accused person who was the Manager/supervisor of the said store. That upon the arrival of these accused persons, they then inflicted torture against the said suspect starting with the 3rd and 2nd accused persons and eventually the 1st accused person who was the last person to join them. Later on, he joined team in the witness of the Post Mortem Examination of the deceased's death on 15th May, 2021.

From this incident then, marked the turn of event from theft case to Manslaughter against the accused persons. The accused persons were then interrogated on the said killing accusations and dully charged for being responsible with the killing of the said thief suspect. The suspect of theft then became the victim of manslaughter and those complainants of theft, became culprits of manslaughter via TAR/IR/1893/2021. He further

testified that, in his investigation, he had established that the said suspect of theft, had introduced himself as Jackson Alexander at police but later came to be known as Johnson Kagusa Msirambo by the information received from close relatives of the said deceased.

With this testimonial evidence by the prosecution, they are praying for conviction boasting that their case has been established beyond reasonable doubt that all accused persons are responsible of the charged offence of manslaughter.

It is a well-established principle that an accused person cannot be convicted relying on the weakness of their defence, inability to defend themselves or because of lies. The law requires accused persons be convicted relying on the strength of the evidence adduced by credible prosecution witness (es). Is this prosecution evidence then sufficient to ground conviction as charged? As it was ruled that the prima facie case has been made out, the accused persons had to give their defense testimony.

Accused persons on the other side have denied the allegations of being responsible of the said manslaughter as charged. Each one giving his own account.

The first accused person who introduced himself as a businessman and the Chairman of Tarime Rural District Council (thus Ward Counsellor), in his sworn testimony admitted to own the said store from which the said theft occurred but disputed to have gone at the said Crime scene as alleged and that he never went to police to report or assist reporting the said crime. Though dully informed of the said theft incident via the second accused (Mr. Samwel Marwa Mahende), he uttered that he neither went to the scene nor at police as alleged. On that account, he discounted the testimony of PW2, if what he testified was true that he saw him at the scene and took part in beating the said deceased person, he being the owner of the said Store, why did he then handover the said suspect of theft to Mr. Jimmy (3rd Accused person) instead of him (the owner)? With the testimony of PW3, he challenged it as not being logical in line with the testimony of PW2. If she knows him as the owner, and that he went at police station with the said thief suspect being with the 2nd and 3rd accused persons, why then the third accused person (Jimmy Sospeter Mniko) was made the complainant of the case in his presence? On this, he registered his concern that he was not around at the scene, he didn't beat the said suspect nor escorted him to police station as testified. He considered the

prosecution evidence as discredited and of no any legal value. He prayed for acquittal.

The second accused person in his testimony admitted to have gone at the scene of crime on the date of the incident after had received the information but from Mr. Gweso who went to the shop he is working to, and informed them that there was theft incident at their store and a thief caught. As he was with the third accused (Mr. Jimmy), they walked together to the scene, which is about 60 meters distance as per testimony of DW1, and saw the said thief there out arrested with the said three juice cartons (one for Azam and 2 for Jambo). At their arrival, they saw many people already gathered and that nearer to the scene, there is a mosque and it was the Eid Elfitir day in which many Muslims had gathered there for the Eid Elfitir Prayer. He denied beating the said suspect. What further he witnessed was the said thief being handed over to Mr. Jimmy who then took him to police and that himself had returned to office (shop).

On his part, the third accused person in his defense testimony admitted that on the 14th May, 2021 around morning time, he went to the scene being with the second accused person after the news from Mr. Gweso that there is a thief caught having stolen cartons of juice in the

store he is supervising/managing. Upon his arrival which was around 08.00hrs, he saw the said thief out and under arrest. There were many people gathered at the scene as it was Eid Elfitir Day and there is a Mosque on that place. Then he was given the said thief person to take him to police where they took Bajaji together with two young persons who escorted the thief to Police as ordered by the PW2 (street chair). The said thief suspect was by that time fine and self-walking. They arrived at police station around 09.06hrs and the accused person had a self-walk and fine. He recorded his complaint statement and left the accused person there with police and was given a piece of paper with Ref No. TAR/IR/1885/2021, marked "Theft" (admitted as exhibit DE1) leaving the said suspect by name of Jackson Alexander there with police. He was then told to return to police on 17th May 2021. That when he returned on 17th May, 2021 for the said follow up, he wondered that he was arrested for unknown reasons and on the 21st May, 2021, he was arraigned before the District Court of Tarime for the charges of manslaughter against Johnson Kagusa Msirambo the accusations he doesn't know. What he knows, the thief suspect he was given to Police Station was Jackson Alexander and not Johnson Kagusa Msirambo and he had left him there.

On the basis of this defense testimony, each accused person prays for this Court to dismiss the charge and accordingly acquit them from these accusations. In support of their prayer, the defense counsel being led by Mr. Paulo Obwana, submitted in support of their position that the prosecution case has not been proved beyond reasonable doubt and conversely arguing that the defense testimony has raised a reasonable doubt against the prosecution case which must result to the acquittal of the accused persons.

First, is contradiction on the name of the deceased person. PW4 testified that Jackson Alexander is Johnson Kagusa Msirambo as informed to him by his relative Nelson David Mkoro. This fact needed proof. As that said relative did not testify in court, it remains hearsay evidence which is unworthy of credit. On this, he drew support from the case of **Katone Rashid @ Mitano vs Republic**, Criminal Appeal no 487 of 2016 at page 14. As he was not called, he prayed this court to draw adverse inference against the prosecution evidence. On this, he prayed that the testimony of PW1, PW2, PW3 and PW4 he expunged as making reference to unknown

With the second issue, there is no linking evidentiary value between the testimony of PW1, PW2 and exhibit PE1. He argued this because what PW2 testified that he saw the accused persons beating the deceased on his buttocks and back. However, PW1 and exhibit PE1 says the death of the accused person was caused by head injury. This then suggests that the deceased died of another beating different from that spotted at the scene. He exemplified that, here then comes into play the relevant of "*the last blow doctrine*" as per case of **Bombo Tomora vs Republic**, (1980) TLR 254, that where two persons beat the same person, the last person to inflict the last blow must be held responsible. As the one who made the blow on head is not known, it is that person then who is responsible of the said death.

The third point for consideration is on poor investigation. It has been argued by the defense counsel that as there is no statement/prosecution evidence that the deceased complained of being beaten, the issue of PF3 of the deceased whether really received medication as alleged before PW1 and that it has not been cleared what name of the victim the said PF3 carried. They think these are fundamental contradictions which erode the significance of the prosecution case as far as its investigation is concerned.

The fourth issue is, on “the fact not disputed is deemed to be admitted”. In cross-examination, the defense counsel argue that they raised enormous issues which have not been cleared by the prosecution. Such issues included:

- Whether there was any complaint recorded of the deceased on the fact of being beaten.
- That the said deceased was fine by the time he was taken to police.
- DW2 and DW3’s testimony stated that at the scene, there were many people. This fact has not been cross-examined by the prosecution.
- It is undisputed that the deceased was at police station by 09:40 hours. However, PW1 says he had received the deceased at 14:00 hours. Where was the deceased person between 10:30 and 13.00 hours when he is said to have been taken from CRO to Hospital? Citing the decision of the Court of Appeal in the case of **Ismail Ally vs Republic**, Criminal Appeal No 212 of 2016, CAT at Mtwara at page 21, he

submitted that the prosecution is stopped from disbelieving what these witnesses testified. On these issues, they pray that this court to find that all accused persons are innocent.

In addition, Mr. Mutalemwa who seemed more interested with the affairs of the 1st accused person (the Boss) argued that in consideration of the prosecution's case, there are vital witnesses for the prosecution case who have not been called to establish the case. So long as the names of the deceased person kept on changing from Jackson Alexander to Johnson Kagusa Msirambo, it was expected that Mr. Nelson Davis and Ssgt Elicikia to have come to the Court and establish the fact of the names of the deceased. Failure to do so amounts to reasonable doubt. That burden does not shift to the accused person to establish their innocence.

He added further that, the relevant documentary material in respect of proof of the names of the deceased have not been provided. Considering the testimony of A/Insp Elly who spoke of two case files **TAR/IR/1885/2021** and **TAR/IR/1893/2021**, referring the same person, there ought to have been production of the said records. Had they been brought; he hopes there should have been the best picture of the case, whether what has been testified by the PW4 is reflective on record.

As documents speak louder than words, the said documentary evidence was more essential for the establishment of the case than words and in any way cannot be replaced by mere words from PW4.

Silence of the prosecution witnesses. On this, the attack has been directed to PW2 and PW1's testimony. That since PW2 is the first person who talked to the court the names of the deceased be that of **Johnson Kagusa Msirambo**, defense counsel (Mr. Mutalemwa) wonders if the same names of the deceased appear in his statement before police recorded his statement under section 10 (3) of the CPA. With PW1, he testified that the deceased died of brain damage, but in PE1 exhibit there is nowhere brain damage is mentioned. When cross-examined, PW1 stated that the palm beat cannot cause death, nor back beat neither an attack to buttocks. PW2 on his testimony testified that the 1st accused person had beaten the deceased on palm and back. His degree of involvement is therefore less. He concluded that, however strong the speculations/suspicious are, cannot ground conviction.

With these pointed out and discussed issues, defense are persuading this court to consider them as they qualify to be reasonable doubts and that must benefit the accused persons.

Mr. Kibwana learned senior state attorney for the republic on the other hand submitted that, as per available evidence in record via the four prosecution witnesses and one exhibit tendered, all three accused persons are guilty of the charged offence as the prosecution's evidence has established the accusations against them all beyond reasonable doubt. Expounding on the cardinal principle of the criminal law that the prosecutions are at charge to establish the case beyond reasonable doubt as also held in the case of **Mohamed said Mtula vs Republic**, (1995) TLR 3, where it was insisted that on such establishment, there must **proof between the link of the accused person and the murder**. With this case, in respect of the prosecution's evidence via the four prosecution's witnesses and one exhibit, there has been established a close link between the death of the deceased and accused persons. PW2 clearly demonstrated how the accused persons had beaten the deceased. First in beating was the second accused person followed by the third accused person and later the 1st accused person (the Boss).

The evidence has established that it was along the corridor where the deceased was beaten. The witness testified how each accused person used broom hand against the deceased. The PW2 was so confident in his

testimony and that none of the accused persons denied being known by the PW2. As it was morning time, full of light, this is also confirmed by the evidence of DW1 and DW3 that they are familiar to each other and that they have no quarrels.

With the case of **Bongo Tomora** (quoted by Mr. Obwana, defense counsel) he argued that, the case is more favorable for prosecution than defense. It is therefore the blow for the defense as the evidence of the prosecution on beating establishes that the beating was by these accused persons and no one else. To say otherwise, is to invite speculative issues which have no place at all. What is clear then with the testimony of PW2, it is only the accused persons who had beaten the deceased.

PW2 further testified that, not only had these witnesses beaten the deceased but also moved with him to police. Pw3 corroborates the testimony of PW2 that she saw these accused persons bringing the deceased at police (CRO).

He added, it is undoubted that these accused persons are owners of the said stolen goods. As they left with him, at 09:00 hours and that they are anxious of their stolen goods and that they arrived at Police at around

09:45 hours, considering that the distance between the crime scene to Police station ranges only between five to ten minutes, for sure the lapse of time in between might be adversely considered against the accused persons.

On the pointed-out deficiencies, Mr. Kibwana disputed that there is no any significant variation or contradiction pointed out by the defense against the prosecution's case. As all witnesses had testified that the deceased first introduced himself as **Jackson Alexander** but later was identified to be Johnson Kagusa Msiramba, legally that is not a significant contradiction as it makes reference to the same person. In the circumstances of this case, it was not so important that deceased's relatives should have come to court for that testimony. That was not the issue before the court. Since PW2 testified that the same deceased was handed to 3rd accused person and that the same re-appears at police (PW3), With this evidence, there is no any significant contradiction for drawing adverse inference against the prosecution's case.

The main issue here for consideration is who had beaten the deceased, emphasized Mr. Kibwana. Whether it was on toes, hair or buttocks, provided that the death occurred because of the said injuries, no

matter what was the blow: where and how. On the significance of the PE1 exhibit, when clearly digested, speaks the same, lauded Mr. Kibwana. That failure to re-examine a witness cannot be considered as failure to cross examine a witness. On this, he prayed that this argument be disregarded.

With sketch map non production in court, Mr. Kibwana was of the view that there was no such importance as there was no any serious issue with the scene.

Lastly, he emphasized that the issue of alibi by the first accused not to be considered at all. Instead, on the strength of the prosecution's evidence via PW2, PW3, PW4 and PW1, all accused persons be convicted as charged as each one has been considerably connected with the charge on proof beyond reasonable doubt.

Upon stating the whole case, its evidence and submissions, I am now duty charged to state whether the prosecution's case has been dully established beyond reasonable doubt as per law.

To start with, the offence of manslaughter in which accused persons are charged with is distinguished from the offence of murder on the manner the unlawful killing is executed. Whereas in murder the unlawful

killing of another person (human being) is accompanied with malice aforethought (pre-meditated), manslaughter is killing of another human being without pre meditation. It happens accidentally by an unlawful act or by culpable negligence. Where then death is caused by an act done in a heat of passion as a result of provocation or where an accused person is suffering from diminished responsibility or causing death in omission to take responsibility of a certain act or acting irresponsibly in a particular act, that is manslaughter. In law, the killing becomes unlawful if the act or omission causing the death cannot be justified.

On the other hand, the killing is with malice aforethought if the person who killed another intended to cause death or grievous bodily harm. Circumstances to be considered in establishing malice aforethought are well stated in section 200 of the Penal, Code Cap. 16 of the R.E. 2019 which provides as follows:

"Malice aforethought shall be deemed to be established by evidence proving any one or 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.”*

For an offence of murder or manslaughter to be established, there must be a cause of death. Whenever there is unnatural death, the cause of death is essential ingredient to be established. The law under section 203 of the Penal Code, Cap 16, defines causing of death as hereunder:

A person is deemed to have caused the death of another person, although his act is not the immediate or sole cause of death, in any of the following cases-

- a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death; in which case it is immaterial whether the treatment was proper or mistaken if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;*
- b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper*

surgical or medical treatment or had observed proper precautions as to his mode of living;

- c) if by actual or threatened violence he causes that other person to perform an act which causes the death of that person, the act being a means of avoiding the violence which in the circumstances would appear natural to the person whose death is so caused;*
- d) if by any act or omission he hastens the death of a person suffering under any disease or injury which, apart from that act or omission, would have caused death;*
- e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of another person.*

In the current case, the issue for deeper meditation with the evidence in record is whether **the person arrested at the store by PW2 and handed over to the third accused person is dead?** This is regardless whether the said person is named Jackson Alexander or Johnson Kagusa Msirambo. I say so because if the deceased person in this case is that person arrested by PW2 stealing at the store of the first accused person and then is proved dead, then whether he identified himself first by name of Jackson Alexander or later identified by others by being Johnson Kagusa Msirambo, is immaterial as long as he is identified to be the same person. This is because people at different times for different reasons happen to change names depending on the circumstances he is

exposed to. In this case, if that person was the same he could even be named as **Jackson Alexander @ Johnson Kagusa Msirambo**. Thus, mere saying that the said person is either Jackson Alexander or Johnson Kagusa Msirambo is not an issue. The issue is whether these both names meant the same person in the circumstances of this case.

I have digested the prosecution's evidence in this case as far as the death of the said John Kagusa Msirambo a person who had stolen goods from the 1st accused person's store is concerned. It has been alleged by the prosecution that the said person who stole at that store owned by the 1st accused was beaten by these three accused persons before he was handed over to the 3rd accused who then in companion with the 2nd accused person sent him to police station. At police station, PW3 says she had received the three accused persons together with the deceased who was suspected to have stolen from the store of the first accused person. The said person then while at police cells, complained feeling awful following the beating thereof (at the scene). He was then taken to Tarime Government Hospital for treatment who shortly died in the course of being offered medical assistance. From that point, then the killing episode against these accused persons commenced leaving the theft episode

abated with the death of the said suspect. As there is evidence by the prosecution side (PW2) that these accused persons had beaten the said thief suspect, if he died following the said injuries, then his death legally is the direct consequence of the said occasioned injuries (See section 203 (a) and (b) of the Penal Code, Cap 16, R.E 2022).

In this case, the one who saw the said thief suspect stealing at the scene is only PW2, Who then informed Mr. Gweso and Boazi and later the third accused being supervisor of the said store. It is him also (PW2) who witnessed the said thief being beaten by these accused persons after he had shown them their thief whom he caught stealing in their shop/store. Later on, he handed the said thief (with a letter addressed to police) to the 3rd accused person in the presence of Mr. Boazi, Gweso, 2nd accused person and the 1st accused himself. By that time, PW2 says the said thief suspect was fine and okay as he walked himself easily to the Bajaji. The third accused then being with the 2nd accused person left with the said thief to the Police station (Tarime) by using Bajaji while the 1st Accused person left by using his car. At police station, 3rd accused person says he had left the said suspect there being fine and walked by himself. To the contrary, PW3 (police Officer) says the accused persons had brought the

said thief suspect being not well. As said thief suspect was awful, was aided to take off from the said Bajaji by the 2nd and 3rd accused persons. After the report was made, the three accused persons left, leaving their thief suspect there at police. Shortly, the said thief more suspect felt awful complaining that he was beaten by those three accused persons. PW3 then informed her superiors on the health status of the said suspect who then was sent to Hospital and died in the course of undergoing medication.

In the digest to the testimony of PW2, I am satisfied beyond reasonable doubt that what PW2 testified is credible, truthful, reliable and trustworthy. In essence, I have no even a single doubt to raise suspicion against that testimony. By the way it is trite law that every witness is entitled to credence and must be believed and his/her testimony accepted unless there are good and cogent reasons for not believing a particular witness. In the case of **Mathias Bundala vs Republic** , Criminal appeal No. 62 of 2004 CAT at Mwanza where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, the court held that:

" it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".

In his defense testimony, the 1st accused person is suggesting that he was not at the scene on the material date. He neither appeared at police with the 2nd and 3rd accused persons being with the said thief person. I will be the last person to disbelieve what PW2 and PW3 testified on the strength of the testimony of PW2 and PW3. Their testimony is steady, straight and reliable as far as the presence of the accused persons at the scene plus beating and also their re-appearance at Police station. What then is stated by the accused persons in their defense story is more defense testimony but hardly reliable as truthful. Since the law is, defense evidence though be considered in the analysis of the case before verdict is entered, is hardly reliable and truthful. It must be considered with caution. What mostly is considered by the Court, is whether the said defense evidence raises a legal reasonable doubt. By the way it is trite law that, accused person's story needs not be believed as he is only struggling for his acquittal and not more.

The central issue for consideration remains one, in consideration of whether the evidence by the prosecution, the case has been proved beyond reasonable doubt? In the case **Magendo Paul and Another Vs The Republic** [1993] T.L.R 219 (CAT), it was held inter alia that;

"..for a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed"

This was held in line with the philosophy enshrined in the case of A Chandrankat Ioshubhai Patel Vs the Republic, Criminal Appeal No. 13 of 1998 (CAT - DSM) in which it was held that;

"remote possibilities in favour of the Accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of Criminal Justice if they were permitted to displace solid evidence or dislodge irresistible inferences"

In the case of **Christian Kale & Another Vs. The Republic** (1992) T.L.R 302 CAT and **John Makorobera & Another Vs. The Republic** (2002) T.L.R 296, which insistently held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case not on the weakness of the defence case. In line with this principle of burden and standard of proof, another important principle becomes necessary as enunciated in the case of the case of **Mariki George Ngendakumana Vs The Republic**, Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported), which inter alia held that:

"It is the principle of law that in Criminal Cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the Accused person who committed it"

Otherwise, it is also trite law in the dispensation of criminal justice that the interests of criminal law is, the guilty are held responsible and punished and the innocents are acquitted. This should be done by the Court even if the Heavens fall but justice be seen done.

I have deeply digested the prosecution's case in this matter, I agree with Mr. Kibwana for the Republic that only fundamental contradictions are entertained by the Court. In law contradictions and inconsistencies in the witness's statement or testimony can only be considered adversely if they are fundamental. In **Luziro s/o Sichone v. Republic**, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."

The foregoing position underscores the splendid position propounded by the Court of Appeal of Tanzania in **Dickson Elia Nsamba Shapurata & Another v. Republic**, CAT - Criminal Appeal No. 92 of

2007 (unreported) in which the learned Justices quoted the passage in Sarkar's Code of Civil Procedure Code. It was held as follows:

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."

Having said all this, I now come to the conclusion part of the case which is so fundamental to the verdict of the case: Who is the deceased in this case? Is he the person arrested by PW2 and sent to Police by the 3rd accused person or someone else? PW3 says she had released him from Police Cells for going to Hospital for treatment and given him to Sgt Elicikia. If he is the one, then as he died of unnatural death, his death is a result of the direct consequence of the said injuries as per exhibit PE1 which says:

"The deceased died of head injury; internal bleeding due to harmful object."

The summary of the said report says:

"Cut wound on the right arm, multiple swellings haematoma on the shoulders and also on the head + oral and nasal bleeding, conjunctive pale ++ Abdomen not distended. The cause of death was Head Injury & Internal Bleeding."

To the contrary, the third accused person says he left the said thief suspect by name of Jackson Alexander at Police Station (being very fine) on accusation of theft and was told to return there on 17th May 2021 for follow up of his case. When he returned on the 17th May 2021, he was arrested and eventually charged. PW2 on the other hand, also testified that when he handed over the said suspect to Jimmy (3rd Accused person), the said thief suspect was fine and self-walking. With the available evidence in record, there is interlinking between the fineness of the said thief suspect as between the testimony of PW2 and DW3. What we are missing is credible evidence as who actually died at the Hospital. Is it that thief suspect by PW2 or someone else? Where there is an allegation that an arrested person was sent to police and later dies, it must be fully established that the said person is actually that person he was arrested previously. How he died is the duty of a medical doctor to establish that. But as to whether the person who died is the same, is the issue of fact. In this case, it was the domain of PW2 to tell that. Did he establish in Court

whether that person he handed over to the 3rd accused person (Mr. Jimmy) is the one dead (Exhibit PE1). That evidence is wanting in Court which now gives this Court a hard task to find out. I think this is the only reasonable doubt left out by the Prosecution and thus a material discrepancy as who is the deceased? Considering the fact that the said deceased kept on being baptized several names: Jackson Alexander and John Kagusa Msirambo, the identification of the corpse by the PW2 was so essential to bring the culprits into square.

For a case involving killing to be considered to have been proved beyond reasonable doubt, its evidence must be strong enough against the accused person as to leave only a remote possibility in his favour which can easily be dismissed. In this case, the evidence that the corpse at the Hospital (Exhibit PE1) is actually the person who was arrested by the PW2 and handed over to the third accused person and later to PW3 has not been established by the prosecution. This in law is a serious omission by the Prosecution which in turn is classified as reasonable doubt to the offence being charged with. As the offence involves unlawful killing, what was supposed to be established are four things: (1) That there is a person who died of an unnatural death; (2) That there was killing which was

unlawful or not endorsed or certified by the law; (3) That the person claimed killed is actually that person who is dead (in the circumstances of dispute), (4) That the accused person arraigned before the Court is the one who killed the deceased.

In this case the component of malice aforethought was not relevant thus, not applicable as it is a manslaughter charge. As per circumstances of this case, the establishment that the deceased person with a mixed names of Jackson Alexander and Johnson Kagusa Msirambo is the same person arrested by PW2 has not been established in Court. Where there is a dispute whether the victim of injuries is dead (dies later), it must first be established sufficiently that the person who died is actually that person who was injured. That can only be established by the person who first witnessed the victim succumbing the said injuries to connect it with the said killing, charge and culprits. Otherwise, there is a fear in the circumstances of this case, any corpse could be baptized the name of Jackson Alexander @ Johnson Kagusa Msirambo either deliberately or mistakenly. I am afraid that this Court will also fall in the same trap in which I am lacking sufficient material to prop on. The law is, "*in dubio pro reo*" *i.e* where there is doubt, don't act. In this case, as there is doubt

whether the said thief suspect is actually dead, corpse identification by the witnessing persons during his arrest and detention (PW2 and PW3) was relevant to identify the said corpse if it carried remains of the same person (thief suspect). That was not done. PW2 just heard from the 1st accused person that the said thief suspect is dead. Likewise, PW3 says, she just heard from Sgt Elicikia that the said person is dead. Is that then a legal proof?

For the said doubt which is classified as reasonable one, I give a benefit of doubt to the accused persons that they are not responsible with the offence charged under section 195 of the Penal Code for want of proof beyond reasonable doubt that the person beaten by the accused persons at the scene is actually dead and it is that corpse (PE1 Exhibit). On that doubt, I thus acquit them all.

DATED at TARIME this 21st day of November, 2022.




F. H. Mahimbali

Judge

Court: Judgment delivered this 21st day of November, 2022 in the presence of Ms. Janeth Kisibo, Mr. Davis Julius, learned state attorneys for the Republic; Mr. Paul Obwana, Onyango Otieno, Florida Makaya learned advocates for all accused persons; all accused persons being present and Ms. Elizabeth Gwerino, RMA.

Right of appeal is explained.

A handwritten signature in black ink, appearing to read 'F. H. Mahimbali', with a long horizontal flourish extending to the right.

F. H. Mahimbali

Judge