

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ORIGINAL JURISDICTION**

IN THE SUB-REGISTRY OF MWANZA

AT CHATO.

CRIMINAL SESSIONS CASE NO. 117 OF 2016

REPUBLIC

VERSUS

CHARLES S/O MANG'WENG'ULA.....1st ACCUSED

DEUS S/O MARCO @ MBITI.....2nd ACCUSED

JUDGMENT

19th May -14th November & 8th December, 2022

ITEMBA, J.

The accused persons, **Charles Mang'weng'ula** and **Deus Marco @ Mbiti**, are jointly charged with the offence of murder, in contravention of the provisions of **section 196** and **197** of the Penal Code, Cap. 16 [R.E 2002]. When the charge was read over and explained to them, they all pleaded not guilty to the charged offence. The plea of not guilty necessitated conducting of a full trial in which the oral and documentary evidence was produced by both parties to the trial proceedings.

When the matter was scheduled for trial, the prosecution was represented by Mr. James Pallangyo and Ms. Winfrida Mpiwa learned state attorneys while the 1st and 2nd accused were represented by Ms. Martha Nicolaus and Ms. Penina Mashimba learned advocates, respectively. At a

later stage, Ms. Monica Matwe learned state attorney took over prosecution while Mr. Constantine Ramadhani, learned advocate, represented the 1st accused.

It is alleged that the deceased met his death at the hands of the accused. The information reveals that on 28th November, 2014, at 19.00 hrs, at Kanyahongola hamlet, in Kasamwa village, within Geita Region, Charles Mang'weng'ula and Deus Marco Mbiti together with another person who is still at large, jointly and together, murdered the deceased, Joseph Mashauri.

The background and account of what happened on the incidence day is briefly that; the deceased was living with his wife named Christina Samoja and his sister **Maresiana Kapama (PW2)**. PW2 told the court that, on the fateful day at around 1900 hrs, the deceased was at home with his family. He was milking the cows with PW2. Two men came claiming they are looking for their lost cow. They were wearing long coats and gumboots. They asked for drinking water, PW2 instructed a child to give them, of which the one who asked for water did not even drink it. He poured the water down and immediately followed the deceased in a cowshed and attacked him, he hit him with a hoe handle on his head. PW2 had just took the milk inside and left the deceased at the cowshed.

It is further explained that the deceased fell down, the assailants slaughtered him with a machete. PW2 and other family members raised an alarm (mwano) which attracted the neighbours but once they reached the scene, the assailants had already disappeared and, the deceased had breathed his last. The scene was dark and the assailants were new to PW2, therefore she could not identify them.

PW2 also mentioned that there were rumors that the deceased had an affair with the 1st accused's wife named Maria Budagala.

The tragedy was reported to the to police. On 29th November, 2014, the team of police officers visited the scene of the crime, **G. 8751 D/CPL Salum (PW6)**, drew a sketch map of the scene (**Exhibit P4**). Later on, **Dr. Joseph Francis Makungu, (PW1)**, a medical doctor, examined the deceased body at Geita Hospital. He prepared a post mortem examination report (**Exhibit P1**) which established that cause of the death was hypovolemic shock due to excessive blood loss caused by extensive laceration wound on the neck involving jugular vein. He had also sustained scratches on the right ear.

Subsequent investigation led to the arrest of the accused persons. It was **D 6944 D/SSG Emanuel, (PW5)** who arrested the 2nd accused. PW5 testified that the arrest was by the aid of one Maneno who is a friend

of the 2nd accused. Maneno led the police officers to the 2nd accused. PW5 stated that the 2nd accused was arrested in the street, at Lwenge area and he told the arresting officers that he had some exhibits at home. At the second accused's house, an emergence search was done and two items were seized thereof; a piece of a hoe handle and a black coat. A certificate of seizure was also filled. That it was the 2nd accused who showed the arresting officers those items. The said Certificate of seizure, a jacket and a hoe handle were respectively admitted as exhibits **P3 (i)**, **P3(ii)** and **P3 (iii)** collectively. According to PW5, the 2nd accused admitted to have worn the jacket Exhibit P3(ii) in order to hide his identity and to use the hoe handle (exhibit P3 (iii) to attack the deceased. PW5 testified that the 2nd accused also mentioned Daudi and Selemani who are involved with the incidence, and the said officers traced the two up to Sengerema but in vain. That, they went back to Kasamwa Police Station where they handled the accused and he took the exhibits to Geita Police station

It was **F.1093 D/SSG Elia (PW4)**, who informed the court that he recorded the 2nd accused's cautioned statement. The said statement was admitted as evidence after a trial within a trial, as **Exhibit P4**. The cautioned statement reveals further that the 2nd accused with one

Selemani Kubanija who is still at large, was hired by the 1st accused to kill the deceased. That, the one who linked the 1st accused to the 2nd accused was known as Daudi, who is also a nephew to the 1st accused. That, a search was mounted against the said Selemani Kubanija and Daudi without any success.

On 6th December 2014, the two accused persons recorded their extra judicial statements before a justice of peace **PW7**, Hamadi Hussein, the Ward Executive Officer of Kalangalala. The 1st accused person could not speak Kiswahili language therefore his extra judicial statement was recorded by the aid of an interpreter named **Meshack Katambi, PW3** who was the street executive officer based at Mulingo Buhalahala ward in Geita. PW3 interpreted from Kisukuma language to Kiswahili and vice versa. However, both extra judicial statements did not pass the test of admissibility and they were rejected by the court, hence, they do not form part of prosecution's evidence. This marked the end of prosecution's evidence.

At the close of prosecution case, the accused persons defended themselves under oath, and they did not have any witness to call. They both totally denied to have been involved with the deceased's death.

The 1st accused person **Charles Mang'weng'ula** testified that he was living at Nyampakawe village and working as a traditional healer for about 10 years. That, on 29th November 2014, in the morning hours, he was arrested at his home by police officers. They did a search and seized a leopard skin and single legged stool, items which he was using for treatment of people. That, he was taken to Kasamwa police station and put under arrest and later, he was asked his personal particulars by police officers named Elia and Shabani. They kept on asking him about the leopard skin and he replied that he got it from his grandfather. That, they mentioned that they will frame him with murder case. He added that he was taken in a room where there were beer and soft drink 'fanta' bottles and he was forced to take off his clothes and sit on a bottle of beer. He informed the court that he was tortured in order to admit that he has committed the offence of murder. Thereafter, he was forced to put his thumbprint on two different pieces of paper. He stated that he had one wife named Ntatu Mayala. He denied to have killed the deceased or to even know him, he stated that he did not even know the 2nd accused. Lastly, he asked to be released.

The second accused person, Deus Marco @ Mbiti told the court that he was living at Iteje in Geita, that he was arrested at his village following

a bicycle accident where he had knocked someone. He expounded that in on that day while he was in the street, there was a crowd of people and police officers were searching for illegal brew dealers. He was taken in the police car up to Kasamwa police station together with many other people who were drunk and had gallons of illegal brew. He explained to have been beaten by three police officers who had sticks. The following day he was asked to give his particulars and he was forced to sign some papers. He said that he tried to ask the police officers to read the said papers but they said he should not teach them their job. That, on 6th December 2014 he was taken to another person known as 'boss' where he was forced to record his statement by stating his personal particulars. He objected that his house was never searched and he had nothing to do with the jacket and hoe handle produced as Exhibit P3 (ii) and (iii). He denied to have known the 1st accused as he met him at the court.

In their final submission the prosecution determinedly argued that through the seven (7) prosecution witnesses and three (3) exhibits produced, they have successful proved the case against the 2 accused persons. That, the death of the deceased was unnatural and that the weight of the evidence is on the confession statement of the 2nd accused person. That, the 2nd accused made his confession to have killed the

deceased with a machete and a hoe handle, and he confessed while free. The prosecution submitted that in criminal trials the best evidence is a voluntary confession made by accused person. In this, the cases of **Jumanne Hamad Chivinja and Another v Republic** (Criminal Appeal 371 of 2019) and **Jumanne Issa and others v R** Consolidated Criminal Appeals no. 54 of 2021) [2022] TZCA 328 (CAT) Kigoma, were cited.

The learned state attorney argued further that when the cautioned statement is retracted it need to be corroborated as it was held in **Mabala Masasi Mongewe v R** Cr. Appeal no. 161 of 2010 CAT (Dsm). She explained further that in this case the cautioned statement was corroborated by PW1 that the cause of death was excessive bleeding due to a cut wound and that PW2 stated that there were 2 accused person who attacked the deceased and the weapons used are panga and hoe handle.

The accused's final submission was done jointly by Mr. Ramadhani learned counsel. He started by stating the legal principle that, it is the prosecution which has duty to prove its case and the standard of proof is beyond reasonable doubt. It was his submission that the republic did not prove the offence of murder against the 2 accused persons as PW6 and PW7 were not at the scene, PW2 could not identify the assailants as the

conditions were not favourable for proper visual identification as per **Waziri Amani v R** (1980) TLR 250. He added that exhibit P2 was not voluntarily acquired and it needed corroboration as per section 33(2) of the Evidence Act and as per the decision issued in **Mdalawa Shilanga and another v R** criminal appeal 247 of 2008 and other cases which he cited. He argued that there is no other remaining evidence implicating the accused persons as even the Exhibits P3 (ii) and (iii) were not identified by any witness. He also argued that Maneno did not testify and even the arresting of the 1st accused is unknown. Therefore, the court should draw adverse inference to prosecution for failure to call material witnesses.

Having appraised the evidence from both parties, the issue is whether the prosecution has established the offence of murder against the 2 accused persons.

Section 196 of the Penal Code established the offence of murder and it states as follows: -

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

Therefore, the main ingredients which needed to be proved against the accused are **causing death, with malice aforethought**, which gives us two main issues:

- i. whether the accused persons caused the death of the deceased.*
- ii. If they did, whether they had intended to kill the deceased.*

To start with, based on prosecution's evidence that of PW1 and PW2 there is no dispute that the deceased's death was unnatural as he was brutally slaughtered. There are two issues which I will deliberate in order to reach the decision. **One**, as to what transpired at the scene, PW2 was clear that she did not identify the accused person apart from stating that they were two men dressed in coats and gumboots, armed with a machete and a hoe handle. She states that the two arrived at the scene, one of them asked for drinking water, he did not drink it he just poured it down. Both attacked the deceased with a hoe handle and when he fell down, they slaughtered his neck and immediately disappeared after the brutal killing.

Two, as to who killed the accused persons the prosecution evidence is anchored in two pieces of evidence first that of PW2 who was at the scene of crime and secondly, the 2nd accused own cautioned statement.

Reading through the cautioned statement (exhibit P2), its contents are that the second accused person Deus Marco @ Mbiti confessed to have killed the deceased after being hired by the 1st accused for a reward of TZS 350,000/= and; the reason for killing him was that the deceased had sneaked out '*alimtoroshā*' the wife of the 1st accused named Maria Busagara. The 2nd accused had explained in detail as to the initial planning which involved Selemani Lukubanija as the second assailant, Daudi, who linked him to the 1st accused and Maneno Mathias who transported them from one place to another using his motorcycle. He also mentioned that on the incidence day he visited the scene earlier to know the surroundings and while there, he met the deceased's wife and they exchanged some few words including the whereabouts of the deceased. That, the said deceased's wife said the deceased has gone to the farm. That, thereafter, he went for shopping where he bought the coat for TZS 17,000, the hoe handle for TZS 1,000, the machete for TZS 3,000 and he sharpened it for TZS 1,000. There is more information about what transpired at the scene, that it was Selemani who asked for drinking water and actually drank it, while he is the one who heavily attacked the deceased until he fell down and then Selemani slaughtered him.

In **Tuwamoi v. Uganda** (1967) EA 84 the court provided among others that an accused persons' confession may be relied as a basis for conviction if the court is satisfied that the confession is true. The court stated *inter alia* that:

'A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a court will act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary for law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.'

From the cautioned statement, there is an issue which troubled me as to what is alleged to have happened after the killing. I will quote part of the cautioned statement:

"..... mimi nilimfuata JOSEPH s/o MASHAURI na kumpiga kwa nguvu kubwa akaanguka chini na SELEMANI alichukua panga na kumchinja

*shingoni mke wake na watoto walikimbia baada ya kuhakikisha kuwa tayari amesharafiki dunia mimi niliondoka na SELEMANI akiwa na panga mkononi na mpini **niliutupa kwa kuwarushia mke wa marehemu** kwa sababu **nilimpiga marehemu hadi ukavunjika** baada ya kurudi tulimkuta MANENO s/o MATHIAS ametusubiri...”*
(Emphasis supplied)

To paraphrase these words, in the cautioned statement, the 2nd accused says that just after killing the deceased, he threw the hoe handle to the deceased wife as it was actually broken, and he flew away together with Selemani. At the same time there is evidence from PW5 who arrested the 2nd accused that after the arrest the accused led them to his house and showed them the weapons which he used for killing. That they seized the machete and a hoe handle from the said house. Furthermore, PW5 produced the said hoe handle which was admitted as exhibit P3 (iii). Looking at exhibit P3 (iii) indeed, it is broken. However, the 2nd accused does not say if he left at the scene while holding any piece of the hoe handle so as to justify the fact that the said piece of hoe handle which was allegedly found at his (the 2nd accused's) house, was brought in by the accused. Considering that both parts of evidence from exhibit P2 and PW5 are from prosecutions, I am left with the following questions (i) if

the hoe handle was thrown at the scene, how was it seized at the 2nd accused house? and in a different village? (ii) if the 2nd accused left with one piece of the hoe handle, and the other piece was thrown at the scene, why wasn't it traced from the scene and produced before the court? (iii) If the accused persons bought the hoe handle as a weapon to kill the deceased, and the deceased was killed, which means the mission was accomplished, the handle is broken, why will the 2nd accused still keep the broken piece at his house? If that is not enough, when the seizing officer PW5 was cross examined by the counsel for the 1st accused, he stated that the hoe handle was not left at the scene and if someone will say so they will be lying, but; the 2nd accused's cautioned statement says that he threw the handle at the scene, does it mean the cautioned statement contains lies? who is telling the truth between the 2nd accused in the cautioned statement and PW5? I will not assume the answers to these questions. Nonetheless, I consider these contradictions on the prosecution's case are serious enough to loosen the weight and authenticity of the whole cautioned statement of the 2nd accused. Hence, I find that exhibit P2 is not true a confession and it is unsafe to rely on this statement against the two accused persons.

That being said, apart from the evidence from PW2 and Exhibit P2, we are left with the testimony of PW3 and PW7 who recorded the extra judicial statement which was not admissible, and PW6 who drew the sketch map of the crime scene. Their evidence is obviously not answering the issue as to who was responsible with killing the deceased. Likewise, the remaining exhibit is the coat which was not identified by any witness to be the one which was worn by the accused person on the incidence day.

Just for the purpose of argument, I find the following questions which remain unanswered; if the 2nd accused visited the scene earlier before the incidence and talked to the deceased wife, why the said wife was not called to identify the second accused before the court? If the 2nd accused was ready to show the places which he bought the weapons used, why didn't he do that? if he did, why didn't the seller(s) come to testify to that effect? There was a person named Maneno who appears to be a key player in this case, wasn't called as a witness?

In **Woodmington v. DPP** (1935) AC 462, it was held *inter alia* that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused. Although the term beyond

reasonable doubt is not defined, in the case of **Magendo Paul & Another v. Republic** (1993) TLR 219 the Court held that:

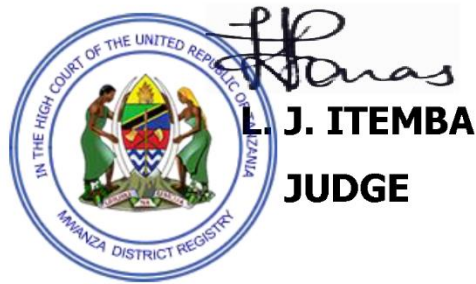
"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."

Based on the deliberation above and by submissions from the defence counsels, I hasten to state that the prosecution evidence was tainted with glaring doubts. As a result, I conclude that the prosecution evidence was not strong enough to answer in affirmative the 1st issue raised by the court which was whether the accused persons caused the death of the deceased.


Finally, the two accused persons **Charles Mang'weng'ula** and **Deus Marco @ Mbiti** are found not guilty of the offence of murder contrary to section **196** and **197** of the Penal Code, which they stood charged with. I hereby order their immediate release from prison unless they are held for other lawful causes.

It is so ordered.

DATED this 8th Day of December 2022.



Judgment delivered this 8th day of December 2022 in the presence of both accused persons, Ms. Monica Matwe, State Attorney for the republic and Ms. Mgeni Mdee advocate, holding brief for Mr. Constantine Ramadhani and Ms. Penina Mashimba for the 1st and 2nd accused persons respectively, and Ms. Evodia Kakwezi, RMA.


L. J ITEMBA
JUDGE
8.12.2022