

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)
AT BUKOBA**

CRIMINAL SESSIONS CASE NO. 76 OF 2020

REPUBLIC

Versus

ELIUD LEONARD & ISHENGOMA FRUGENCE

JUDGMENT

02nd & 28th November 2022

OTARU, J.:

The accused persons, **ELIUDI S/O LEONARD** and **ISHENGOMA S/O FRUGENCE** are charged with the offence of **Murder** contrary to Section 196 of the **Penal Code** (Cap. 16 R.E. 2002). It is alleged that the two accused persons killed one **JAFES S/O ELIAS @JAPHET** on 19th March 2018 at Byeju village within Missenyi District in Kagera Region. Both accused persons pleaded 'Not Guilty' to the offence charged. By virtue of the amendment of Section 265 of the **Criminal Procedure Act**, Act No. 1 of 2022, the trial Judge is mandated to choose whether to hear the case with or without the aid of assessors when determining murder cases, the matter was heard in the absence of assessors.

The Prosecution side was represented by Ms. Judith Mwakyusa and Mr. Kanisius Nduguru, learned State Attorneys. While the accused were represented by Mr. Derick Zephrine and Remidius Mbekomize, learned advocates.

In proving their case, the prosecution called five (5) witnesses and tendered three (3) Exhibits. The Defence on the other side, relied on the sworn testimonies of the accused as well as the written statements of PW2, PW3 and PW5 taken at the police, to shake the credibility of the Prosecution's case.

The facts of the case are such that on 20th March 2018 a resident of Byeju Village by the name of Edward John (PW1) discovered a dead body of a man lying in his shamba. This incident was reported and investigated. Yohana Nyagwa, Assistant Medical Officer (PW4) who examined the body and produced the Post Mortem Report (Exhibit P1) testified that the deceased met his death through a heavy blow to the head by a hard, blunt weapon. During further investigations, E4072 D/SGT Moris (PW5), gathered that Jackson Venant (PW3) saw the deceased and the accused at Kayanja Centre, the night before. That the deceased told PW3 he was going home. PW3 then saw the accused going in the same direction as the deceased, he

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claims to have heard the 1st accused asking the deceased why he did not pay back the money he owed him. Sylvester Sylveri (PW2), a resident of Byeju village and acting chairman of Byeju hamlet narrated how they went to apprehend the accused who were together with a person identified as Mussa Daudi @Byamungu.

The Site Plan and the written statement of Mussa Daudi @Byamungu were admitted as Exhibits P2 and P3 respectively. Mussa Daudi @Byamungu testified that in the morning of 20th March 2018, he and the two accused went hunting in the forest. While there, he heard the 1st accused asking the 2nd accused if the deceased had family in the following words '*je yule Japhet alikuwa ana mke na watoto?*', then the 1st accused added '*huyo Japhet alikula hela yangu shilingi elfu kumi lakini tulichomfanyia jana hakitoshi, atanikoma, sijaridhika*'.

There is no eye witnesses in this case. The evidence connecting the accused to the offence is purely circumstantial, whereby, the prosecution relied on two legal principles that '*the accused were the last persons to be seen with the deceased*' and '*hearsay evidence*' on the comments that the accused made about the incident. Both accused persons defended themselves under oath, without calling any additional witnesses. Although

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they did not deny being at the Kayanja Centre on the fateful night, they denied killing the deceased. Finally, counsels for each side made final submissions.

This being a criminal case, I am aware that in order to convict, the case should be proved beyond reasonable doubt, as was held in the case of **Ally Bakari and Another vs. Republic** (1992) TLR 10. Further, the guidance with regard to standard of proof against accused persons is found in the decision of **Magendo Paul and Another v. Republic** [1993] TLR 220, where the full bench of the Court of Appeal, held at page 223 that:

'If the evidence is so strong against an accused person as to leave only remote possibility in his favour which can easily be dismissed, the case is proved beyond reasonable doubt.'

Keeping that in mind, in proving the case, the prosecution focused on the following three elements; that the death was not natural; that the accused caused the death; and that the death was caused with *malice aforethought*. The defence side denied committing the offence, challenged the credibility of all witnesses and eventually concluded that none of the elements raised by the prosecution were proved as against the accused persons.

Now the question before this court is whether the prosecution has proved the case against the accused persons beyond reasonable doubt. In answering this question, I analyzed the elements as submitted by the prosecution. On the first element, that death was not natural, the prosecution submitted that PW1 up to PW5 testified that the body of the deceased had fatal injuries on the head consistent with the Post Mortem Report (Exhibit P1). I have considered the evidence, the law and the submissions by both sides. PW4 who examined the body had stated that it was his first Post Mortem examination and he did not have the necessary instruments with him. This being the case, it explains why examination was not as detailed as it should have been. However, the fact that the deceased died from an unnatural cause remains. In my considered view therefore, the prosecution managed to prove that the deceased died from unnatural cause.

The second element the prosecution focused on, is proof that the accused are the ones to have caused the death. As earlier stated, the prosecution relied on the testimony of (PW3) Jackson Venance and (Exhibit P3) the statement of Mussa Daudi @Byamungu. Exhibit P3 indicates that in the morning of 20th March 2018, he (Mussa Daudi) and the two accused went hunting in the forest. While there, he heard the 1st accused asking the

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2nd accused if the deceased had wife and children (in the past tense), then adding that what they did to the deceased for not returning his 10,000/- was not enough and some other action will follow. Reading the two sentences, I find them to be contradictory in the sense that the former suggests that the maker knew that Japhet was already dead and the latter suggests otherwise. I therefore find it strange for the same person to have asked as such.

Further, according to PW3, the deceased was last seen at around 20.00hrs in the company of the accused persons. The witness did not see any indication that there was any quarrel between the accused and the deceased apart from hearing the 1st accused asking the deceased why he did not return the money. The Defence on the other hand, relied on the decision of **Japhet Kalanga vs. Republic**, Criminal Appeal No. 332/2016 CAT (unreported), on the need for corroboration in circumstantial evidence and taking with great caution the fact that only one person saw the deceased and the accused. The Defence also cited the case of **Richard Matambule and Another vs. Republic** (1992) TLR 5 on the need of corroborating evidence, to amplify their argument. In response, the Prosecution argued that Exhibit P3 corroborates the evidence of PW3.

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I have considered the arguments by both sides. I have also considered that the statement of Mussa Daudi (Exhibit P3) was recorded on 15th April 2018, about 25 days after the incident. He states in his statement that immediately after the incident he went into hiding for fear of being implicated into the crime. Also, when summons was sent to Mussa Daudi to testify in this case, it came back with information that he left the village since 2019 and his whereabouts are unknown. I am concerned about the credibility of his statement. His behaviour is incomprehensible and suspicious.

Another thing that I find incomprehensible is the existence of a suspect by the name of JAVIRA who was seriously looking for the deceased at around 20.00 hrs on the night of 19th March 2018. Exhibit D3 is to that effect. PW5, when cross examined, stated that this case was still under investigation as there are a number of uneliminated suspects. As such, there is a number of potential witnesses, that could have assisted in proving the case, but their statements have never been taken. Relying on the case of **Azizi Abdallah vs. Republic** (1991) TLR 71, I am in agreement with the Defence that under such circumstances, an adverse inference may be drawn against the Prosecution due to their prima facie duty to call witnesses.

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The testimony of Sylvester Sylveri (PW2) is mainly on the demeanor of the 1st accused when apprehended. In trying to shake the credibility of this witness, the Defence pointed out that his oral testimony in court is to the effect that the accused were apprehended as they emerged from hiding; the 1st accused threw a spear at him, and that the accused were in the company of Mussa Daudi. While, his written statement at the police (Exhibit D1) says nothing of the sort. The defence counsel urged the court to disregard his testimony in court for being merely an afterthought that he came up with later. In addition thereto, Exhibit D1 mentions JAVIRA as the possible offender. The defence counsel cited the case of **Jeremiah Shemweta vs. Republic**, (1985) TLR 228 where the court held that *'the discrepancies in the various accounts in the stories of the prosecution's witnesses gives raise to a reasonable doubt about the guilt of the appellant'*.

The prosecution argued that contradictions of their witnesses are due to human recollection and are therefore minor. They urged the court to believe their witnesses and relied on the case of **Julius and Dismas Alloys Lyimo vs. Republic**, Criminal Appeal No. 36 of 2017 (CAT) that *"circumstantial evidence may be only as conclusive but even more conclusive*

than eye witness". The prosecution prayed that the court believes their witnesses as credible and reliable and convict the accused accordingly.

I have compared the testimonies of PW2 and PW3 to their statements ie: Exhibits D1 and D2, respectively. I have as well considered the arguments of both parties in their final submissions. I am not convinced that the contradictions are minor. The contradictions are based on omissions of important information and inclusion of another important information that was not there before. I am in agreement with the Defence counsel that the added information about the demeanor of the 1st accused throwing a spear at PW2 is a clear afterthought. The two witnesses' testimonies need to be considered with a pinch of salt. I therefore find the contradictions to be significant, and the witnesses unreliable.

According to Exhibit P2 and the testimony of PW1, the body was found very close to a public road. The time gap between when the accused was last seen and the body being found is 12 hours. The Post Mortem Report does not indicate the possible time of death, neither is there information if the deceased reached his home on 19th March 2018. Did he reach home, but then left again? Or maybe he did not? Maybe he met some other people on

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the way? Maybe the deceased was killed in the morning? The last person to be seen principle here does not lead to the accused's guilt.

Further, I am mindful of the requirement of proving the link between the death and the accused, as held in the case of **Mohamed Said Matula vs. Republic** (1995) TLR 3 (CA) that;-

'upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.


It is an established principle that the court may convict a person based on circumstantial evidence, if such evidence draws an inference which irresistibly points to the guilt of the accused person(s), see **Ally Bakari and Pili Bakari v. R** [1992] TLR 10; **Protas John Kalongola and Another v. R** [1992] TLR 51 and **Hassan Fadhil v. R** [1994] TLR 89. In the case at hand, the evidence adduced does not point, irresistibly to the guilt of the accused persons neither am I convinced that the accused are the only people who could have committed the offence. As such, the link between the death and the accused persons has not been proved to the required standard.

Since the evidence does not irresistibly exclude every possibility that the death of the deceased could have been caused by somebody else, the doubts therefore are resolved in favour of the accused. Consequently, the question as to whether the prosecution has proved the case beyond reasonable doubt is answered in the negative. Having said that, I see no need of dealing with the third element of malice aforethought.

As the prosecution has not discharged its duty, both accused are hereby set free unless any of them, or both are otherwise lawfully held.


It is so ordered.

Dated at BUKOBA, this ^{28th}..... day of ^{November}..... 2022.


M.P. Otaru
Judge

The right of the appeal to the Court of Appeal is explained to the parties




M.P. Otaru
Judge
28th November 2022