

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL SESSIONS CASE NO. 51 OF 2022

REPUBLIC

VERSUS

1. RASHID JUMANNE @ TOLU

2. MTORI LUCAS @ MARAGO @ PELE

JUDGMENT

24th November & 12th December, 2022

M. L. Komba, J.:

On 25th day of February 2021 was the day one **Mkaka Boniphace** (the deceased) met his demise at Etaro village within Musoma District in Mara Region after being assaulted by a group of people accused him to be a thief. The report on post-mortem examination performed by a medical officer **Douglas Massawe Proches** revealed the cause of deceased's death was due to the internal bleeding in the skull resulted from wounds caused by cut from sharp objects.

What narrated in that brief story above is the reason why the accused arraigned before this court for the offence of murder contrary to section 196 and 197 of the Penal Code Cap 16 [R.E 2019 now 2022]. The accused **Rashid Jumanne @ Tolu** and **Mtori Lucas @ Marago @ Pele** alleged to murder the deceased. It was stated on particulars of offence to the

information preferred against the accused, that, **Rashid Jumanne @ Tolu** and **Mtori Lucas @ Marago @ Pele** on 25th February 2021 at Etaru village within Musoma District in Mara Region, murdered one **Mkaka Boniphace**.

During the hearing of this case, following the prosecution prayer, the first accused **Rashid Jumanne @ Tolu** was abated from this case under section 284A of the Criminal Procedure Act [CAP 20 R.E 2022] after the prosecution proved by tendering the death certificate, that the first accused died in prison on 3rd August, 2022. Thus, remained one accused person **Mtori Lucas @ Marago @ Pele** who achieved the full trial.

After the information read over and explained to the accused person in the language he understood, he denied the offence preferred against him hence the plea of not guilty entered against him. As the cardinal principal in criminal law, the burden of proof always lies on prosecution side. In the case at hand the prosecution represented by Ms. Monica Hokororo and Nico Malekela, the learned State Attorneys marshalled a total of four witnesses and tendered one exhibit (post-mortem examination report) to prove the charge laid against the accused person.

The testimony of the first prosecution witnesses **Baraka Boniface Mkama** (PW1) was to the effect that on 25th February, 2021 around

08:50hrs he received a phone call from one **Kichele** informing him to go to Egenge as his brother **Mkaka** (the deceased) was in trouble people want to kill him. PW1 rushed to the scene area and while on his way he met with **Baraka Myabi** and **Kiguti Laurent** who accompanied him after he asked them. PW1 proceeded that, when they reached at Egenge he saw group of people some of them holding the local weapons. He also saw the deceased sat down and he was injured by machetes on the left head, on his neck and on back of his head.

PW1 asked the deceased on what happened to him, the deceased replied that they wanted to kill him, he will tell him later. On the scene PW1 managed to identify the accused and one **Mabuyi** because he knows them. PW1 further told this court that he tried to help the deceased by board him on the motorcycle to the hospital but they obstructed him. **Tolu** put the deceased down and **Pele** removed the motorcycle switch while **Mabuyi** assaulted PW1 by using flat side of machete.

When the PW1 asked **Pele** why they denied him to help his brother, he told him that the deceased is a thief, he stole the fish nets. PW1 then asked where are the fish nets the deceased stole, he answered that they have been taken by the authority dealing with natural resources. PW1 testified further that, the assailants tied the deceased's hands on his back

and continued to assault him. PW1 decided to call his elder brother who gave him the phone number of OCS. PW1 called the OCS and informed him about the situation. The OCS told PW1 to tell the assailants not to kill the deceased and take him to the police station.

PW1 stated further that he told **Pele** what he talked with OCS and then they took the deceased but after a short work distance they hit the deceased by a club and the deceased fell down. PW1 called the OCS again who wanted to talk with the assailants on the phone but **Pele** refused. The OCS told PW1 that he has already sent the police officers to the scene to take the deceased. But by the time the police officers arrived at the scene **Mkaka** was already died and the assailants have already disappeared.

PW2 **F5668 D.CPL Michael** told this court that on 24th December 2021 around 21:30hrs while he was in office, he got informed by the head of his section that the murder suspect was found and they should go to arrest him. PW2 proceeded that they went and succeeded to arrest the accused **Mtori Lucas Pele** at his home in Etaro village.

The third prosecution witness one **Kiguti Laurent** (PW3) testified that on 25th February, 2021 morning he was going to his daily routine with **Baraka Myabi**. When their around Luwela area they met with PW1 riding

a motorcycle and he asked for a ride. PW3 testified further that when they reached at Kuluwela they got informed by one **Kichele** that there was a person put under arrest at Egenge area. They decided to go to Egenge area while PW3 riding a motorcycle.

PW3 proceeded that when they reached at Egenge they found the deceased sat down and has wounds from the cut on his head. He also stated that they found like ten or more people on the area armed with the local weapons. PW3 testified to identify **Tolu, Rashidi, Pele, Mabuwibeni, Tega, Makalanga** and **Ekama**. PW3 added that **Pele** was armed with a wood, **Mabuyi, Tega** and **Tolu** had machetes and **Ekama** was holding a club.

PW3 witnessed further that PW1 talked to the deceased and then the deceased walked himself and boarded the motorcycle but **Pele** took him down saying that the deceased is a thief he must die and they continue to assault him. PW3 added that PW1 called the police but the police said that they don't know the location of the scene so PW1 and **Kiguti Laurent** went to direct them. During cross examination witness informed the court that when they rescue the deceased by motorcycle Pele and accused jointly removed Mkaka from the motorcycle then Mabuyi removed

the switch of the motorcycle as a protest of assailants not to rescue the deceased. He further said he drive the motorcycle to the egege.

PW4 **Douglas Massawe Proches**, his evidence was pertaining to post-mortem examination he performed on deceased body. He testified that he discovered the deceased's death was due to internal bleeding in the skull resulted from cut wounds by sharp objects. He then finalized his evidence by tendering post-mortem examination report (Exhibit P1).

Upon closing the prosecution case and this court to rule out that the *prima facie* case has been established against the accused, leading by advocate, Mr. Evance Njau, the defence side entered their defence. The defence side relied on the defence of *alibi* of which they provide notice early.

DW1 **Mtori Lucas Marago @ Pele** testified to the effect that on 25th February, 2021 he left his home at 05:00hrs using his bicycle to attend agricultural activities at Kigeratuma village. He arrived at Kigeratuma village around 06:45hrs and he proceeded with farming activities cooperated with other people as he was cultivating watermelons. DW1 proceeded that he knows the deceased and that when he returned home later, he heard that there was a stealing incident, two people were caught

and one died at Egenge. He heard the one who died was **Mkaka** (the deceased).

DW1 continued that the following day he went to mourn the loss of the deceased on the account that he was his neighbor and after the deceased's burial ceremony he returned back to his home. He testified further that ten months after the incident, he was arrested on 24th December, 2021. DW1 added that he is not in good terms with the deceased family. He stated that in 2019 the deceased's family cows entered to his farm and destroyed the crops. After DW1 took the action over the incident, the deceased's family ordered to pay him four million Tanzanian shillings (Tsh. 4,000,000/) but they paid him one million Tanzanian shillings (1,000,000/).

The second defence witness **Paulo Charamba** (DW2), testified to this court that on 25th February, 2021 he was at Kigeratuma doing agricultural activities with DW1 and three other people. He stated to found DW1 on the farm when he arrived at 08:00hrs and he left around 18:00hrs to his home. On that day around 19:00hrs DW2 heard about the incident happened at Egenge and the following day he attended the mourning. He added that on material date he was at the farm with DW1 all day.

The last defence witness **Sebastian Boniface** (DW3) told the court that on 25th February 2021 while he is in Busamba area, he received the call from village chairman called Edward and informed him that there is an emergence alarm, his young brother (the deceased) was chased by police men and caught by the villagers in the area of Egenge. DW3 decided to go to the scene area and found the deceased caught by a group of around 20 people. The deceased was injured and he was continued assaulted by the people. DW3 saw five people who attacked the deceased using machete and club and he remembered two of them to be **Manyama** and **Masatu**. DW3 added further that he knows **Pele** (the accused) and he did not saw him among the crowd and the people who attacked the deceased. DW3 also told the court that the decease is his young brother. That marked the end of defence case.

Having gone through the evidence adduced by both parties, I find the pertinent issue to deal with is whether the prosecutions proved their case beyond reasonable doubt. And in doing so, I will stand firm to see whether all elements of murder were proved against the accused person. In the case of **Philimon Jummane Agala @ J4 vs. The Republic** Criminal Appeal No. 187 of 2015, the Court of Appeal held that in murder trial the prosecution must prove the elements of murder.

There is plethora of authority that provides for essential ingredients of the offence of murder. In criminal jurisprudence, in order to be victorious, the prosecution has to prove the followings elements that establish the offence of murder;

- 1. There is the death of a person.*
- 2. The said death was caused by unlawful act or omission.*
- 3. It is the accused who caused the death of deceased.*
- 4. The accused acted with malice aforethought.*

Regarding the 1st and 2nd elements, it is undisputed throughout prosecution and defence evidence that **Mkaka Boniface** (the deceased) died and that his death was unnatural one. Despite the fact that the accused did not dispute the deceased death during the preliminary hearing, the evidence of PW4 and exhibit P1 (post-mortem examination report) proved that the deceased death was due to internal bleeding in the skull resulted from cut wounds by sharp objects. **The crucial issue is whether the deceased was murdered by the accused person at hand.**

It is obvious that the evidence to consider in order to determine whether the accused is responsible for the deceased's death rests on the testimonies adduced by PW1 and PW3. As the evidence suggests, PW1

and PW3 are the eye witnesses who witnessed the accused assaulted the **Mkaka Boniface** to his death.

However, after I hardly studied the evidence of PW1 and PW3 I found a lot of discrepancies that tainted the whole prosecution evidence. **First**, PW1 told this court that on material date he received a call about his brother incident from one **Kichele** and when he rushed to go to scene, he met PW3 and **Baraka Myabi** whose he asked them to accompanied him and they did. Unlike, the PW3 testified to this court that on material date when he was on the way with **Baraka Myabi** to attend his daily routine, they met PW1 who has the motorcycle and he asked him for a ride. And that on their way they got informed that PW1's brother was arrested at Egenge, thus they decided to go to Egenge.

Second, PW1 told this court that at the scene he told the deceased to board a motorcycle and he sat behind him to take him to the hospital, but **Pele** (the accused) pull him from the motorcycle and removed the switch while **Tolu** took the deceased off the motorcycle. Unlike, in his evidence and when cross examined by the accused's advocate, PW3 testified that the accused and **Tolu** are the ones who put the deceased off the motorcycle and that the accused did not pull PW1 from the motorcycle.

He also stated that the one who removed the motorcycle switch was **Mabuyi**.

Third, PW1 testified before this court that when attacking the deceased, the accused was armed with club and machete. Contrary, PW3 in his testimony he told the court that the accused had no machete, he had a piece of wood which he used to assault the deceased. **Four**, PW1 informed the court he was driving to Egenge to rescue deceased while PW3 said the same that he was the one who ride the motorcycle to the scene of crime. I wonder if at all they went Egenge and witnessed the assault.

As I stated early above, the cardinal principal in criminal law is that the burden of proof always lied on prosecution shoulders. There are plethora authorities on this stance. See the decision of the Court of Appeal in **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 CAT at Mbeya where it was held as follow;

"It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution.

*In the case of **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika** [2002] T.L.R. 296 the Court held that: "A person is not guilty of a criminal offence because his defence is not*

believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt"

As far as the prosecution evidence in this case are concerned, it raises a huge doubt due to the contradictions between material witnesses PW1 and PW3. I am of the views that, the contradictions arose between PW1 and PW3 evidence are not minor, they go to the root of the case. The discrepancies dented the prosecution case as the PW1 and PW3 are only material witnesses who were at the scene of crime. It is the settled position that contradiction can only be considered as fatal if it is material going to the root of the case. See **Sebastian Michael & Another vs The Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018, CAT at Mbeya.

In the case at hand, I found hardly to believe which witness between PW1 and PW3 who were both at the scene of crime eye witnessed the incident was telling the truth. PW1 stated that the accused was armed with machete and club used to attack the deceased while on the other hand PW3 told this court that the accused had no machete rather than he used a piece of wood to attack the deceased. This contradiction is not minor as

it can answer the question whether the accused attacked the deceased and by using which kind of weapon.

The Court of Appeal in the case of **Mohamed Said vs The Republic**, Criminal Appeal No. 145 of 2017 held that a witness who tell a lie on a material point should hardly be believed in respect of other points. See also **Zakaria Jackson Magayo vs The Republic**, Criminal Appeal No. 411 of 2018, CAT at Dar es salaam.

In this case, I find difficult to believe testimonies of PW1 and PW3 as they contradicted each other on important points. This makes their testimonies to contain lying at some points.

In the upshot, I have found critical deficiencies in the prosecution case. I have gone through the testimonies of the prosecution witnesses, their testimonies are tainted with contradictions, and it is not safe for the court to rely upon their testimonies. Therefore, I am left with no scintilla of evidence to support the conviction of the accused person for the murder. For the reasons I endeavoured to explain above, I am of the opinion that the prosecutions have failed to prove their case beyond reasonable doubt as required by the law.

Ultimately, I find **Mtori Lucas @ Magaro @ Pele** not guilty and acquit him of the offence of murder contrary to section 196 and 197 of the Penal

Code [CAP 16 R.E 2019]. I order the accused person to be released from the prison unless he is otherwise lawful held.




M. L. KOMBA

Judge

12th December, 2022

Right of appeal is fully explained.


M. L. KOMBA

Judge

12th December, 2022