

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT MPANDA

CRIMINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 22 OF 2016

REPUBLIC

VERSUS

1ST ACCUSED: MARIAM D/O TUNGU

2ND ACCUSED: FLORA D/O PAUL

3RD ACCUSED: KAMBONA S/O NKANA

4TH ACCUSED: TUNGU S/O SALUM

JUDGEMENT

Date of Last Order: 16th March 2022

Date of Judgement: 24th March 2022

NDUNGURU, J

Accused persons, Mariam Tungu, Flora Paul, Kambona Nkana and Tungu Salumu stand charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 RE 2002 now 2019 (hereinafter referred to as the "Penal Code"). It is alleged that on 2nd day of July

2017 at Kitupa village within Mlele District in Katavi Region, did murder one Mazoya Misangwa (hereinafter referred to as "the deceased").

When the charge or information of murder was read over and properly explained to them. They pleaded not guilty to the offence, and thus plea of not guilty was entered, hence full trial.

During the trial of this case, Mr. Abel Mwandalama, the learned Principal State represented the Republic; whereas, the 1st and 2nd accused persons were represented by Mr. Gadiel Sindamenya, the learned advocate, while 3rd and 4th accused persons were represented by Mr. Patrick Mwakyusa, learned advocate.

To drive home the allegation levelled against the accused persons, the republic brought a total of nine witnesses namely Anord Alfred Fungo, who testified as prosecution witness No. 1 (PW1), Patrick John Mambosasa as PW2, G. 4308 D/Coplo Joram as PW3, Abdallah Moses as PW4, ASP Mashauri as PW5, G. 4021 Coplo Shauri testified as PW6, Raphael Thomas as PW7, WP 9817 DC Pili as PW8 and F. 6408 D Coplo Richard as PW9. The prosecution also tendered a total of six exhibits including Post Mortem Report, Sketch Map and accused person's confession statements.

Upon the closure of prosecution case, defence case opened after it was found that the prime facie case has been established against accused persons; thus, requires them to give their defence story. In disapproving the prosecution allegation levelled against them, accused persons testified as DW1, DW2, DW3 and DW4. They neither called a witness to testify on their favour nor tendered exhibit. The summary of prosecution testimonies is as hereunder;

PW1, Anord Alfred Fungo, a Medical Officer testified that on 02nd of July 2017 while at his office was called by OCS of Majimoto Police Post wanted him to conduct Post Mortem at KATUPA Village. At the scene, he went to the house where the body was. The body was of Mazoya Misangwa. He conducted examination on the body of the deceased which had a lot of blood and wound on the head and injuries on the neck. According to his examination the cause of death was due to hemorrhage shock due to severe blood.

PW2, Patrick John Mambosasa, resident of Kitupa village testified that at night of 01st July 2017 to 2nd Day of July 2017 he was awoken by Handaya Masanja and he was informed on the murder event happened at the home of Mazoya. He informed OCS. He went to the home of Mazoya and he found deceased lying down and saw four big cut wounds, one on the head another on the neck, other on the ribs and

upper part of leg. At the morning he started going around the house. At the rear part there was a small window but not possible for a person to pass. All the doors of the house were intact. PW2 contended that at the funeral he found two families who are very close to the scene were absent, it was the family of Tungu, Salumu and Mwigulu. He testified that normally when death happens, they all gather to participate. He further testified that having noted their absence, they traced them. At their home, only women were present. He asked the wife of Mwigulu she replied that her husband is on safari, but some people denied and asserted to have seen yesterday, the wife muted. PW2 said the wife of Tundu said her husband was present and he slept at home but he awoke away at night and came back at midnight while his clothes were full of blood. Upon asked her husband, she was told to sleep, then her husband went away with a bicycle saying if she had to seek more information should get from their expert one Kambona. He arrested Kambona and the bicycle make sport grey in colour which had blood at right hand of steering which was identified to be of Tungu Salum. He and six men arrested Tungu who was at Bukoba bar and sent him to the police station. He also given chance to interrogate Tungu and he said to him it was a satan who led to do that. He was shown the wound on the

front face and the hand saying he was cut by the deceased while defending himself.

PW3, G. 4308 D Coplo Joram testified that on 02nd of July 2017 at about 02:00pm was assigned by Insp Mashauri to go Kitupa village to the scene of murder. At the scene he found in the room a male dead body. The body had a wound on head. He drew a sketch map which he tendered in court and admitted as exhibit P2. He told the court that the deceased was Mazoya Misangwa and according to the map the deceased body was found in the room of the house.

When cross-examined by Mr Mwakyusa he replied that the murderer broke the window and entered therein to commit the crime.

When cross-examined by Mr Sindamenya he replied that he is an expert of drawing the map.

On re-examination he stated that the window has no top, it had been covered by bricks almost six bricks were recently removed and thrown down.

PW4, Abdallah Moses resident of Kitupa village testified that on 01st July 2017 at night hours he was phoned by sungusungu leader who told him that there was a murder crime at the home of Mazoya. He and his neighbours went to the scene of area. At the scene he found Mazoya was daed and the body had a sharp cut wound on the head, neck and

leg. He said people started asking how the crime happened. Sungusungu started investigation and identified the families which did not attend the funeral. The families identified were that of Tundu and Mwigulu. He arrested Kambona and the bicycle. He interrogated Kamoba who said the wife of the deceased and her mother went to the witch doctor and they informed that the deceased was bewitching the family of her wife and was also squandering the properties. Kambona told him Mwigulu and Mawazo are the ones who killed the deceased. At the scene PW4 said window of the house covered by bricks were removed. He said only two bricks were removed.

When cross-examined by Mr Sindamenya he replied that he was not the one who did investigation, he heard from Tungu and Mwigulu wives when interrogated by Sungusungu leader. (Ntemi)

PW5, ASP Mashauri, a Police Officer testified that on 02nd day of July 2017 he was informed through a call from village chairman of Kitupa one Evarist Saanane of the murder incident. He and other police men went to the scene of crime and he found the dead body of Mazoya with wounds on head, neck and was full of blood. He was told by the wife of the deceased that the murderers passed through the window, however he got doubt as the window was small and only one brick was removed. PW5 told te court that he was told by Sungusungu leader that

families of Tungu and Mwigulu were suspected of the crime for the their missing in the funeral. He interrogated Kambona who said Tundu had blood in the clothes and he took the bicycle Tungu had left at the home of Kambona.

PW6, G. 4021 Coplo Shauri testified that on 29th of September 2017 he was assigned to record cautioned statement of the accused Tungu Salum. He informed the accused of his rights and proceeded to record the statement. The statement was tendered in court and admitted as exhibit P3.

When cross-examined by Mr Mwakyusa PW6 stated that he was assigned to interrogate the accused by Insp Mashauri due to shortage of policeman at Majimoto police post. PW6 said Tungu in his statement stated that Kambona told him to find killers.

When cross-examined by Mr Sindamenya PW6 stated that he was assigned to record statement of Tungu Only.

When re-examined by Mr Mwandalama PW6 replied that he was not investigator of the case.

PW7 Raphael Thomas Msangama testified that on 30th of September 2017 at about 10:00hrs while in the office he received Tungu Salum who was brought by a police officer one Florence for the purpose of recording confession statement. He asked the accused if he was

willing to record his statement, he was willing and he recorded the statement. The extra Judicial statement was tendered in court and admitted as exhibit P4.

PW8 WP 98 17 DC PILI testified that on 05th of July 2017 he was assigned to record cautioned statement of Flora Paul. She introduced herself to the accused and she informed of her rights. Having informed of her rights she proceeded to record the statement which was tendered and admitted in court as exhibit P5.

PW9 F. 6408 D Coplo Richard testified that on 02nd of July 2017 was assigned to record cautioned statement of Kambona Nkana. He took the accused and he introduced himself. He informed the accused of his rights and upon his willing he proceeded to record the statement which was tendered in court and admitted as exhibit P6.

The court having found that, the prosecution has sufficiently established a case against accused persons to require them to make their defence, the accused persons were called to defend themselves and they elected to testify under oath. The first accused testified as DW1, second accused as DW2, third accused as DW3 and fourth accused as DW4. They neither called witness to testify in their favour nor tendered exhibit. The summary of their evidence is as hereunder;

DW1, Mariam Tungu, a Peasant testified that flora Pau is her biological daughter who was married at Majimoto to Mazoya Masangwa. She told the court that she had good relationship with her in law Mazoya Misangwa. She has never visited them for almost a month before the death of the deceased. She stated that she never planned the killing of his in law. While at the funeral she was arrested by sungusungu. She denied to have plotted the killing of the deceased. She was then sent to the police station where she was locked up. She said she does not know 3rd and 4th accused persons.

When cross-examined by Mr Mwandalama DW1 replied that she never interfered the properties of flora and his husband. She was paid 15 cattle's as dowry payment and she was arrested on 05th of July 2017.

On re-examination by Mr Mwakyusa DW1 stated that deceased was her in law and she came to know the 3rd accused while at Majimoto Police Station like wise to the 4th accused person.

On re-examination by Mr Sindamenya DW1 stated that she was not related to the properties of her in law.

DW2 Flora Paul testified that on 02nd of July 2017 she was at home sleeping with her husband. While sleeping they were invaded by unknown people as she could nit identify them. DW2 said those people

passed through the window and cut the solar panel. She said those two people upon entered they caught her husband. They started fighting with her husband and cutting him. DW2 further told the court that those people opened the door of the room and got out. She went to the sitting room and started shouting telling neighbors that they have been invaded. She went to report to the chairman and chairman reported to the police. DW2 testified that on 05th of July 2017 she was arrested but she denied to have been involved in the killing. She told the people that they were invaded. At the police station she was interrogated by a male police man not woman who came to testify.

When cross-examined by Mr Mwandalama DW2 stated that she never gave her statement at the police.

On re-examination by Mr Mwakyusa DW2 stated that they were invaded at 03:00hrs and the bandits passed through the window which was at the sleeping room. She never knew the 3rd and 4th accused persons until she met them at Majimoto Police Station.

On re-examination by Mr Sindamenya DW2 stated that Joram recorded her statement but never tendered the same.

DW3 Kambona Nkana testified that he was arrested by sungusungu militi at about 02:00pm and sent him at the scene of crime

where he denied to know the people who killed the deceased. He was beaten but he denied to know the bandits. DW3 said he was recorded the statement at Majimoto Police Station after being beaten. He never involved in the killing.

DW4 Tungu Salum testified that she was arrested by sungusungu at Majimoto at about 20:00hrs and she was sent to the police station. At the police station she was interrogated by OCS and she was beaten. She denied to know Kambona, Mwigulu and Mawazo

When defence case was closed, both the State Attorney and the learned advocates for the republic and accused persons respectively were given audience to address the court on final submissions. They all opted not to submit. They all left the matter to the court to decide.

After thoroughly going through prosecution and defence case I summed up to court assessors who thereafter gave respective opinions. Lady and gentleman assessors respectively who sat with me in the trial of this case had similar opinion. They both opined to me to find the accused persons not guilty of the offence facing them and be acquitted.

The main issues before this court are essential three for the determination of the case at hand.

- (i) whether the deceased one Mazoya Misangwa alleged to have died is actually dead, if the answer is in affirmative,*
- (ii) whether the accused person Mariam Tungu, Flora Paul, Kambona Nkana and Tungu Salum, are responsible for the death of Mazoya Misangwa,*
- (iii) whether their action was actuated with malice aforethought.*

To start with the first issue, it is evident from the evidence of PW1, PW2, PW3, PW4 and PW5, that all these witnesses visited the area of scene and saw the dead body of Mazoya Misangwa lying down in one of the rooms of his home at Kitupa village. They all identified the body to be of Mazoya Misangwa. Also, PW1 the medical officer accompanied with PW5 ASP Mashuri by then OCS of Majimoto Police Station conducted post mortem examination at the area of scene. The medical officer through post mortem report (Exh. "Pi") established that the cause of death was due to sever blood loss as a result deep cuts wound on the head (Hemorrhagic shock). The medical officer further opined that the cut wounds were deep to the vein of the deceased. Even, the defence side did not dispute that the deceased actually died. There is no any other piece of evidence which dispute with the above assertion/ proposition. Thus, the deceased, Mazoya Misangwa is actually dead. The

death was actually unnatural one, as the deceased sustained several cut wounds on his body as opined by PW1, a Medical Officer.

As pointed above, the testimony reveals that the death of the deceased Mazoya Misangwa was unnatural, the second issue raised whether it is the accused persons herein who were involved in the killing of the deceased.

From the evidence on record as far as the cause of death of the deceased, is contained in the Post Mortem Examination report (Exh. P1). The report, Exh. "P1" reveals that the cause of death is due to severe blood loss due to multiple deep sharp cuts to the head, backbone and neck which went deep into the inner parts of the body

According the totality of the prosecution testimony, none of the witnesses testified to have seen the accused persons assaulting the deceased which resulted to his death. The accused persons are only connected with the circumstantially connected with the death of the deceased, that is to say, the prosecution case hinges on circumstantial evidence. The law is very settled that court of law may ground conviction based solely on circumstantial evidence. That means the said evidence irresistibly led to the inference that it was the accused persons and nobody else who committed the offence, and such evidence must

also be incapable of more than one interpretation and the chain linking such evidence must be unbroken. See **Justine Julius and others vs Republic**, Criminal Appeal No. 155 of 2005; **John Mangula Ndogo vs Republic**, Criminal Appeal NO. 18 of 2004; **Shaban @ Elisha Mpunza vs Republic**, Criminal Appeal No. 12 of 2002; **Aneth Kapwiya vs Republic**, Criminal Appeal No. 69 of 2012, all unreported and **Ally Bakari vs Republic** [1992] TLR 10.

That for the court to find the accused person guilty of the offence of murder the available evidence must link the accused person with the said death.

The first link begins with the evidence of PW2, which is to the effect that at night of 01st July 2017 to 2nd Day of July 2017 he was awoken by Handaya Masanja and he was informed on the murder event happened at the home of Mazoya. He informed OCS. He went to the home of Mazoya and he found deceased lying down and saw four big cut wounds, one on the head another on the neck, other on the ribs and upper part of leg. At the morning he started going around the house. At the rear part there was a small window but not possible for a person to pass. All the doors of the house were intact. PW2 contended that at the funeral he found two families who are very close to the scene were absent, it was the family of Tungu Salumu and Mwigulu. He arrested

them for that reason of absence from the funeral. He asked the wife of Mwigulu she replied that her husband is on safari, but some people denied and asserted to have seen him yesterday, the wife muted. PW2 said the wife of Tungu said her husband was present and he slept at home but he awoke away at night and came back at midnight while his clothes were full of blood. Upon asked her husband, she was told to sleep, then her husband went away with a bicycle saying if she had to seek more information should seek from their expert one Kambona. He then arrested Kambona and the bicycle make sport grey in colour which had blood at right hand of steering which was identified to be of Tungu Salum. He and six men arrested Tungu who was at Bukoba bar and sent him to the police station. He also given chance to interrogate Tungu and who he said to him it was a satan who led to do that. He was shown the wound on the front face and the hand saying he was cut by the deceased while defending himself. Upon being asked the bicycle of Tungu was with him, Kambona stated to him that Tungu went at his home at night had an injury on his head and he left the said bicycle so that he Kambona send back home, then Tungu disappeared.

PW3 testified to have drawn sketch map of the scene of area (Exhibit P2). According to his map, he stated that the body of the deceased was found in the room of the house.

PW4 testified that he was among the persons who went to the scene of area and witnessed the body of the deceased. He further testified that wives of Tungu and Mwigulu were arrested by sungusungu upon transpired that were not at the funeral. Upon interrogated the wife of Mwigulu told them that her husband was n safari while the wife of Tungu told them her husband returned back home at night while his clothes had blood. The wife Tungu further told them if she needed more details should seek Kambona, and her husband took the bicycle and left. He said Kambona was also arrested with the bicycle owned by Tungu. PW4 further told the court that at the scene the doors of the house were intact and the window of the house was removed two bricks only.

PW5 a Police Officer also testified to have gone at the scene of area where he found the dead body of Mazoya Misangwa. PW5 informed this court that at the house of the deceased only one brick was removed. He was also doubtful of the statement given by Flora wife of the deceased that the bandits entered the house through the window, which according to his observation was small.

Now looking at the testimony of PW2, it was very clear that the witness got information which led to the arrest of Kambona and the bicycle alleged to have been found with blood. PW5 told the court that he got such information from the wife of Tungu after interrogation,

however that crucial witness to my view was supposed to be listed by the prosecution to be among the witnesses eligible to testify, but was not called. Such witness was in a position to testify the assertion by PW5 that Tungu returned home at night with his clothes full of blood and then he took the bicycle to Kambona's residence. Unfortunately, even the said bicycle which was alleged found at Kambona's residence as owned by Tungu and taken to the Police Station by PW5 was not tendered in court as exhibit. The bicycle was alleged to had blood stains; the prosecution could go far to prove whether the blood relates to that of the deceased. But such effort was not done. These doubts as regards the above facts narrated by the witnesses PW2 and PW5 in their testimonies ought to be cleared by the prosecution. Therefore, doubts are solved in favour of the accused persons.

Again, in his testimony PW2 informed this court that after he arrested 4th accused person was given chance to interrogate him. However, PW5 in his testimony denied to have given PW2 a chance to interrogate the 4th accused person.

There is also contradiction between the testimonies of PW4 Abdallah Moses who said at the house of the deceased only two bricks were removed; while PW5 ASP Mashauri said only one brick was removed at the house where the deceased body was found. PW2

testified that six bricks were removed. PW3 who drew sketch map was in a better position to inform this court of the space left after removal of the bricks. But PW3 testimony does not resolve the contradictions.

It is therefore considered view of this court that the testimonies of PW2, PW4 Abdallah Moses and PW5 ASP Mashauri do not swim together. They are contradictory to each other and they are not consistent as a result one could say they cannot be relied upon. I am aware that not every discrepancy in the prosecution witnesses may cause the prosecution case to flop. It is where the gist of evidence thereof is contradictory then the prosecution case will be dismantled. See. **Said Allyv Ismail vs Republic**, Criminal Appeal No. 241 of 2008, CAT at Mtwara, unreported and **Mohamed Said Matula vs Republic** [1995] TLR 3.

This contradiction and inconsistencies occurred in this case have an impact in assessing the credulity of the witnesses testified before this court. PW2, PW4 Abdallah Moses and PW5 ASP Mashauri are contradicting as regards to the number of bricks which were removed by bandits at the house of the deceased.

Again, PW5 testified what PW2 was told by the wives of Tungu and Mwigulu, that was hearsay evidence. What the wife of Mwigulu and wife Tungu told PW2 is what PW5 testified before this court.

The next to consider is whether the piece of incriminating evidence relating to confession statements made by the accused persons alone can suffice conviction to the accused persons. DW4 Tungu Salum's cautioned statement (Exhibit P3) and extra-Judicial Statement (Exhibit P4) were admitted in court without objection also cautioned statement of DW2 Flora Paul (Exhibit P5) was admitted in court without objection. The cautioned statement of Kambona (Exhibit P6) was admitted in court after conducting an inquiry.

In this case, and in their respective defence, all the accused persons DW2 Flora Paul, DW3 Kambona and DW4 Tungu Salum retracted their confession statements made to the police officers and to the Justice of Peace. The court still had a duty to satisfy itself from the circumstances in which confessions were made that they were voluntary.

I think the statements were voluntary because there was nothing in all the evidence to suggest that they were obtained through undue influence. But having been retracted, the procedure is to look for corroboration. The trial court is required to proceed with caution as per the case of **Tuwamoi vs Uganda** [1967] E. A 84.

I think the confession statements were to be corroborated the evidence of PW2 Patrick John Mambosasa, PW4 Abdallah Moses and

PW5 ASP Mashauri, but as stated above their evidence were tainted with contradictions and doubts.

The statements made by the three accused persons also differ in terms of how they conspired, modality of executing the crime and the planning. The statements by itself can not be relied upon to ground conviction.

In determining a case centered on circumstantial evidence, the proper approach by trial court and appellate court is to critically consider and weigh all the circumstances established by the evidence in their totality, and not to dissect and consider it piecemeal or in cubicles of evidence or circumstances. See. **Stephano Muhiche vs Republic**, Criminal Appeal No. 29 of 1980, CAT, **Ali Bakari vs Pili Bakari** [1992] TLR 10 and **Kipkering arap Koske and Another vs Republic** [1949] 16 E.A.CA 135.

With those said and done, if I disregard the testimonies of PW2, PW4 and PW5 there is no evidence to corroborate the confession statements of the accused persons given by DW2, DW3 and DW4 apart from the testimonies of PW1 who was a Medical Officer who proved the cause of death of the deceased and PW3 who drew sketch map of the scene of crime. Their evidence does not point the guilt of the accused

persons. Generally, the prosecution case left several questions unresolved. The benefit must be given to the accused persons.

Therefore, in other words, I may say and I am saying that the defence story by DW1, DW2, DW3 and DW4 cast reasonable doubt to the prosecution case. Thus, I hold the issue framed herein above in the negative that the accused persons herein are not responsible for the death of the deceased.

In the result, I concur with the Lady and Gentleman assessors who entered a verdict of not guilty, and proceeded to hold that the prosecution failed to prove this case against the accused persons beyond reasonable doubt. Henceforth, I find them not guilty and acquit them of the offence they stand charged, that is murder contrary to section 196 of the Penal Code. I now order that the accused persons, Mariam Tungu, Flora Paul, Kambona Nkana and Tungu Salumu be set at liberty unless otherwise lawfully held in connection with any other criminal offence.

It is so ordered



D. B. Ndunguru

D. B. NDUNGURU
JUDGE
24/ 03/ 2022