

IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

ORIGINAL JURISDICTION

AT GEITA

CRIMINAL SESSION CASE NO. 223 OF 2016

THE REPUBLIC

VERSUS

1. ANDREW S/O MAGEREJA	} ACCUSED
2. GABRIEL S/O INNOCENT		
3. MASALU S/O FULUGUTI		

RULING

Date: 25th February, 2022

W.P. DYANSOBERA, J:.

The accused persons, namely Andrew s/o Magereja, Gabriel s/o Innocent and Masalu s/o Fuluguti henceforth the 1st, 2nd and 3rd accused persons, are charged with murdering Nzali s/o Ngoko. According to the information, the allegations against the trio are that on 24th day of September, 2015 at about 10:00 hrs at Mwambagalu village within Chato District in Geita Region, did murder the said deceased.

Upon arraignment, they denied the charge and the prosecution, in order to prove their case beyond reasonable doubt, called four witnesses.

Besides, three documentary evidence, namely a sketch plan (exhibit P. 1), a Report on Postmortem Examination (exhibit P 2) and a cautioned statement of the 1st accused (exhibit P 3) were produced in evidence. The information against the accused persons was prosecuted jointly by Ms. Janeth Kisibo and Ms. Monica Matwe, both learned State Attorneys whereas the 1st, 2nd, and 3rd accused persons were defended by learned Counsel that is Mr. Pauline Michael, Ms. Yulitha Hezron and Penina Mashimba, in that order.

At the closure of the evidence of the prosecution, Counsel for both the prosecution and defence left to the Court to consider whether or not there is evidence that the accused committed the charged offence and are liable to be convicted.

Sub-sections (1) and (2) of section 293 of the Criminal Procedure Act, Cap. 20 (R.E.2019) are clear and provides thus:-

"293.-

- (1) When the evidence of the witnesses for the prosecution has been concluded, and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers after hearing the advocates for the prosecution and for the defence, that there is no evidence that the accused or any one of several accused committed

the offence or any other offence of which, under the provisions of section 300 to 309 of this Act he is liable to be convicted, shall record a finding of not guilty."

- (2) When the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused committed the offence or any other offence of which, under the provisions of section 300 to 309 he is liable to be convicted, shall inform the accused person of his right-

(a) to give evidence on his behalf; and

(b) to call witnesses in his defence

and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights.

From the above provisions, it is clear that what the court should do is to consider, after the evidence of the prosecution witnesses has been concluded and the statement if any, of the accused person before the committing court has been given in evidence and after hearing the advocates for the prosecution and for the defence, that there is there or there is no evidence that the accused committed the offence or any other offence for

which, under the provisions of section 300 to 309 of Criminal Procedure Act, he is liable to be convicted. Thereafter record a finding that the accused is not guilty or address them in terms of paragraphs (a) and (b) of sub-section (2) of Section 293 of the Criminal Procedure Act.

The normal practice in criminal trials such as the one in consideration, is that the prosecution has the burden of proving beyond reasonable doubt not only all the elements of the charged offence but also to present evidence linking the accused with the offence committed. The issue to be resolved at the present moment is whether the court considers that there is evidence that the three accused persons or any of them committed the offence and are or is liable to be convicted.

As stated above, the prosecution relied on the evidence of PW 1, PW 2, PW 3 and PW 4 as well as exhibits P 1, P 2 and P 3. Briefly, the case for the prosecution established that Nzali s/o Ngoko, the deceased, was a resident of Mwabagalu village. He had a wife called Ndabasha Luswetula (PW 2) and other children including Kimbu Nzali (PW 2). While the deceased and PW 2 were living together in the same house, PW 1 was living in at his home. On 24th day of September, 2015 at 01:00 hrs, the deceased and PW 2 were in their house sleeping. They then heard dogs barking outside. The

deceased woke up and went outside. PW 2 also woke up so as to follow her husband. She did not manage to get outside as she was prevented from exiting by a person she could not identify who went straight to their bedroom, broke the drawers and stole Tshs.300,000/=. Later, PW 2 managed to go outside but found the deceased lying down dead. The deceased had been cut with pangas on the head and neck. The children had been locked inside from outside. PW 2 unlocked the door and all went to the dead body and started raising an alarm. Some people including PW 1 responded the alarm. He was told that the deceased had been killed by being slashed with pangas. The police then arrived and permitted them to inter the dead body.

Both PW 1 and PW 2 were clear in their evidence that they did neither witness the deceased being slashed to death nor identify the assailants as it was dark and there was no light.

PW 2, however, told this court that on the day he could not recall, he went to the pombe shop belonging to Deus Kema at Mwambagala centre and found people taking some local brew. He then heard people saying,

'Tumeua. Tumeshamaliza. Tumeshapewa hela. Tumeshamaliza kabisa'. As to who was uttering those words, PW 2 stated that it was the 2nd accused and that the same 2nd accused mentioned his fellows to be the 1st and 3rd accused persons. PW 2 did not tell who the audience to whom the 2nd accused was uttering those words was. PW 2 asserted that he later called the clan, that is his young brothers, his mother (PW 2) and the village chairman and recounted to them what the 2nd accused was bragging. . PW 2 further argued that the village chairman did, in writing, refer him to the Police Station at Buseresere. While PW 1 was clear that he could not tell if the accused persons were involved in the killing and insisted that she did not identify any at the crime scene, the evidence of PW 1 and PW 2 established that these witnesses were not only living in the neighbourhood with the accused persons but also were related to each other.

The other witness was F. 2513 Det. Seargent Nimrud who apprehended both the 2nd and 1st accused. He was not involved in investigating the case. The last witness was E.4265 Det. Seargent Jishosha who, on 8.2.2016 recorded the 1st accused person's cautioned statement. In evidence, the defence objected to its admissibility and after a trial within a

trial, though the court found it to have been retracted by the accused, admitted it as exhibit P 3.

Upon consideration of the evidence, there no dispute that the accused persons were not seen killing the deceased. The same accused were not arrested at the crime scene but at their respective homes though after a long time. Moreover, they were not found with anything incriminating.

Now, with regard to the evidence of PW 1, his assertion that he heard the 2nd accused bragging that he together with his fellows had killed. This evidence is wanting in many respects. In the first place, it was not stated who, the 2nd accused was saying to have killed. Second, PW 2 did not state who the audience of the alleged utterances was and it is not clear if at all he told the clan members and reported the utterances to either the village chairman or even the police. That evidence was not supported anywhere. Even if, for the sake of argument, PW 2 had heard those utterances and reported to the police through the village chairman, his evidence does not indicate when he made that report. There was no indication that the police used that report in apprehending the accused. This is partly because, apart from the fact that PW 2 was silent on when he made that report, PW 4 told this court that the source of apprehending the accused persons was the

information they had received from their informers. Those informers were not disclosed and did not testify. The court lacks the details the informers gave to the police which led to the apprehension of the accused persons. And partly because, there was unexplained delay in apprehending the accused persons particularly where the accused persons were not only well known to PW 1 and PW 2 but also were closely related as the evidence of PW 2 revealed. According to PW 1, the 2nd accused was their neighbour while the 1st and 2nd accused were living in the neighbouring villages. PW 2 was clear in his evidence that the 1st accused was his '*bageshi*', the 2nd accused was the friend of his father, hence his father while the 3rd accused was his brother in law. It is on record that the incident occurred on 24th September, 2015 but it is not until on 8th day of February, 2016 when the accused persons were arrested and taken to the police station. It is trite that unexplained delay in arresting the accused creates doubt (see the case of **R. v. Rugisha Kashinde and Sida Jibuge** [1991] TLR 175.


Apart from the evidence of PW 1, there is the evidence of PW 4. It is on record that the said witness not only recorded the cautioned statement of the 1st accused but also participated in apprehending the accused persons. The basis of his evidence was exhibit P 3 which is the cautioned statement

of the 1st accused. The 1st accused retracted it. It is the law that where a confession is retracted the procedure is to look for corroboration. This principle was well echoed at p. 26 by the Court of Appeal in the case of **Amiri Ramadhani v. R.**, Criminal Appeal No. 228 of 2005 (UR). As the record reveals, there is no evidence on record to corroborate exhibit P 3.

Having evaluated the prosecution evidence on record and the provisions of section 293 (1) of the Criminal Procedure Act [CAP 20 R.E.2019] and upon directing properly our minds to the law and evidence, we consider that there is no evidence that the accused persons committed the charged offence and are liable to be convicted.

We thus record a finding of not guilty in respect of the 1st, 2nd and 3rd accused persons under sub-section (1) of Section 293 of the Act.

1st Assessor (Hawa Swedi).....

2nd Assessor (Jumanne Nkana).....

3rd Assessor (Shija Malale).....

W.P.Dyansobera

Judge

25.2.2015

This ruling is delivered under my hand and the seal of this Court on this 25th day of February, 2022 in the presence of Ms Janeth Kisibo and Ms Monica Matwe, learned State Attorneys for the Republic and Mr. Pauline Michael, Ms Yulitha Hezron and Ms Penina Mashimba, learned Advocates for the 1st, 2nd and 3rd accused persons, in that order.



W.P.Dyansobera

Judge

Rights of appeal explained.



W.P.Dyansobera

Judge