

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 96 OF 2017

THE REPUBLIC

VERSUS

JUMA SHABANI

JUDGMENT

8th and 18th March, 2022

KISANYA, J.:

The accused person Juma Shabani was charged with the offence of murder contrary to sections 196 and 197 of the Penal Code [Cap. 16, R.E. 2002]. The particulars of the offence show that, on the 6th day of May, 2016 at Gwata, Kisarawe District within Coast Region, the accused person did murder one, Loli Zengo, the deceased.

The accused person denied the offence, prompting the prosecution to line up five witnesses and tender two documentary evidence namely, the report on post mortem examination (Exhibit P1) and the sketch map of the scene of crime (Exhibit P2). On his part, the accused person was the sole witness in his defence.

During the trial, the prosecution was represented by Ms. Rehema Mgimba, and Mr. Clemence Kato, learned State Attorneys, whilst Mr. Francis Munuo and Mr. Joston Francis, learned advocates represented the accused person.

The trial was conducted with the aid of three assessors, namely, Maria Mwita, Wactiache Wactiache and Khalfan Nyundo who were selected before commencement of the trial.

The facts underlying the arraignment of the accused person are briefly as follows. The deceased and accused person were residents of Gwata Village within Kisarawe District in Coast Region. On the 6th day of May, 2016, the deceased, Yeni Mohana (PW4) and one Ngembe were grazing cattle in the forest of Gwata Village. While the deceased was grazing calf, PW4 and Ngembe were grazing goats. The accused was the youngest child. In the course of grazing cattle, they met the deceased who informed them that his mission in the grazing field (forest) was to collect wild fruits. Thereafter, the deceased, PW4 and Ngembe led their cattle to a watering trough. On their way back home, they met the accused person. According to PW4, the accused person chased them with a machete. PW4 and Ngembe fled leaving behind the accused person and deceased.

The deceased did not return home on the material date. His uncle, PW5 Malangha Mahona and others searched for her. In the course of searching for the deceased, PW5 met the accused person who told him not to search for the deceased in the shrub. It was testified by PW5 that the accused person directed them to find the deceased in the residential area. On the following morning, the deceased body was found in the shrub.

Following a report made to the police station, PW1 ASP Joseph Emmanuel, PW3 G.7716 DC John and other police officers went to the scene of crime. They were with PW2 Innocent Lucas Mkindi, a medical doctor from Kisarawe District Hospital. In their respective evidence, PW1 and PW3 stated that many people were found at locus in quo. At the same time, the accused person had been arrested by the village authorities after being suspected of having killed the deceased. One, DC Joel prepared a sketch map (Exhibit P2) which was tendered in evidence by PW3. On the other hand, the deceased body was examined by PW2 whose report on post-mortem examination (Exhibit P1) revealed that the deceased was raped and strangled to death. In his evidence, PW2 stated that the immediate cause of the deceased's death was suffocation when she was being raped.

When put to his defence, the accused person vigorously denied being responsible for the death of the deceased. He introduced himself as a witchdoctor. He went on to state that, on the fateful day, he was at Mzenga village from 1000 hours and returned to Gwata village around 1600 hours. The accused person stated that his mission at Mzenga was to collect herbs. He admitted that he met PW5 when the latter was searching for the deceased. He testified further that he assisted PW5 to search for the deceased but their efforts were in vain. The accused admitted that he was arrested on the allegation of having killed the deceased. He stated under oath he did not admit to have committed the offence.

At the end of trial, I summed up the evidence for the prosecution and defence to the assessors. Apart from the issue of facts, I summed up to them several points of law in relation to the facts of the case. This included the ingredients of the offence of murder, evidence of visual identification, circumstantial evidence and credibility of identifying witness. When required to give their opinion, each assessors returned a verdict of guilty of murder against the accused person.

Having considered the evidence on record, I have noted that the accused person does not dispute that Loli Zengo met her demised on 6th day of May, 2016. The next issue whether the deceased death was unnatural. It is extracted on the evidence adduced by the prosecution that, the deceased body was found in the shrub. When examined, her corpse was found with bruises on various parts of her body including the vagina, thereby suggesting that she was raped. According to PW2, the deceased suffocated due to strangulation. However, his report on post-mortem examination (Exhibit PI) shows that the cause of death was due to rape. At any rate, I am satisfied that the circumstances of this case show that the deceased's death was unlawfully or unnatural.

Next on consideration is whether the accused person is responsible for the deceased's death. In terms of evidence adduced by the prosecution, no direct evidence or eye witness whose evidence connects the accused person to the

charge laid against him. Therefore, this case is based on the circumstantial evidence to the effect that, the accused person was the last person to be seen with the accused in the circumstances that is not easily explained away. Apart from circumstantial evidence, PW5 indicated that there was an oral confession made by the accused person before the village authorities.

Starting with the circumstantial evidence, the law is settled that in a case depending entirely on such evidence, the court must find that the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which weakened the inference. [See the cases of **Abdul Muganyizi v. R** (1980) TLR 263, **Hassani Fadhili v. R** (1994) TLR 89, and **John Magula Ndongo vs R**, Criminal Appeal No 18 of 2004 CAT (unreported)].

In the present case, the prosecution relied on the evidence of PW4 that the accused person was the last person to be seen with the deceased. There is a plethora of authorities to the effect that if the accused person is alleged to be the last person to be seen with the deceased, he is presumed to be the killer unless a plausible explanation to explain away the circumstances leading to death is

adduced by him. See for instance, the case of **Mark Kasimiri vs R**, Criminal Appeal No. 37 of 2017, CAT (unreported).

In view of the foregoing, the issue is whether the accused person was the last person to be seen with the deceased. This question is answered by looking at the evidence of PW4. This is the witness who was grazing cattle with the deceased and Ngembe. According to her, they met the accused in the forest (grazing field) when they were grazing and taking their cattle to the water trough. It was her evidence that they talked to the accused person who told them he was collecting wild fruits.

PW4 went on to state that the accused person chased them while armed with panga when she, the deceased and Ngembe were hailing from the water trough. That is when PW4 and Ngembe ran away leaving behind the deceased in the hands of the accused.

In the circumstances, I am of the view that the issue of visual identification evidence arises. That being the case, this court is inclined to analyze the evidence adduced before it with a view of satisfying itself on whether the accused person was properly identified as the person who chased PW4, Ngembe and the deceased on the material day. This duty is based on the position stated in the case of **Philip Rukaiza vs R**, Criminal Appeal No. 215 of 1994 at Mwanza (unreported), that:

"... in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness."

Certainly, the law of visual identification evidence is settled that, such evidence must be watertight in order to form the basis of conviction. The guidelines on visual identification were set out in the landmark case of **Waziri Amani vs. Republic** [1980] TLR 250, in which the Court of Appeal held that:

"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial Judge

should direct his mind before coming to any definite conclusion on the issue of identity."

Similar position was stated in **Shamir John vs R.**, Criminal Appeal No. 166 of 2004, **Chacha Jeremia Mrimi and 3 Others vs R.**, Criminal Appeal No. 53 of 2015 and **Oscar Mkondya & 2 Others vs DPP**, Criminal Appeal No. 505 of 2017 and (all unreported).

In the instant case, it is not disputed that PW4 knew the accused person before the incident. She also testified to have identified and talked to the accused person when they were leading the cattle to the water trough. It is in evidence that the accused person did not attack them at that time. Her evidence was to the effect that the accused person chased them when they were heading to the water trough. However, she did not tell the court how she managed to identify the accused. Although her evidence that she arrived home at 1800 hours suggests that there was sufficient light, PW4 did not enlighten the Court as to the time under which the accused person remained under her observation, the distance at which she observed him and whether there was an impediment from identifying the accused person. As that was not enough, the descriptions of the accused person such as attire were not stated by PW4.

In the case of **Chacha Jeremia Mrimi and 3 Others vs R.**, Criminal Appeal No. 53 of 2015 (unreported), the Court of Appeal held that the issues whether the

witness named or described the accused to the next person he saw, whether the said other person gave evidence to confirm that fact are among the factors to considered in determining whether the accused was properly identified. PW4 testified that she informed her parent how the accused person had chased them with a panga and how she and Ngembe ran away leaving behind the accused person and the deceased. However, the said parents of PW4 were not called to confirm PW4's assertion. No explanation was given by the prosecution on the failure to call any of the parents of PW4.

In view thereof, I am of the considered view that the factors were not favourable for PW4 to identify the accused person. The prosecution did not lead PW4 to adduce evidence on how she managed to identify the accused person as the one who chased them in the grazing field (forest) and left with the deceased on the material day.

Having resolved that the visual identification evidence is not watertight, I am of the view that the doctrine of last person to be seen with the deceased, does not apply in the circumstances of this case. This is also when it is considered that the accused person distanced himself from the offence.

That aside, it is also deduced from the evidence of PW1, PW2, PW3 and PW5 that, the deceased was found with bruises on different parts her body including her private parts. According to PW2 and Exhibit P1, the sperms were found in the deceased's vagina. The prosecution did not prove the connection between the sperms found in the deceased's vagina and the accused person. No medical examination such as DNA conducted to unveil such fact.

Another circumstantial evidence is reflected in the evidence of PW5. It is to the effect that the deceased body was found in the shrub, while the accused person had on the previous day, directed or prevented PW5 and others not to find the deceased in the shrub. Pursuant to PW5, the accused person directed them to search the deceased in residential houses. Nothing suggesting that the accused person threatened PW5 and his team on the material day. The fact that he told PW5 to search the deceased in residential houses does not irresistibly lead to the conclusion that the accused person had killed the deceased.

At this juncture, I am of the considered view that the circumstantial evidence was not proved on the required standards.

Another evidence which connects the accused person to the case at hand is an oral confession. PW5 testified, among others, that the accused made an oral confession when interrogated at the scene of crime by the village authority. However, the village authority officers who interrogated the accused person were

not called to testify. I have also considered that PW1 and PW3 testified that many people were found at the scene of crime where the accused person was being held. In the circumstances, the possibility that fear appeared on the part of the accused person, and that he was not free, cannot be overruled. Indeed, PW5 was frank enough to state that the accused confessed when beaten at the scene of crime. It is therefore, my considered view that, the accused person was not free and that what happened at the scene of crime should be taken with cautious. Given the fact that the said oral confession is not corroborated by any other evidence, I hold the view that it can be relied upon to convict the accused person.

In the light of the foregoing, I am not at one with the lady and gentleman assessors who opined that the circumstantial evidence proved the charge of murder. Their opinion was premised on the account that, the accused person was the last person to be seen with the deceased. Having concluded that the evidence of visual identification was not watertight, the doctrine of last person to be seen with the deceased, does not apply in the circumstances of this case. It is my considered opinion that the prosecution has not proved its case beyond all reasonable doubts.

I have also considered the accused person did not bring the witness to support his defence that he was at Msinga village. However, the evidence of PW4 and Exhibit D1 suggests that the offence was committed when the accused person

had returned to Gwata Village. Governed by the established principle, this Court cannot convict him due to his failure to defend properly in the circumstances where the prosecution case was not proved beyond all reasonable doubts. See also the case of **Joseph John Makune vs. Republic** [1986] T.L.R 44 where it was held as follows:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case, no duty is cast on the accused to prove his innocence."

In the final analysis, the accused person is found not guilty of the offence of murder preferred against him. Therefore, the Court acquits him for the said offence and orders the accused person's immediate release, unless he is otherwise held for a lawful cause.

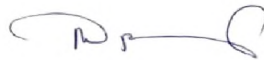
It is so ordered.

DATED at DAR ES SALAAM this 18th day of March, 2022.



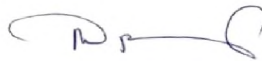
S.E. Kisanya
JUDGE

Court: Judgment delivered in open court this 18th day of March, 2022 in the presence of Mr. Clemence Kato, learned State Attorney for the Republic, the accused person, Mr. Yohana holding brief for Mr. Munuo, learned advocate for the accused person who is also present and the lady and gentlemen assessors.



S.E. Kisanya
JUDGE
18/03/2022

Court: (1) Right of appeal explained.
(2) Assessors thanked and discharged.



S.E. Kisanya
JUDGE
18/03/2022