

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL SESSIONS CASE NO. 22 OF 2022

THE REPUBLIC

VERSUS

ROBERT S/O DAUD

JUDGEMENT

28th February & 08th March, 2023

A. MATUMA, J.

The accused person herein, Robert Daud together with one Jumanne Tungu stood charged for Murder of one Manyanda S/O Kulwa contrary to section 196 of the Penal code Cap 16 R.E. 2019. It is alleged that they committed the crime on the 5th day of July, 2021 at Kituli Village within Shinyanga District in Shinyanga Region.

The brief facts of the matter are to the effect that; on the 5th day of Jul, 2021 the deceased disappeared from his homestead under suspicious circumstances. On the 7th day of July, 2021, the accused hired five bicycle riders (bodaboda wa baiskeli) to carry some goods (sacks of food crops; maize, groundnuts and rice pads) from the homestead of the accused telling them that the deceased was shifting

from that home to another place. As it was night the motorcyclists had their torches on. The accused however commanded them to switch off their torches and everything be done in darkness. He explained the reason behind his directives in that the owner of that goods was in a pombe shop and Jumanne Tungu had his claims against such owner of the goods. In that respect the goods were required to be transferred in darkness so that Jumanne Tungu do not see because if he see the shifting of such goods he might come and raise violence. The bodabodas doubted the deal and having gone a bit distance they decided to return the cargoes telling the accused if that cargo was lawful they would carry it in the morning and not that night. They then went to Sungusungu and reported their suspicions against the accused of the cargo to the effect that he might have been intending to steal the same. Sungusungu went to arrest the accused that night but he escaped them and disappeared from the village. He was arrested about ten days later on the 17th July, 2021. By that time the deceased was not yet seen. The accused was interviewed why he wanted to steal the goods of the deceased, why he escaped sungusungu that material night and where was the deceased. He disclosed that they have murdered the deceased and led to the discovery of the deceased's body who was found killed, covered in sacks and dumped in the deep cave. They were thus arraigned of this case. At

the closure of the prosecution case I found that Jumanne Tungu had no case to answer. I acquitted him and proceeded with the current accused who denied the allegations against him.

At the hearing of this case M/S Edith Tuka learned State Attorney represented the Republic while the accused person who was present in person had the services of Mr. Frank Samwel learned Advocate but later Mr. Timotheus Sulusi learned advocate picked over because Mr. Frank got sick.

The prosecutions in discharging the duty to prove the charges against the accused person beyond any reasonable doubts paraded a total of nine witnesses whose evidence in summary is as follows;

PW1 Vicent Mhoja and PW2 Paschal Luzwilo testified that they are cyclists and were hired by the accused Robert Daud to carry the goods from the deceased's home. They went together with their fellows but the conduct of the accused towards the goods made them suspicious. When they asked the accused if the goods were lawful, the accused replied that it was lawful they should not worry. They however hesitated to go on with the goods and decided to return the same and reported the matter to sungusungu commander.

PW3 Leonard Kulindwa Kalendi is a sungusungu militia. He testified that on the 7th July, 2021 while asleep was awakened by the sungusungu leader one Mr. Shinyange who assigned him together with three other militias to go at the homestead of the accused and arrest him for he was accused to have attempted to steal the sacks of crops from the deceased's home. That they went and managed to get the accused but in the due course the accused escaped them and ran away.

PW4 who is the accused's brother in law gave evidence to the effect that the accused approached him to buy the groundnuts and asked him to escort him to the rice pad buyer as he had rice pads to sale. They went up to Nghulugumba village where the accused met his buyer of the rice pad and having agreed they returned up to the place where the accused had kept rice pads for he was asked to go and help to load the same to the cycles. To his surprise it was at the homestead of the deceased. He saw the accused taking the keys from his own pocket and open the door. He then saw the accused taking out the sacks of such crops but commanding the cyclists to switch of the torches. He thus became suspicious and asked the accused the whereabouts of the owner of that homestead whom he knew to be the deceased and where did he get the keys. The accused replied to him

that he was given the keys by the deceased himself and that the deceased was drinking pombe at the club. Later the accused was arrested and he was one of those who arrested the accused and upon being interrogated by the villagers why did he escape from the village when the sungusungu needed him and where was the deceased because since the stealing saga the deceased is nowhere to be seen, the accused told them that they have murdered the deceased Manyanda Kulwa.

PW5 the village chairman testified that on the 7th July, 2021 the attempt of stealing at the deceased's home was reported to him but the accused escaped the sungusungu when they wanted to arrest him. On the next day the deceased's siblings Paulina Kulwa and Soji Kulwa reported to him the missing of their brother for almost three or four days ago. He took them to police to give the report. This witness went on that on the 17/07/2021 the accused was arrested and he phoned to the police who soon arrived. That at the crowd the accused was asked; *"ulitukimbia, leo tumekukamata. Sasa tunaomba utueleze mtu wetu yuko wapi maana mlipata ujasiri wa kutaka hata kuiba mpunga"*.

According to this witness the police took the accused and on the way the police also asked the accused; *"yule mzee yuko wapi mpaka*

wananchi wanawatilia shaka?" the accused answered in his presence;
"tumemuua Manyanda Kulwa"

The witness went on that later the accused led them a distant away to show them the deceased's body which they found in the deep cave at the hill covered by sacks (sandarusi) and when the body was taken out from the cave he identified it to be that of Manyanda Kulwa.

PW6 Agness Said Mlimbi is the justice of the peace but her evidence dropped at the early stage for having not complied fully to the chief justice's guidelines to Justices of peace.

PW7 E. 6968 D/Sgt Joseph recorded the statement of the accused person but the same dropped out after the trial within trial. This witness also testified that the accused sent them to the crime scene where they found the deceased's body thrown in the cave.

PW8 G.1364 D/C Robert's evidence was to the effect that he drew the sketch map being led by the accused person. The said sketch map exhibit P2 shows the place here the deceased was attacked and where his body was dumped in the cave.

PW9 Richard Kapongo is the Police Inspector and OCS of Tinde Police Station. He was the one leading the operation in rescuing the accused and his fellow from the crowd of angry people and who was in a company of villagers and fellow police staffs in the whole process of

inquiring the whereabouts of the deceased until when the accused led them to the discovery of the body.

The accused in his sworn defence denied completely to have murdered the deceased. He testified that he was arrested by people just because he was caught fighting with Jumanne Tungu who had extra marital affairs with his wife. To his surprise they were arraigned of murder of the deceased he do not know while their arrest was due to a fight.

On the basis of the evidence on record as herein above reviewed, it is my turn to scrutinize the herein evidence for both sides and determine whether the prosecution case has been proved beyond reasonable doubts against the accused person and or whether the defence case has in any way casted reasonable doubts to the prosecution case in lines with the ingredients of the offence of murder supra.

First and foremost, there is no dispute that Manyanda Kulwa is really dead and that his death was unnatural. This is because the evidence of the prosecution went unchallenged that the said Manyanda Kulwa disappeared in the village under suspicious surroundings as from 5/7/2021 until on 17/7/2021 when was seen dead, covered in the sacks (sandarusi) and thrown in the cave. PW5 identified the body to be that of the deceased in this case. According to the post mortem report

exhibit P1 the cause of death was severe bleeding. The same further establishes that the deceased's body was further identified by Paulina Kulwa and Asha Kulwa as being that of the deceased in this case. With all these which are not in dispute by both parties I find and conclude that the deceased Manyanda Kulwa was murdered and whoever murdered him had malice aforethought in the execution of such murder.

The dispute is about the identity of the one who committed the said murder. As earlier on stated the prosecutions' finger of blame is directed to the accused and his companion who was however acquitted for having no case to answer but the accused denied the accusation maintaining that he is not guilty of the murder. He lamented that he was arrested just because he was caught fighting with Jumanne Tungu his alleged companion in the murder. He thus pressed for his acquittal.

From the evidence on record it is obvious the accused was not seen committing the crime, he is incriminated to the crime by circumstantial facts or evidence such as;

- (i) He attempted to steal the deceased's crops while telling the PW1 and PW2 that the deceased was shifting from his homestead and therefore he was assisting him to shift the cargoes including such crops which he wanted PW1 and PW2

with their three others to carry and transfer them somewhere he directed and had required PW4 to buy the groundnuts of the deceased deceiving him that the deceased gave him the keys of his house so that to sale such crops and was himself in the pombe shop drinking pombe while in fact the deceased by that time was already murdered, covered in the sacks and thrown in the deep cave at the hill.

(ii) That the accused having hired PW1, PW2 and their fellow bodabodas to carry the deceased's properties on the pretext that the deceased was shifting the place, directed them to make such a transfer in the darkness commanding them to switch off the torches the conducts which was inconsistent with an innocent mind especially when the deceased's body who was the owner of the goods was finally found murdered and thrown the deep cave.

(iii) That the accused having been arrested led the village authority, people and police officers to the place where they threw the deceased's body which was found in the deep cave whose surroundings could not be possible for the body to be recovered unless a person knowledgeable of the existence of such body at that place discloses the same .

The accused is further incriminated by his oral confession allegedly made at the crowd of people who had gathered for search of the deceased, in the police vehicle when he was taken from the crowd and at police before D/Sgt Joseph.

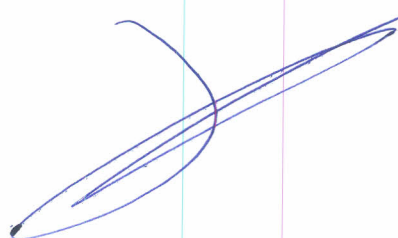
I am aware that for circumstantial evidence to be the ground of conviction, it must be incapable of more than one interpretation, i.e unbroken chain of circumstantial evidence proving the offence beyond reasonable doubts against the accused person can legally ground the conviction against him. See among other decided cases by the Court of Appeal; ***Protas John Kitongole & Another versus Republic (1992) TLR 51, Makungire Mtani versus Republic (1983) TLR 179 and Majidi Mussa Timotheo versus Republic (1993) TLR 125.***

In this case the accused denied the evidence of prosecution witnesses that he attempted to steal the deceased's crops and or to sale them. He denied as well to have led to the discovery of the deceased's body or to have confessed anyhow of the murder in question. Such denial calls for determination of the credibility of these witnesses as to whether they gave credible and reliable evidence or not.

A well settled principle for credibility of witnesses is that; every witness is entitled to credence and have his evidence accepted unless

there are good and cogent reasons for not believing him. See; ***Goodluck Kyando versus Republic (2006) TLR 363.***

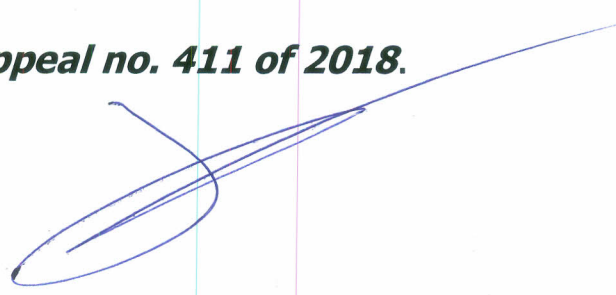
Basing on the evidence on record and the surrounding facts to the case I find that PW7 D/Sgt Joeseeph and PW8 D/C Robert are not witnesses of truth. They are not credible and reliable. Having heard their respective evidences and the manner they were responding to questions from the defence side, I find that they were exaggerating the testimonies to justify their weaknesses on the manner they handled this case. D/Sgt. Joseph for instance purported that during the interrogation with the accused the accused confessed the crime and volunteered to go and show them the deceased's body. He thus stopped the interrogation for the accused to take them to the locus in quo. That they went up to the crime scene where he saw the deceased's body and then returned to police with the accused to continue with the interrogation. But the evidence on record shows that he left the locus in quo when the body was yet to be taken out of the cave which was very deep at almost fifteen meters down. Even when the body of the deceased was taken out from the cave in his absence, the same was found covered in the sacks. His evidence of identification of the body is thus exaggerated for



justifying his weakness for not supervising the exercise of retrieving the body to its finality.

PW8 D/C Robert also purported to have drawn the sketch map of the crime scene on the 17th July, 2021 at 15:00 hours being led by the accused himself. But in accordance to the evidence of PW8 and even PW9 the accused person and his fellows led the police to the crime scene at about 16:30 hours. According to PW9 at 15:00 hours it is when he handled the accused to D/Sgt. Joseph for the interrogation. Now the time which the accused was under custody at police being interrogated is the same time D/C Robert is purporting to have the accused far away at Matanda hill leading him in the drawing of the sketch map of the crime scene.

With these few remarks against PW7 and PW8, I reject the evidence of D/Sgt. Joseph and D/C Robert as a whole as the court is not there for isolating the truth from the lies in the evidence of the same witness and use that which it considers to be the truth because the principle is that; ***"a witness who lies in an important point cannot be believed in others."*** See; ***Mohamed Said versus Republic, Criminal Appeal no. 145 of 2017*** and ***Zakaria Jackson Magayo versus The Republic, Criminal Appeal no. 411 of 2018.***

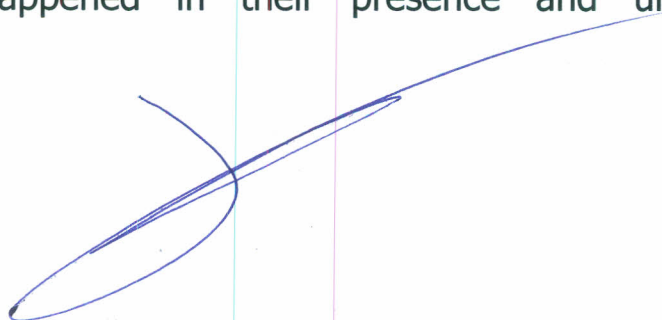


On the other hand, I don't see any suggestive fact to disbelieve the rest of prosecution witnesses. I have considered them to be credible and reliable. This is because neither of the them had any grudges with the accused and they testified on the facts observed at the crime scene and what the accused told them.

PW1 and PW2 were hired by the accused to carry the deceased's properties deceiving them that the deceased was shifting from his homestead to somewhere else and required them to do everything in darkness. On the same night PW1 and PW2 together with their fellows having suspected that the taking of the deceased's crops was not lawful they returned the same to the accused and reported to sungusungu commander on the same very night that the accused had hired them to carry the goods from the deceased's home but under the circumstances at the locus in quo they suspected that the accused was stealing those goods.

The sungusungu (PW3) reacted the same night and went to arrest the accused but the accused escaped them and ran to hide out of the village until when they arrested him after almost ten days. The village chairman PW5 helped to rescue the accused from the angry crowd by calling the police and accompanying them in taking the accused away

from the crowd. On their way to police in the police vehicle PW5 heard the police asking the accused the whereabouts of the deceased and the accused replied that they have murdered him. PW5 later witnessed the accused leading them to the cave at Matanda hill where the deceased's body was recovered and he personally identified the same to be that of the deceased Manyanda Kulwa. PW4 also gave evidence on the manner the accused wanted him to buy the groundnuts of the deceased and how the accused asked him to help loading the deceased's crops to the bicycles of PW1, PW2 and their fellows deceiving him that the deceased has given him the keys to take away those crops in darkness because he wanted Jumanne Tungu not to notice the transfer of those goods for he had his debt to the deceased so he would violate against the shifting of those goods. When he asked the accused where was the deceased himself the accused lied him that he was at the pombe shop drinking pombe. I have no reason for not believing these witnesses on their respective evidences as reviewed above because no any suggestive facts to make them incredible. I take their respective evidences as a true account to what happened in their presence and under their observations.



I find that it is truly the accused tried to steal the deceased's properties deceiving these witnesses that the deceased was in a pombe shop and wanted to shift his home and that he was there to supervise the exercise of shifting the deceased's properties. The conduct of the accused at the homestead of the deceased by the time he wanted to steal the properties and his lies to the witnesses as demonstrated above are inconsistent with an innocent mind in the circumstances that by that time the deceased was already murdered, covered in the sacks and thrown in the deep cave a distant away at the hill. Such lies are corroborative to the fact that the accused was knowledgeable of the death in question and was responsible of it even if the evidence of leading to discovery would have to be ignored provided that the deceased was finally found dead under the explained circumstances supra. Now, the lies of an accused person have been held in several cases that they take further the prosecution case. See; ***Mohamed Said versus Republic, Criminal Appeal no. 145 of 2017*** and ***Zakaria Jackson Magayo versus The Republic, Criminal Appeal no. 411 of 2018.***

Another important incriminating fact against the accused is that he escaped the sungusungu that night when they wanted to arrest him on

allegation of theft so that to find out the whereabouts of the deceased who owned the goods which the accused attempted to steal. His conduct is inconsistent with the innocent mind. I find out that his escape was due to the fact that he knew that the owner of the goods was murdered and he would be required to reveal out the truth about his whereabouts. Failure of the accused to account for his attempt to steal the deceased's properties, failure to account for the lies that the deceased had sent him to shift his properties and or sale them, failure of the accused to account for his escaping from the lawful arrest by sungusungu and the fact that at all these times the deceased was already murdered and inhumanly thrown and dumped in the deep cave gives no any other interpretation than that the accused is responsible for the murder in question.

As between the accused and the prosecution witnesses, I find that prosecution witnesses are credible and reliable. They gave consistence and coherent testimonies against the accused relating to the crime. There is no suggestive facts on record as to why should they have teamed up to fabricate him against the whole villagers. Even his fellow Jumanne Tungu was arrested on the same accusations but these witnesses were very positive that the arrest of Jumanne Tungu was because he was named by the current accused Robert Daud. They did

not testify against Jumanne Tungu in the stealing saga. Why the accused! Even when it comes to the evidence of leading to the discovery of the deceased's body, despite the fact that these witnesses were positive that the two accused persons were together but they were very much clear that it was the accused who was leading the way to the cave and ultimately disclosed the deceased's body.

Under the circumstances I find the accused not credible and not reliable on his defence. He alleged that he was arrested merely because he fought Jumanne Tungu. During cross examination he admitted that he had never heard an alarm in the village merely because people were fighting. Now why should the village raise an alarm against him merely because he was in a fight against his formicator (adulterer) and having raised an alarm on that ground proceed to fabricate him in this serious crime. I reject the accused's defence for I find the same to be a fabricated story which has not casted any reasonable doubts to the prosecution case.

I find the prosecution case to have been proved to the required standard of beyond reasonable doubts.

I therefore, find that the prosecution case has been sufficiently proved beyond any reasonable doubts against the accused person

Robert S/O Daud and find him guilty of the offence of murder which he stand charged. I accordingly convict him for the offence of murder contrary to section 196 and 197 of the Penal Code, Cap.16 R.E 2019 as he stand charged.



**A. MATUMA,
JUDGE
08/03/2023**

SENTENCE

About the sentence both the learned State Attorneys and the defence Advocate had the observation that there is only one sentence under the Penal Code for a person convicted of the offence of Murder. I agree with them.

As there is only one sentence against the person convicted of murder, under section 197 of the Penal Code Cap. 16 R.E. 2019, I do hereby sentence the accused person Robert S/O Daud to suffer a death penalty and in accordance to section 322 (1) and (2) of the Criminal Procedure Act, Cap. 20 R.E. 2022 I direct that he shall suffer death by hanging. It is so ordered.



**A. MATUMA,
JUDGE
08/03/2023**

Court; Under section 323 of the CPA supra the convict is hereby informed of his rights to appeal to the Court of Appeal of Tanzania against the conviction and sentence in this judgment and that the period available for him to lodge the notice of appeal is sixty days from the date of this conviction and sentence.

It is so ordered.



**A. MATUMA,
JUDGE
08/03/2023**