

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IRINGA DISTRICT REGISTRY**

**AT IRINGA**

**CRIMINAL SESSION CASE NO. 04 OF 2022**

**THE REPUBLIC**

**VERSUS**

**1. JOHN SAMWEL MPORO @ TALL**

**2. TILASI THADEI MBEDULE**

**JUDGMENT**

**Date of Last Order:** 10.03.2023

**Date of Judgement:** 24.03.2023

**A.E. Mwipopo, J.**

John Samwel Mporo @ Tall and Tilasi Thadei Mbedule are indicted in this Court facing murder charges contrary to section 196 of the Penal Code, Cap. 16 R.E. 2019. The particulars of the offence in the information shows that on 21<sup>st</sup> May, 2021 at Tagamenda Village within the District and Iringa region, John Samwel Mporo @ Tall and Tilasi Thadei Mbedule together they did murder Stanley Nzelu. When the information was read over to accused

persons each of the accused pleaded not guilty to the offence. The prosecution case was opened and they brought a total of 4 witnesses and one exhibit to prove their case. The court find the prosecution case was made against both accused persons and invited each accused person to defend himself. Each of the accused person testified on oath in defense.

The evidence from prosecution's witnesses shows that deceased was apprehended on the early hours of 21.05.2021 at God Nyaulingo's yard at Ipogolo on theft allegation. The owner of the yard namely God Nyaulingo and his company assaulted the deceased and took the deceased to the farm owned by God Nyaulingo located at Tagamenda Village. While on the way to the farm around 05:00 hours, Deus Mathei Mbugi - PW1 who is Chairman of Malulumo Hamlet saw them. He requested them to take the deceased to police station. God Nyaulingo rejected the suggestion and said he is taking the deceased to his farm located at Kifufu Hamlet within Tagamenda Village. PW1 said he was able to identify God Nyaulingo, 1<sup>st</sup> accused and 2<sup>nd</sup> accused among the people who were assaulting the deceased. He said he know both of them prior to the incident that 1<sup>st</sup> and 2<sup>nd</sup> accused were employees of God Nyaulingo and they live in Miyombe Hamlet. God Nyaulingo, 1<sup>st</sup> and 2<sup>nd</sup>

accused took the deceased and went to God Nyaulingo's farm at Kifufu Hamlet.

PW1 said deceased relative namely Walter asked him on 25.05.2021 if he saw the deceased as the deceased disappeared from 21.05.2021. PW1 answered that he saw the deceased in the hands of God Nyaulingo and his employee's heading to the farm of God Nyaulingo located at Kifufu Hamlet in Tagamenda Village. PW1 and Walter visited the farm of God Nyaulingo and they find Dotto Mwanilwa who is the keeper of the farm. Dotto Mwanilwa told them that deceased was brought to the farm on the morning of 21.05.2021, but God Nyaulingo let him go. Dotto told them they have to look for Mantila who is employee of God Nyaulingo to know more about the incident. PW1 and Walter went to look for Mantila and they found him. They apprehended and took the 2<sup>nd</sup> accused namely Tilasi Mbedule to the Iringa District Central Police Station.

Around 16:00 hours of the same date, PW1 said he was informed by Walter that another suspect namely Tall was arrested and he said the said suspect has confessed that they killed the deceased and buried his body. That, Tall was ready to show them where the deceased body was buried. They wanted him to join them. Police Car followed PW1 around 17:00 hours

and he boarded in the car. Inside the car, PW1 saw police officers, 1<sup>st</sup> accused, Frank and Walter. They went to the farm of God Nyaulingo at Kifufu Hamlet in Tagamenda Village. The 1<sup>st</sup> accused did lead them to the area where the deceased body was buried and the deceased body was retrieve. PW1 said he identified the body of the deceased to be one Stanley Nzelu after it was retrieved. The deceased body was taken to hospital mortuary for safe keeping.

In cross examination PW1 said that he recorded two statement to the police. In the first statement taken on 25.05.2021 he did not mention the name of accused persons as he did not know their names. He came to know the name of 1<sup>st</sup> accused when he was leading them to where the deceased body was buried and he knew the 2<sup>nd</sup> accused when he arrested him. He said 2<sup>nd</sup> accused is known in the street as Mantila.

Bartholomeo Major Kunzugala - PW3, who is deceased uncle, testified that on 24.05.2021 he got information the deceased has disappeared from 21.05.2021. He tried to look for him and collect some information. He was informed that deceased was arrested at Ipogolo by God Nyaulingo on 21.05.2021 for theft allegation. That God Nyaulingo and his employees took the deceased to his farm at Tagamenda Village. PW3 went to report to Iringa

Central Police Station where he was informed to come back on the next day to record his statement. He went to the police station on 25.05.2021 around 10:00 hours and he recorded his statement. He said around 11:00 hours he was informed that one of the suspect has already been arrest and he was brought to the police station. He said the suspect was Tilasi Mbedule – 2<sup>nd</sup> accused. PW3 said he witnessed when 1<sup>st</sup> accused was leading the police to where the deceased body was buried. After the body was retrieved, he identified it to be the deceased and he was able to identify the body as at that time it was not decomposed.

G. 4395 D/CPL Rubeya – PW4 was the last prosecution witness. He testified that on 25/05/2021 around 21:00 hours he was tasked by OC CID Iringa District to record the statement of suspect by the name of Tilasi Mbedule. At that time, Tilasi Mbedule was in police lock up for suspicion of murder offence. PW4 said the cautioned statement of the 2<sup>nd</sup> accused was given voluntarily and he tried to tender it, but after conducting an enquiry trial (trial within a trial) the Court found out that the caution statement was not given voluntarily and the cautioned statement was not admitted as exhibit.

Then, it was the turn of the defense side to defend themselves after the Court was satisfied in its ruling that the prosecution case has been made. Both accused persons testified on oath without calling a witness in their defense.

The first accused namely John Samwel Mporo – DW1 was the first to defend himself. He said that he was employed in the business of buying and selling scrapper by Godlove Nyaulingo. It was his evidence that on 24/05/2021 he was arrested by relatives of Stanley Nzelu who asked him to show whereabouts of Godlove Nyaulingo. He said he was assaulted. They took him to Iringa District Central Police Station. DW1 said he was present when deceased was arrested. After deceased was arrested, a group of people gathered and God and those people started to beat the deceased. Later on they decided to take deceased to the farm of God Nyaulingo and he remained in the yard. DW1 said that it is not true that he did lead the police to recover deceased body where it was buried. He said that he is not responsible for the deceased death.

When cross examined he said he came to know at police station that the person who was assaulted after he was arrested by God Nyaulingo on 21/05/2021 is Stanley Nzelu. The last time he saw God Nyaulingo is on

21/05/2021 after he arrested the deceased around 03:00 hours. God said they are going to his farm, but he don't know where the said farm is located. He said he know the 2<sup>nd</sup> accused as a fellow employee as both were employed by God Nyaulingo. 2<sup>nd</sup> accused was working in God Nyaulingo farm as carpenter.

Then, it was the turn of the 2<sup>nd</sup> accused namely Tilasi Thadei Mbedule – DW2 to testify in his defense. It was his testimony that he was arrested on 24/05/2021 around 11:00 hours at Ipogolo stand area by people who said they are relatives of Stanley Nzelu (the deceased). They informed him that they want him to show them where is Godlove Nyaulingo. After they saw that DW2 is not telling them where is God Nyaulingo, they decided to take him to the central police station. It was around 11:00 hours on 24/05/2021 when they reached police station. He said that it is not true that he assaulted the deceased on 21/05/2021 around 05:00 hours as it was the testimony of PW1. He said PW1 did not explain as to how he was able to identify him. 1<sup>st</sup> accused was brought to police station around 17:00 hours on the same date. He said PW3 assertion that DW2 mentioned other responsible persons for the death of the deceased is not true. It was alleged by PW1 that around 17:00 hours on 25/05/2021 the 1<sup>st</sup> accused led the

police to where the deceased body was buried, but the 1<sup>st</sup> accused never left from the police station. It was on 16/06/2021 when police took DW1 and DW2 out of police station to court.

In cross examination, DW2 said that he is not employed by anybody. He was close to God Nyaulingo and God Nyaulingo used to give him casual works. But, God Nyaulingo is not his boss. He said last time to see God Nyaulingo was on 21/05/2021 around 09:00 hours when he saw God Nyaulingo passing riding a motorcycle. DW2 said that it was on 21/05/2021 around 06:00 hours when God Nyaulingo was forcing him to assault the deceased, but he rejected. God Nyaulingo was forcing him to do it through phone. God Nyaulingo called and asked DW2 to meet with him as he has caught a thief and they are heading to his farm. DW2 said he did not go to where he was told to go. This was the end of defense case.

The accused persons were charged before this Court for murder offence. To prove the offence the prosecution evidence must prove that the accused person caused the death of the deceased by an unlawful act or omission, with malice aforethought. This is provided by section 196 of the Penal Code, Cap. 16 R.E. 2019. Under section 197 of Penal Code, a person convicted of murder shall be sentenced to death. The Penal Code in section



195 (2) defines unlawful omission as an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether the omission is or is not accompanied by an intention to cause death or grievous bodily harm. The unlawful intentional killing of a person by another person is murder, absence of intention to kill makes the unlawful killing to become manslaughter.

In a murder cases, the prosecution is required to prove unlawful killing and malice aforethought. The said burden never shift from the shoulders of the prosecution and it is not the duty of the accused person to prove his innocence. The standard of proving the criminal case is beyond any reasonable doubt, failure of which raise doubts in prosecutions case and shall be resolved in favour of the accused person. It was held by the Court of Appeal in the case of **Christian Kaale and Rwekiza Bernard vs. Republic [1992] TLR 302** that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case.

The evidence adduced by prosecution witnesses proved that the deceased namely Stanley Nzelu is dead. This is found in the evidence of Deus Mathei Mbugi – PW1 and Bartholomeo Kunzugala – PW3 who testified that

they were present at Tagamenda Village in the farm owned by God Nyaulingo where the deceased body was recovered from the pit he was buried. Despite the fact that Doctor who examined the deceased body failed to identify it and to find the cause of death, the evidence of PW1 and PW2 shows that they were able to identify the deceased as Stanley Nzelu. The fact that deceased body was found buried, it means someone tried to hide the deceased death. This shows that someone is responsible for the death of the deceased. Therefore, I'm satisfied without doubt that Stanley Nzelu is dead and his death is not natural.

The next question is whether accused persons are responsible for the deceased death. Looking at prosecution evidence, there is no direct evidence or eye witness whose evidence concludes that they saw the accused persons killing the deceased. The prosecution case is based on the circumstantial evidence that accused persons were the last persons to be seen with the deceased alive on 21.05.2021 around 05:00 hours. Moreover, there is evidence of oral confession leading to discovery of the deceased body which was buried.

For the court to convict the accused person based on circumstantial evidence, the said circumstantial evidence needed to be intact to lead to only

one irresistible conclusion pointing to the accused's guilt. In **Hamida Mussa v. Republic [1993] T.L.R. 123**, the Court held, I quote:

*"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"*

In the case of **Gabriel Simon Mnyele vs. Republic**, Criminal Appeal No. 437 of 2007, Court Appeal of Tanzania at Dar Es Salaam, (unreported), it was held that:-

*"It is common ground that for circumstantial evidence to found a conviction, it must be such that it irresistibly points to the guilt of the accused. From the authorities we are settled in our minds that when a case rests on circumstantial evidence such evidence must satisfy three tests:-*

*(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,*

*(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,*

*(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."*

From the above cited cases, for circumstantial evidence to be reliable for conviction it must be incompatible with the innocence of the accused person and incapable of any other reasonable hypothesis than that of guilt.

On the doctrine of the last person to be seen with the deceased, this Court may convict relying on doctrine where there is no explanation from the accused person parting him away from circumstances leading to the death. In **Mathayo Mwalimu & Another vs. Republic** [2009] TLR 271, the Court held that:

*"... if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer."*

However, I'm aware that the last seen doctrine must be applied with caution as it was held in **Japhet Kalanga vs. Republic**, Criminal Appeal No. 332 of 2016, Court of Appeal of Tanzania at Mbeya, (unreported), and in **Nathanael Alphonse Mapunda & Another vs. Republic** [2006] TLR 395.

The evidence available from prosecution's witnesses shows that deceased was apprehended on the early hours of 21.05.2021 at God Nyaulingo's yard at Ipogolo on theft allegation. The owner of the yard namely God Nyaulingo and his company assaulted the deceased and took

the deceased to the farm of God Nyaulingo located at Tagamenda Village. While on the way to the farm around 05:00 hours, PW1 who is Chairman of Malulumo Hamlet saw them and requested them to take the deceased to police station but they rejected. PW1 was able to identify God Nyaulingo, 1<sup>st</sup> accused and 2<sup>nd</sup> accused among the people who were assaulting the deceased. From the evidence of PW3, this was the last time the deceased was seen alive.

PW3 testified that following disappearance of the deceased, he started looking for the deceased from 24.05.2021. While searching for the deceased, PW3 got information that on 21.05.2021 deceased was apprehended by God Nyaulingo on theft allegation and that God Nyaulingo and his employees took the deceased to his farm at Tagamenda Village. PW1 testimony show that he saw the deceased being assaulted by God Nyaulingo and his employees who are 1<sup>st</sup> and 2<sup>nd</sup> accused persons and they went to go God Nyaulingo's farm. PW1 said he asked God Nyaulingo to stop battering the deceased and to take the deceased to police station, but God Nyaulingo answer was that they are taking the deceased to his farm to dig fish pond.

PW1 and Walter visited the farm owned by God Nyaulingo and they were told that deceased was brought to the farm, but they released him.

PW1 and Walter were able to arrest the 2<sup>nd</sup> accused person on 25.05.2021 and they did take him to police station. PW1 said he know both accused persons prior to the incident that they are employed by God Nyaulingo and they live in Miyombe Hamlet. He said that when he saw 1<sup>st</sup> and 2<sup>nd</sup> accused on 21.05.2021 he did not know their names as he knew 1<sup>st</sup> and 2<sup>nd</sup> accused by face. PW1 came to know their names on 25.05.2021 after he arrested the 2<sup>nd</sup> accused and when the 1<sup>st</sup> accused was leading them to where the deceased was buried. PW1 said that 1<sup>st</sup> accused did lead them to the area where the deceased body was buried and the deceased body was retrieve. PW3 also testified that he was present when the 1<sup>st</sup> accused was leading them to God Nyaulingo's farm at Kifufu Hamlet where the deceased body was retrieved.

Both accused persons denied to assault the deceased on 21.05.2021. The 1<sup>st</sup> accused in his testimony he denied to beat the deceased after the deceased was arrested at God Nyaulingo's yard at Ipogolo. He said that deceased was beaten by angry mob led by God Nyaulingo and later on they went to God Nyaulingo's farm with the deceased. He challenged his identification by PW1 that the condition of identification were not favourable as source of light and light illumination at the scene of crime were not

explained by PW1. He said at 05:00 hours it was still dark. The 2<sup>nd</sup> accused was of the same position that identification at the scene of crime on 21.05.2021 around 05:00 was not watertight. I agree with both accused person that PW1 did not explain the source of light and its illumination. However, PW1 said that he knew both accused prior to incident that they are employees of God Nyaulingo, living at Miyombwe Hamlet. 1<sup>st</sup> accused admitted to be employee of God Nyaulingo and said the 2<sup>nd</sup> accused is his fellow employee who was employed at God Nyaulingo's farm.

The 2<sup>nd</sup> accused denied to be an employee of God Nyaulingo. He said he used to do casual works at his farm. However, during cross examination he admitted to inform the police that God Nyaulingo forced him to beat the deceased, though he rejected. He said that he was given the order through the phone. This raises question that if 2<sup>nd</sup> accused was not present when the deceased was assaulted, how come God Nyaulingo was forcing him to beat the deceased. It is obvious that the 2<sup>nd</sup> accused was at the scene of crime when the deceased was assaulted. In addition, if the 2<sup>nd</sup> accused was not God Nyaulingo's employee's why God Nyaulingo forced him to beat the deceased.

Moreover, the evidence of identification by PW1 is supported by the evidence of discovery of the deceased body. The evidence of PW1 and PW3 shows that it was the 1<sup>st</sup> accused person who led police and other people to the place where deceased body was buried at God Nyaulingo's farm. The deceased body was retrieved from the pit where it was buried. They identified the body to be that of the deceased. It is clear that 1<sup>st</sup> accused knew that deceased was killed and was buried at God Nyaulingo's farm.

This evidence of PW1 proves without doubt that both accused person were the last person to be seen with the deceased alive when they were assaulting the deceased on 21.05.2021. PW1 identified both accused persons to be among the mob who assaulted the deceased on 2105.2021. Further, there is the testimony of PW1 and PW3 that the 1<sup>st</sup> accused did lead police to where the deceased body was buried. The accused persons defense that they were not responsible and that they were not properly identified by PW1 did not raise doubt to the prosecution case. Thus, I find that both accused persons are responsible for the deceased death.

The last question is whether accused persons caused the death of the deceased with malice aforethought. The evidence available in record shows that the deceased was arrested at God Nyaulingo's yard at Ipogolo area on



theft allegation. The owner of the yard was among the people who arrested the deceased and he was the one leading other people including the accused persons in assaulting the deceased. 1<sup>st</sup> accused said the deceased was arrested around 03:00 hours. By 05:00 hours they were taking him to God Nyaulingo's farm at Tagamenda while assaulting him. PW1 asked God Nyaulingo not to beat the deceased and to take him to police, but God Nyaulingo answered that he will not take the deceased to police since usually when criminals are brought to police they are left free. The act of PW1 to ask God Nyaulingo to take the deceased to police proved that it was him who was leading and possibly controlling the whole incident of assaulting the deceased.

The evidence in record shows that both accused persons were God Nyaulingo's employees. PW1 and 1<sup>st</sup> accused confirmed this fact. 2<sup>nd</sup> accused denied to be God Nyaulingo's employee, but his answers during cross examination proved that he was God Nyaulingo's employee. 2<sup>nd</sup> accused even admitted in cross examination that God Nyaulingo was forcing him to beat the deceased. All of this proves that 1<sup>st</sup> and 2<sup>nd</sup> accused had no intention whatsoever to cause the death of the deceased. They were acting under the instruction of their employer namely God Nyaulingo. This is seen on the fact

that even PW1 who is hamlet chairman of Maluluma Hamlet asked God Nyaulingo to take the deceased to police and he did not ask the accused persons. Thus, I find that there is no sufficient evidence from the prosecution evidence to prove that John Samwel Mporo @ Tall and Tilasi Thadei Mbedule caused the death of the deceased with malice aforethought. The evidence available has proved that they committed the offence of Manslaughter contrary to section 195 (1) and 198 of the Penal Code, Cap. 16 R.E. 2019.

Therefore, under section 300 (1) and (2) of the Criminal Procedure Act, Cap. 20 R.E. 2022, I convict John Samwel Mporo @ Tall and Tilasi Thadei Mbedule for the offence of Manslaughter contrary to section 195 (1) and section 198 of the Penal Code, Cap. 16 R.E. 2019.

A handwritten signature in blue ink, appearing to read 'A.E. MWIPOPO', with a long horizontal stroke extending to the right.

**A.E. MWIPOPO**

**JUDGE**

**24/03/2023**

## **PREVIOUS CONVICTION RECORD OF ACCUSED PERSONS.**

### **State Attorney:**

We have no previous conviction record of both accused persons. We pray for the court to sentence them according to the law. They have to learn that it was not proper to punish thieves. They have to take them to police. The accused persons has to be punished severely as they participated in assaulting the deceased. The act of both accused persons to remain silent after incident until they were arrested and be taken to police station prove that they intended to hide that deceased was killed. Both accused persons were given chance to plea guilty to the lesser offence of Manslaughter, but they rejected the offer. This proves that they do not feel remorse and they have caused the Government to incur cost of the suit and the court to use its time to hear this case. On this ground, we pray for severe punishment to both accused persons. That is all.

## **MITIGATION**

### **Defense Counsel:**

We are praying for the court to consider the following factors in sentencing the accused persons.

1. Both accused persons are first offenders.
2. Both accused persons have been in custody from 25/05/2021 until now. It is one year and ten months.
3. The circumstances of the case prove that accused persons did not intend to kill the deceased. They were ordered by their employer to assault the deceased.
4. The State Attorney said that accused persons were offered a plea of guilty to the lesser offence of Manslaughter, but this is not true. They have never been offered with a lesser plea and the court record is silent. Thus, they did not reject the offer and no resources in terms of fund or time which was wasted by Government.

We pray for lenient sentence to both accused persons accordingly, That is all.

### **SENTENCE**

I have considered the aggregating factors such as the act of taking the laws in their own hands to assault the deceased on theft allegation and the resources incurred by Government and court for not offering a plea of guilty to the lesser offence of Manslaughter. Also, I have considered mitigation factors such as they are first offenders, circumstances of the case show that

they were under influence of their boss to assault the deceased and the fact that they have been in custody for 1 year and 10 months. I agree with defense counsel that the record is silent if they were offered a plea of guilty to the lesser offence.

I'm aware that the punishment for Manslaughter offence is between conditional discharge to life imprisonment depending on the circumstances of each case. In this case accused persons were assaulting the deceased for several hours on theft accusation. Instead of taking the deceased to police, they decided to punish and take him to their employer's farm. This led to the death of the deceased. Their actions shows they were negligent. I'm aware that accused persons were under influence and control of their employer during the incident.

Under the circumstances of this case, I sentence John Samwel Mporo @ Tall and Tilasi Thadei Mbedule to serve 4 years imprisonment. It is ordered accordingly. Right of appeal explained.



A blue ink signature of A. E. Mwipopo, written in a stylized, cursive manner.

**A. E. Mwipopo**

**JUDGE**

**27/03/2023**