

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

CRIMINAL SESSION CASE NO. 89 OF 2021

THE REPUBLIC

VERSUS

1. FIDEL SAMWEL MPOMA

2. PAULO MATELI LUNYALI

JUDGMENT

Date of Last order: 09.03.2023

Date of Ruling: 27.03.2023

A.E. Mwipopo, J.

Accused persons namely Fidel Samwel Mpoma and Paulo Mateli Lunyali are jointly charged for the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2019. Particulars of the offence in the information reveals that on the 9th of December, 2020, at Kaning'ombe Village within Iringa Rural District and Iringa Region jointly and together they murdered one Benardino Chatila. When the information was read over to accused persons they pleaded not guilty to the offence and the prosecutions paraded

5 witnesses and 2 exhibits to prove their case. The court was satisfied that the prosecution case was made and accused persons were invited to defend themselves. Each accused testified on oath without calling any witness in their defense.

The first prosecution witness to testify is Isabela Mpulule – PW1. She is the wife of Benadino Chatila, the deceased herein. She said that the deceased died on 09/12/2020. It was her testimony that on 08/12/2020 she went to the farm with the deceased to clean the farm (Kubelega Mabua). Later on Fidel Samwel Mpoma (1st accused) arrived at the farm accompanied by Sylvester Kalinga. PW1 said that 1st accused is the cousin of the deceased and Sylvester Kalinga is deceased uncle. 1st accused and Sylvester Kalinga were harvesting bamboo juice (kugema ulanzi) in deceased farm as the bamboo trees were within deceased farm. The said bamboo trees were inherited by 1st accused and Sylvester Kalinga from their parents. The deceased collected remains of the maize stalks (mabua) in the end of the farm and burned them. The fire burned 1st accused bamboo trees. The 1st accused asked the deceased as to why he was burning the bamboo trees. 1st accused threatened to stab the deceased with knife when he goes to Mlimba to drink alcohol if she will not get bamboo juice from the burnt bamboo trees. Mlimba is the hamlet in Kaning'ombe village, Kaning'ombe

and Mtongati are neighbouring villages. The deceased answered that he will continue to go to Mlimba if he has to go.

On 09/12/2020 the deceased went to Mlimba Hamlet around 13:00 hours as there was mass prayer and local brew. He did not come back. On the next day PW1 went to report to the Ten Cell leader namely Leonisia Kasuga – PW2 as the 1st accused already threatened to stab the deceased with a knife. PW2 suggested they look for the deceased on the way to Mlimba. They followed the way to Mlimba and they found deceased laying on ground along the way at Mtemambugi area. The deceased had cut wounds caused by sharp object in the head and on stomach. They informed village chairman and police about the incident. Police visited the scene of incident accompanied with a doctor. The doctor examined deceased body and informed them that he is already died. Police allowed them to bury the deceased body and they buried the deceased.

When cross examined, PW1 said that it was not normal for the deceased not to return home, that is the reason she was worried after the deceased failed to return on 09.12.2020.

Testimony of PW2 namely Leonisia Kasuga is similar to that of PW1. She said that on 10.12.2020 PW1 informed her of the disappearance of the deceased and that on 08.12.2020 1st accused threatened to stab the

deceased during the argument. That they went looking for the deceased and they found him laying on the ground injured and covered with blood. They informed the village leadership and police about the incident. Police came with the doctor to the scene of crime.

Robert Lumato – PW3 is the doctor who examined the deceased body on 10.12.2020. He said that during post mortem examination he was informed of the deceased name by deceased relatives. He said that the deceased body was laying on ground covered with blood. The body has injuries on neck, hand and on abdomen. There was protrusion of intestine at abdomen. The injuries were caused by sharp object. The cause of deceased death is severe haemorrhage. After completing his examination of the deceased body, PW3 prepared a report of post mortem examination – Exhibit P1.

A/Inspector John Shayo – PW4 was another witness for the prosecution. He testified that he was the investigator of this case and the file was assigned to him by OC CID Iringa on 12.12.2020. He did read the file and he found out in the cautioned statement of Fidel Mpoma (1st accused) that she said she committed the offence with her husband namely Paulo Lunyali (2nd accused). At that time, Fidel Mpoma was in Police Lock up. Paulo Lunyali for that particular time had escaped from the village after

the incident. PW4 said he got information from secret informers that Paulo Lunyali was at Pawaga in Kisanga area. He made arrangement for the suspect to be arrested and Paulo Lunyali was arrested on 15/02/2020 at Pawaga. Later on the 2nd accused was brought to Iringa Central Police. When police interviewed the 2nd accused, he denied to commit the offence. PW4 said that in his investigation he found out through statement of Sylvester Kalinga that Sylvester Kalinga witnessed Fidel Mpoma and Paulo Lunyali killing the deceased.

When cross examined, PW4 said that the 2nd accused was arrested because he was mentioned by the 1st accused. Both the 1st and 2nd accused were mentioned by Sylvester Kalinga in his statement as responsible for deceased death. At that time, Sylvester Kalinga was in police custody as there was suspicion that he might be responsible for deceased death. Sylvester Kalinga recorded his statement as witness. PW4 said he was aware that there was a conflict over ownership of land between the deceased and Sylvester Kalinga. But, there is no witness who said that Sylvester Kalinga killed the deceased. For that reason Sylvester Kalinga was released from custody. He added that he don't remember as to when the statement of Sylvester Kalinga was recorded and who recorded the statement.

The last prosecution witness is A/Inspector Lazaro James Ngoko – PW5. This witness is the additional witness called to testify for the prosecution's side after prosecution filed notice of additional witness under section 289 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2022. PW5 testified that on 13.12.2020 around noon hours he was assigned by OCS Ifunda to record the statement of Sylvester Kalinga who was the witness of murder case. In the said case, the deceased is one Bernadino Chatila. PW5 said that he took Sylvester Kalinga in the investigation office and introduced himself. He informed Sylvester Kalinga of his duty to say the truth and read to him the oath to say the truth, Sylvester Kalinga agreed to say the truth and he signed. PW5 recorded statement of Sylvester Kalinga and after he finished to record the statement, he gave statement to Sylvester Kalinga to read it and Sylvester Kalinga said that the statement is correct. Sylvester Kalinga signed the statement and PW5 recorded his certificate that the statement was recorded correctly and he signed. Then, PW5 took the witness statement to OCS. PW5 tendered the statement of the witness under section 34B (1) of the Evidence Act, Cap. 6 R.E. 2022 and the Court admitted the statement as Exhibit P2 as the defense side did not object the tendering of the statement.

In the said statement – Exhibit P2, Sylvester Kalinga said that on 08.12.2020 he was harvesting bamboo juice in his bamboo trees when he witness the quarrel between the 1st accused and the deceased. That the 1st accused threatened to stab the deceased if he will go to Mlimba Hamlet to drink local brew. He said in the statement that on 09.12.2020 he was in the company of the deceased going to Makongati Village from Mlimba Hamlet around 18:00 hours. While on the way they meet with 1st accused who asked the deceased why he decided to go to Mlimba Hamlet despite the threat. Sylvester said he passed and went ahead leaving them talking, suddenly he saw 1st accused attacking the deceased head with machete/ bush knife. The deceased blocked the blow by using his hand and the 2nd accused emerged from a bush and they jointly attacked the deceased. Sylvester Kalinga said in the statement that he was able to identify 1st and 2nd accused persons as there was sunlight. He tried to go back to separate them, but 2nd accused threatened to attack him and he decided to leave. On the next day he saw the deceased dead at the same area where 1st and 2nd accused were attacking him. Sylvester said in the statement that he did not report immediately until on 13.12.2020 as the second accused escaped from the village and he was afraid of his life.

When cross examined, PW5 said that he believe Sylvester was telling the truth in the statement. When he recorded Sylvester Kalinga's statement, Sylvester was not in police custody, he was coming from his home. PW5 said that he don't know if Sylvester Kalinga was arrested in connection to this case. The fact that Sylvester Kalinga said he witnessed the incident on 09.12.2020, but he gave information about the incident on 13.12.2020 did not surprise PW5. PW5 said he don't know where Sylvester Kalinga is at the moment. He said that Sylvester Kalinga did not specify who stabbed the deceased, but he said that 1st accused did cut the deceased in the hand with a bushknife. Sylvester Kalinga said after he was threatened by 2nd accused during the incident, he left and he don't know what was going on. Sylvester Kalinga said in the statement that the deceased body was found in the area where he saw accused persons attacking the deceased. In the statement, Sylvester Kalinga said that he was afraid to report as one of the accused person escaped from the village to unknown place after the incident. This was the end of prosecution's case and they closed their case.

The Court made a ruling that prosecution case was made and both accused persons were invited to their defense. Both accused testified on oath without calling any other witness.

Fidel Samwe Mpoma (1st accused) – DW1 was the first to give her testimony. She denied to kill the deceased. It was her testimony that on 09.12.2020 she went to harvest bamboo juice (kugema ulanzi) in the morning and went back home waiting for her client to pick the bamboo juice (ulanzi). Thereafter, she did not go anywhere on that day. DW1 said she was arrested on 10/12/2020 around 11:00 hours at her farm located in Wilolesi area. The people who arrested her told her she has done some crime and took her to Mtemambugi area where there was a person laying on ground dead covered with bed sheet. She said there were people crying and she also cried. Later on she learned that the deceased is the one who is covered with bed sheet.

DW1 said Sylvester Kalinga is her uncle (baba Mdogo) and the 2nd accused is her boyfriend. She said she did not attack the deceased and she know nothing about the incident. DW1 said she is not living with the 2nd accused though they reside on the same hamlet. DW2 said the last time she saw the 2nd accused was on 05/12/2020 where he came to inform her that he was travelling to Pawaga. 2nd accused used to go to Pawaga for casual works.

When cross examined, DW1 said that on 08.12.2020 she went to harvest bamboo juice in her bamboo trees located at deceased farm. She

said that the deceased and PW1 were present. Deceased burned her bamboo trees while burning maize stalks and when she asked him why he burned the bamboo trees the deceased told her to uproot her bamboo trees in his farm and plant it in her father's farm. She said there was heated argument as she was not happy. DW1 denied to threaten to stab the deceased if he goes to Mlimba as it was alleged by PW1. She said her relationship with PW1 and Sylvester Kalinga was good and she don't know the reason PW1 and Sylvester Kalinga said that she threatened to kill the deceased during heated argument. 2nd accused went to Pawaga on 05/12/2020 to find casual works and he was working at Paul Malekela's farm. She was arrested in connection with the deceased death because of a conflict they had after the deceased burned her bamboo trees.

Then, it was turn of the 2nd accused namely Paul Lunyali– DW2 to testify. DW2 denied to kill the deceased on 09.12.2020 as it was alleged by prosecution witnesses. He said that on 09.12.2020 he was at Pawaga. He said that he informed the 1st accused that he was going to work in the rice farms. It was not true that he attacked the deceased on 09.12.2020 as it was stated in the statement of Sylvester Kalinga – Exhibit P2. He was not at Kaning'ombe when the incident occurred, he was at pawaga.

In cross examination, DW1 said that he is residing at Kidegemsitu hamlet in Kaning'ombe village. He know Sylvester Kalinga as their farms at Mtemambugi were close, next to each other. On 05.12.2020 he travelled to Pawaga. He don't know the reason for Sylvester Kalinga to record his statement at police saying that he saw 1st and 2nd accused attacking the deceased. He was informed about the death of the deceased after he was brought to Iringa District Central Police Station on 15.12.2020. This was the end of defense case and both accused closed their defense case.

The evidence adduced by prosecutions witnesses proved that the deceased namely Bernadino Chatila is dead and his death was not natural. The testimony of PW1 namely Isabela Mpulule who is the wife of the deceased and Leonia Kasuga – PW2 shows that on 10.12.2020 they saw the deceased lying at Mtemambugi area within Kaning'ombe Village injured and was covered with blood. Later on, Dr. Robert Lumato – PW3 who is working at Kiponzelo Health Centre confirmed that Bernadino Chatila is dead. The report on post mortem examination of the deceased body – Exhibit P1 shows that the cause of death is haemorrhagic shock. The summary of the report reveals that the deceased is Bernadino Chatila aged 67 years and he was found with cut wounds on shoulder, neck and stab wound in the lumber leading to protrusion of intestine. That, the whole body was soaked in blood. From this

evidence, there is no dispute that the deceased namely Bernadino Chatila is dead and his death is not natural. There is no way for the cut wounds he sustained to be self-inflicted, the injuries must be inflicted by someone.

The next question is whether the prosecution's evidence proved without doubt the offence of murder against both accused persons. In the information filed by prosecutions, both accused persons were indicted for murder offence contrary to section 196 of the Penal Code, Cap. 16 R.E. 2019. That on 09.12.2020 at Kaning'ombe Village within Iringa Rural District in Iringa Region they murdered one Benardino Chatila.

The offence of murder is committed when a person causes the death of another person by an unlawful act or omission with malice aforethought. Malice aforethought is established by evidence proving among other things an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not, according to section 200 of the Penal Code, Cap. 16 R.E. 2019. Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder according to section 196 of the Penal Code.

The burden of proof in criminal cases lies with the prosecution and the standard set is beyond reasonable doubt. The accused persons needs only

to raise doubt on the prosecution's evidence as it was held in the case of **Hemed vs. Republic [1987] TLR 117**. In the case of **Mohamed Said Matula vs. Republic [1995] TLR 3** it was held that:

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."

From above cited case, the accused person has no duty to prove his innocence.

The prosecution case is relying on the suspicion caused by the threat which 1st accused uttered to the deceased on a previous day before the deceased was killed, statement of witness who could not be found – Exhibit P2, and the evidence that 2nd accused escaped after the incident.

PW1 testified that on 08.12.2020 the 1st accused threatened to stab the deceased with a knife if he goes to drink alcohol following the heated argument which occurred in the farm. That, on the following date the deceased went to drink local brew and he did not come back. Following suspicion that something bad might have happened to the deceased, PW1 reported his disappearance to PW2, a tencell leader. PW1 and PW2 decided

to look for him along the way to Mlimba Hamlet and they found him lying on the ground injured. This evidence raises suspicion that probably the 1st accused is responsible for the deceased death.

However, it is established law that suspicion, however strong, cannot be ground for conviction. This was stated in several cases including the case of **Hakimu Mfaume vs Republic, (1984) TLR page 201, Republic vs. Israili Epuki Achietu (1934) E.A.C.A.** In the case of **Nyeura Patrick vs. Republic**, Criminal Appeal No. 73 OF 2013, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:-

"We similarly seek to emphasize that as often stated, suspicions, however strong they may be, cannot be the basis of a conviction in a criminal charge."

The evidence of PW1 is the reason for the 1st accused to be arrested on 10.12.2020 after deceased body was found. This evidence by PW1 is suspicion and it does not prove that it is the 1st accused who killed the deceased. This Court can't rely on PW1 testimony as proof that 1st accused killed the deceased. There has to be other independent evidence.

The statement of Sylvester Kalinga – Exhibit P2 is the evidence which shows that it was both accused persons who attacked the deceased with bushknife and knife on 09.12.2020 in the evening hours. The said statement

was tendered by PW5, the police officer who recorded it. The prosecution side filed notice to tender statement of unfound witness and there was no objection from defense side. The Court admitted the said statement of Sylvester Kalinga under section 34B (1), (2) (a), (b), (c), (d), (e) and (f) of the Evidence Act, Cap. 6 R.E. 2022, after the statement met all conditions stipulated therein. In the said statement, Sylvester Kalinga said that he was present on 08.12.2020 when 1st accused threatened to stab the deceased, he was present at local club drinking with the deceased on 09.12.2020 at Mlimba Hamlet, and he was in a company of the deceased when he was attacked by accused persons. Sylvester Kalinga was arrested by police as among the suspect who killed the deceased and it was on 13.12.2020, four days after he saw accused persons attacking the deceased, when he said that he saw the incident. In the said statement, Sylvester Kalinga said when he went to help the deceased during the incident, 2nd accused threatened to kill him if he interfere. He said after the incident 2nd accused disappeared from the village and this worried him and made him hesitant to report about the incident.

Further, PW5 who recorded the statement of Sylvester Kalinga said that he was aware that Sylvester Kalinga had a conflict with the deceased over land ownership. As the said Sylvester Kalinga was not found to come

to testify in Court, it is obvious that the defense side did not get chance to cross examine him on those areas which they raised through cross examination. This show that the said statement still has a lot to be explained by the maker. The said Sylvester Kalinga was among the suspect and his movement from 08-09.12.2020 in general was suspicious that is the reason he was arrested. It was possible for him to write or say anything in order to exonerate himself from the crime. His evidence was supposed to be tested through cross examination, but it was not possible as he was not found. For that reason, I'm of the opinion that the statement of Sylvester Kalinga – Exhibit P2 needs another independent evidence before the Court convict accused persons relying on it.

The last piece of prosecution evidence which connect the 2nd accused with the case is found in the statement of Sylvester Kalinga and testimony of PW4 that 2nd accused did run away from the village after the incident. The act of disappearing immediately after the event and reappearing after so long is inconsistent with his innocence. The position was stated by the Court of Appeal in the case of **Omary Kijuu vs. Republic**, Criminal Appeal No. 39 of 2005, Court of Appeal of Tanzania, at Dodoma, (unreported). The Exhibit P2 needs corroboration before the Court to could rely on its evidence, thus it could not be said to be the proof that 2nd accused disappeared after

the incident. On his part, PW4 testified that he learned that 2nd accused has disappeared immediately after the incident. Through secret informer, PW4 got information that Paulo Lunyali was at Pawaga in Kisanga area. He made arrangement for the suspect to be arrested and Paulo Lunyali was arrested on 15/02/2020 at Pawaga. It is not clear on how PW4 learned that 2nd accused disappeared from the village after the incident. Thus, this evidence could not be conclusive that 2nd accused disappeared from the village after the incident.

On the other hand, the 2nd accused said in his defense that he travelled to Pawaga on 05.12.2020 to work in the rice farm. That, he informed 1st accused. He admitted that he was arrested at Pawaga on 15.12.2020 and he was brought to Iringa Central Police Station on the same date. This evidence show the possibility that the 2nd accused travelled to Pawaga on 05.12.2020 as he alleges and this raises doubt on prosecution's evidence that he was the one who killed the deceased on 09.12.2020 and that he disappeared immediately after the incident.

Therefore, I find that the prosecution evidence has failed to prove without doubts that it was Fidel Mpoma and Paul Lunyali who killed the deceased. The only evidence showing that accused were responsible for the deceased death is statement of unfound witness namely Sylvester Kalinga –

Exhibit P2 which could not be relied by this Court as it requires another independent evidence to support it. In this case, there is no such independent evidence to corroborate the statement of Sylvester Kalinga. Consequently, Fidel Mpoma and Paul Lunyali are acquitted from the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2019. It is so ordered accordingly.




A.E. MWIPOPO
JUDGE
27/03/2023

The ruling was delivered in open Court this 27th March, 2023, in the presence of counsel for the Republic, both accused persons and the defence counsel for the 1st and 2nd accused.




A.E. MWIPOPO
JUDGE
27/03/2023