

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA REGISTRY)

AT CHATO

CRIMINAL SESSIONS CASE NO. 83 OF 2020

THE REPUBLICPROSECUTOR

VERSUS

JULIUS S/O JOSEPH @ DEUS.....1ST ACCUSED

HOJA S/O ELIAS.....2ND ACCUSED

JUDGMENT

Date of Last Order: 22.03.2023

Date of Judgment: 31.03.2023

M. MNYUKWA, J.

Julius s/o Joseph @Deus, the 1st accused person and Hoja Elias, the 2nd accused stand charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [RE: 2002] now [RE: 2022]. The prosecution alleged that Julius s/o Joseph @Deus and Hoja Elias on the 22nd day of October 2018 at Mwendakulima Village within Chato District in Mwanza Region, did murder one Mwanzalima s/o Katwiga @Ndaki. Both accused persons denied the charge levied against them hence the conduct



of a full trial which involved the calling of five (5) prosecution witnesses and two for the defence.

During the trial, the prosecution side, thus the Republic was represented by Mr. Anosisya Erasto, learned Senior State Attorney and Clemence Mango, State attorney while Mr. Costantine Ramadan, learned counsel represented the 1st accused person and Mr. Innocent Kaijage learned counsel represented the 2nd accused person.

To support the charge, the prosecution called his first witness, PW1, Rigobelt Kalisa, a Medical doctor, a resident of Makete Njombe, Christian, sworn and testified that on 22.10.2018 while working at Chato District he was informed of a murder incident and he accompanied police officers to the scene of crime. He examined the body of the deceased and found that he was injured on the head and the right hand was fractured. He further testified that, he filed the Post Mortem Report (PMR) and the cause of the death was due to excessive bleeding from the wound on the head.

PW1 prays the court to admit the (PMR) as an exhibit whereas the defence side objected and upon the inquiry by the court, the PMR could not be admitted and form part of the prosecution evidence for the reason that the PMR ought to be tendered differs with the PMR which was supplied to to the defence side during the committal proceedings.



PW1 went on testifying that, he was introduced by the relatives of the deceased that it was the body of Mwanzalima Katwiga.

PW2 Mawazo s/o Mwanzalima a resident of Katoro, a farmer, and Christian, sworn and testified that, he received information on 22.10.2018 when he was at Ushirombo that his father was invaded and killed and he decided to go at his father's home. He saw the dead body and asked her mother who could not identify the assailants but told him that his father's mobile phone and some clothes (vitenge) were stolen. He testified further that after the body was examined, it was handed over to them and they conducted burial. He added that, they went to Vodacom offices at Katoro to track the mobile phone and report to the police. He testified further that, police also traced the mobile phone and only to find that it was used with a new sim card registered by the name of Shoma Ngelela.

PW2 went on that, on 02.02.2019 he was informed that the person who was involved in the murder of the deceased was Julius Joseph @ Deus and at that time he was seen at Buseresere. He informed the police officers and he went to Buseresere and when Julius Joseph @ Deus saw him he ran away and through the assistance of citizens who were in that area, they managed to arrest him and handed over to the police at around 19.000hrs. PW2 also identified Julius Joseph @ Deus as the 1st accused at the dock.



When cross-examined he testified further that he was given a letter by the police to go to the Vodacom offices to track the deceased mobile phone.

PW3, F. 2513 D/Sergeant Nimludi, police officer, a resident of Chato, Christian, sworn and testified that he is a police officer working at Chato police station and before he was working at Buseresere police station. On 25.10.2018 he was assigned to investigate the death of Mwanzalima Katwiga which occurred on 22.10.2018 where the assailants stole the deceased's mobile phone and some clothes. PW3 went on that, they wrote a letter and communicated with Vodacom, a service provider and on February 2019 the police were informed that the mobile phone of the deceased was used with another sim card with the number 0765277805 registered by the name of Shoma Ngelela. They found Shoma Ngelela on 08.02.2019 and conducted a search and recovered her voter's registration card by the name of Shoma Ngelela. PW3 prays to tender the seizure certificate and the voter's registration card which was objected to by the defence and after the inquiry by the court, the certificate seizure and Shoma Ngelela voter's registration card were admitted collectively as exhibit P1.

PW3 went on that they arrested Shoma Ngelela and upon interrogation, she admitted that the mobile phone number was registered

using her voter's registration card but that sim card was used by her husband Julius s/o Joseph @Deus.

He testified further that they started searching for the 1st accused and on 02.02.2019 he was arrested at Buseresere at around 19:00-20:00hrs and was sent to Buseresere police station and upon preliminary interrogation, he admitted to have murdered the deceased and sold the phone to an unknown person and threw off the mobile sim card. PW3 stated that, the accused also named the 2nd accused, Hoja Elias and Shija Renatus as the person to whom they cooperated to kill the deceased and that Shija Renatus is now a deceased.

He added that, on 03.02.2019, he took the 1st accused and went to Hoja Elias who was arrested at around 00:00hrs to 1:00hrs. PW3 went on that, Hoja Elias named Felician Mwanzalima as a person who hired them to kill the deceased

PW3 went on testifying that the 2nd accused told them the place he hide the clothes stolen "Vitenge" and they went to the house of the 2nd accused with the wife of the deceased and upon search, they were able to recover 5 pieces of vitenge which were identified by Tiho Kahinda, the wife of the deceased. PW3 was able to identify the certificate of seizure and the clothes "vitenge" seized and pray the court to admit them as



exhibits. The defence side objected and after the inquiry by the court, they could not be admitted to form part of the prosecution evidence because the search that was conducted was illegal.

PW3 went on that, they searched the 1st accused's home and they could not find anything related to the offence. And therefore, they returned to the police station at 9.20 hrs and both accused persons' statements were taken. He went on that on 03.02.2019 Felician Mwanzalima was arrested and his caution statement was taken. PW3 testified further that, the 1st and 2nd accused persons admitted to have committed the offence and were taken to the justice of peace and wrote their confessions.

When cross-examined, PW3 testified that in the statement he wrote at the police station, he stated that it was Coplo Matete who searched the Shoma Ngelela bag while at the court he testified that it was WP Stella and exhibit P1 shows that the search was conducted by Coplo Nimludi. He testified further that, the deceased wife's statement stated that the phone stolen was Itel while he testified that the mobile phone stolen was Techno.

PW4, G. 205 Coplo Amos, Police officer, a resident of Chato, Christian, sworn and testified that in 2019 he was stationed at Buseresere



police station. On 02.02.2019 he was ordered to arrest the 1st accused person at Ibondo and he found him arrested by the citizens and was handed over to him and took him to the police station and on preliminary interrogation, he mentioned Hoja Elias and Felician Mwanzalima as co-accused. They also arrested the 2nd accused on 03.02.2019 and both the 1st and 2nd accused admitted to have committed the offence and named Felician Mwanzalima as a person who hired them. PW4 testified further that, on 03.02.2019 they went to the house of the 1st and the 2nd accused and upon search in the house of the second accused, they recovered clothes 'vitenge' five pieces claimed to be stolen from the deceased and returned to the police station at around 9.00hrs.

PW4 testified further that, he wrote the 2nd accused person caution statement. PW4 identified the caution statement and prays the court to admit it as an exhibit to form part of the prosecution evidence. The defence side objected to the admission of the caution statement and after the inquiry by the court, the caution statement could not be cleared for admission as it was recorded out of the four hours' provided by the law and therefore was not admitted.

PW5: G. 206 D/ Coplo Matete, police officer, a resident of Geita, Christian, sworn and testified that he is a police officer stationed at Geita. On 02.02.2019 he was instructed to arrest the 1st accused person Julius



s/o Joseph @Deus and when they reached they found the accused already arrested by the citizens. They took the accused to the police station at around 20.00hrs and when interrogated he admitted to having killed the deceased in collaboration with Hoja Elias and Shija Renatus and that they were hired by Felician Mwanzalima the son of the deceased. On 03.02.2019 they arrested the 2nd accused Hoja s/o Elias at around 1.00hrs and returned to Buseresere police station approximately within 30 to 40 minutes. After reaching the police station, the accused accompanied them to arrest Felician Mwanzalima and up to 6.00hrs they could not find him and went back to the police station where they reached at around 7.00hrs. After they reached the police station they went to conduct search to the house of the accused persons and recovered the stolen clothes 'vitenge' in the house of the 2nd accused and returned to the police station around 9.30 hrs.

PW5 testified further that, at 9.30hrs, he took the 1st accused to the room and started recording his caution statement and the accused narrated to him what he knows about the death of the deceased. PW5 identified the caution statement and prays the court to admit it as an exhibit. The defence objected to its admissibility and after the enquiry by the court, the caution statement could not be cleared for admission as it



was taken out of the prescribed time provided by the law and therefore was not admitted.

When cross examined, PW5 testified that, Hoja Elias entered the house and come out with the stolen clothes and handed them over to the police at a time the search and that no person was found at home and he did not see the wife of the 2nd accused.

The prosecution case was marked closed and this Court ruled in terms of section 293(2) of the Criminal Procedure Act, (CPA), [Cap. 20 R.E. 2019], that the prosecution managed to establish a prima facie case against Julius s/o Joseph @Deus the 1st accused person and Hoja Elias the 2nd accused person and therefore both the 1st and 2nd accused persons have a case to answer. In line, the accused persons were addressed in terms of section 293(2)(a) and (b), (3) and (4) of the CPA and both Julius s/o Joseph @Deus the 1st accused person and Hoja Elias the 2nd accused person chose to defend themselves on oath without calling witnesses.

DW1 Julius Joseph, 32 years, peasant, a resident of Katoro CCM, Christian sworn and testified that on 27.01.2019 at around 18.00 he was at Katoro and while heading to *kijiwe cha kahawa* he was arrested and sent to Buseresere police station and informed that he was accused of committing the offence of murder. He testified that he was kept in the



lockup and after 10 minutes he was sent to a room where he was interrogated and beaten in several parts of his body while handcuffed and denied having committed the murder and was sent back to the lock-up. He went on to testify that from 28.01.2019 to 30.01.2019 he was daily sent to the interrogation room beaten and he maintain to deny that he did not commit the offence of murder. He stated further that he stayed at Buseresere police station for 6 days and he was transferred to Chato police station and on 06.02.2019 he was arraigned before Chato District Court. He testified further that, he did not write any statement before any police officer and he did not admit the commission of the offence. He also denied knowing Felician Mwanzalima and he was not hired by any person to kill the deceased. Again he denied to knowing Shoma Ngelela and did not use her voter's registration card to register a sim card and he also did not use the deceased mobile phone. He, therefore, prays the court to set him free.

When cross-examined, he insisted that on 30.01.2019 he was beaten and reported to the police who were on duty. He maintained that he was living at Katoro and he had never lived at Mwendakulima.

DW2, Hoja Elias, 31 years, peasant, a resident of Katoro CCM, Pagan, affirms and testified that, he is a farmer doing his farming activities at Mikoto within Chato District. On 02.02.2019 at around 20.00hrs while



at his home he was arrested by four men who he didn't recognize who handcuffed him and told him that he was involved in the business of bangi and he was sent to Buseresere police station. He testified that, he was taken from the lockup to the investigation room and severely beaten until he was unconscious and found himself in the lockup naked.

He testified further that, the next morning he was brought back to the interrogation room and was given clothes to wear and a piece of paper to sign and when he refused he was severely beaten and forced to thumbprint the paper then he was sent back to the lock-up. He testified further that the next morning he was transferred to Chato police station and on 06.02.2019 he was arraigned before the District Court of Chato with two other persons who he didn't know for murder charges.

When cross-examined he testified that he did not bring evidence to show that he was beaten because he was not given a PF3.

After the testimonies from both the prosecution and defence, the death of the deceased was among disputed matters after the evidence of PW1 who testified to have examined the body of the deceased and filed PMR report of which when he prays to tender as exhibit appears to be different from the PMR report that was supplied to the defence side during committal proceedings. But taking his oral testament, that PW1 went to



examine the body of the deceased, and the description of the occurrence of the death, and taking into consideration that the accused persons did not object to the death of the deceased, I find that the deceased died and according to the testimony by PW1, which is corroborated with the evidence of PW2 proves that the death was unnatural.

The prosecution side as required by law needs to prove the case against the accused persons and the standard as stated under section 3(2)(a) of the Law of Evidence, Act Cap. 6 RE 2019 (now RE 2022) is beyond a reasonable doubt. (see also **Mohamed Haruna @ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007) as provided for under Section 110 and Section 112 of the Evidence Act, Cap6 [RE: 2002], now [RE: 2022], the accused is not placed with a duty to prove his innocence but to raise doubts on the prosecution evidence. In **Joseph John Makune v R** [1986] TLR 44 the Court of Appeal held that:

"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. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."

Since the charge against the accused persons is that of murder the prosecution must prove the act of killing and connect the act of killing



with the evil intention of the perpetrator (malice aforethought) as provided for under Section 196 of the Penal Code, Cap. 16 [RE: 2019] now RE: 2022 which provides that: -

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder".

In proving the act of killing, it is undisputed that Mwanzalima s/o Katwiga @Ndaki is dead and based on the evidence by PW1, the deceased was beaten and injured on the head and his hand broken which connotes that the assaulters did it with malice aforethought and there is no disagreement they contemplated and intend to kill. Whoever attacked and beat the deceased did it with malice aforethought in terms of Section 200 of the Penal Code, Cap. 16[RE: 2019] now [RE: 2022].

I now proceed to determine whether the prosecution managed to prove to the standard required that it was the accused persons Julius s/o Joseph @Deus, the 1st accused person and Hoja s/o Elias the 2nd accused who killed the deceased Mwanzalima s/o Katwiga @Ndaki.

First, from both the prosecution witnesses PW1 to PW5 no one testified to have witnessed the commission of the offence or identified the assailants in the scene. PW1 testimony was to the extent that the deceased died and his death was unnatural. PW2's testimony was to the



extent that he helped the police with the investigation and arrest the 1st accused.

The evidence of PW3, PW4 and PW5 linked the accused persons with the commission of the offence of murder of the deceased Mwanzalima s/o Katwiga @Ndaki. DW1 and DW2 in their defence denied having committed the offence as charged.

PW3 a police officer investigated the case and communicated with Vodacom to track the mobile phone of the deceased which was alleged to have been stolen after the assailants killed the deceased. It was his testimony that the service provider informed him that the mobile phone stolen was used with another sim card which was registered by the name of Shoma Ngelela whom they managed to arrest, search and recovered a voter's registration card, exhibit P1 collectively and according to PW3, it was Shoma Ngelela who told the police that, the 1st accused person who was her husband did register a sim card with her voter's registration card.

In his defence, DW1 denied knowing Shoma Ngelela and that she was not her wife as claimed. As I perused the records, it is clear that Shoma d/o Ngelela was arrested and recorded her statement at the police station. Based on the denial by the defence that he did not know Shoma Ngelelela nor was his wife, the prosecution had a duty to prove that PW3



testimony was watertight for two reasons. One, it was Shoma d/o Ngelela whose identity appears to use the deceased phone and not the 1st accused person and two, it was the duty of Shoma Ngelela to prove that the sim card was not her but belongs and was used by the 1st accused and the circumstances prevailing her voter's registration card to be used.

Failure of the prosecution to call such material witness in person or else her statement which was dully made, calls for this court to invoke adverse inference against them that had they called her she would have given evidence against their favour. This was held in the case of **Azizi Abdallah v Republic** [1991] TLR 71 on pages 72 that; -

"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".

See also **Godfrey William @ Matiko and Another vs Republic**, Criminal Appeal No. 134 of 2022 and **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 350 of 2008.

As it appears in records, exhibit P1 collectively, which is a voter's registration card reads by the name of Shoma d/o Ngelela who is not an



accused before this court. In the absence of her evidence to connect the 1st and 2nd accused persons, exhibit P1 cannot be relied on by this court to determine the guiltiness of the accused persons and therefore exhibit P1 collectively has no evidential value.

Both PW3, PW4 and PW5 testified that during the preliminary oral interview with the 1st and 2nd accused persons admitted to having murdered the deceased and that they named one Felician s/o Mwanzalima as the person who hired them to execute the evil deed. In the defence, both DW1 and DW2 denied the charge of murder and equally denied knowing Felician Mwanzalima. As I go through the court records, it appears that one Felician s/o Mwanzalima was among of the accused who was arrested, arraigned and committed to this court to face his charges of murder. The records also show that before the case came up for a preliminary hearing, the prosecution side withdraw his intention to prosecute him as the 3rd accused person and entered *nolle prosequi* and he was discharged.

The circumstance raised the issue of credibility and reliability of the evidence of PW3, PW4 and PW5 in the following manners. One, the records show that Felician Mwanzalima was arrested, arraigned and charged with the offence of murder together with 1st and 2nd accused persons but in between before the trial the prosecution was satisfied that



Felician s/o Mwanzalima had nothing to do with the offence charged and therefore, they dropped charges against him. Surprisingly, the same prosecution who were satisfied that Felician Mwanzalima was not involved brought witnesses who are PW3, PW4 and PW5 who testified that the 1st and 2nd accused admit to commit the offence of murder and were hired by Felician Mwanzalima.

The epicenter of the Republic's case revolves around the evidence of PW3, PW4, and PW5 in whose totality their evidence tends to suggest that, the accused persons killed Mwanzalima Katwiga after being hired by Felician Mwanzalima, the son of the deceased. However, it is my firm view that their evidence contradicts with their action to enter *nolle prosequi* to Felician Mwanzalima.

I am settled that the contradictions are common in the cause of trial and the court is duty bound to evaluate the same and decide whether are minor or go to the root of the case. In **Awadhi Abrahamani Waziri vs Republic**, Criminal Appeal No. 303 Of 2014 which refers with authority to the case of **Mohamed Said Matula** 1995 TLR 3 the Court of Appeal stated thus:-

"...Where the testimonies by witnesses contain inconsistencies and contradictions, the Court has a duty to address the inconsistencies and try to resolve them where possible, else the Court has to decide whether the



inconsistencies and contradictions are only minor, or whether they go to the root of the matter"

As I pointed out above, the act of the prosecution to form its firm opinion that one Felician s/o Mwanzalima was not connected or involved to the offence charged, the evidence of PW3, PW4 and PW5 in the cause of trial of the 1st and 2nd accused persons contradicts with the earlier action of entering *nolle prosequi* against Felician s/o Mwanzalima. In their defence, the accused persons denied knowing or being hired by Felician s/o Mwanzalima and their defence raised a doubt which was the same supported by the action of the prosecution to discharge Felician s/o Mwanzalima from the charges of murder.

In **Swaibu Amani Shabani vs Republic**, Criminal Appeal No. 87 of 2021 the Court of Appeal reproduced an excerpt from page 48 of **Sarkar, The Law of Evidence**, 16th edition, 2007, which states: -

"Normal discrepancies in evidence are those which are due to normal errors of observation; normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While



normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."

The contradictions are material that goes to the root of the case and therefore affect the totality of the incriminating evidence against the accused persons. (See also **Bujigwa John @ Juma Kijiko v. Republic**, Criminal Appeal No. 427 of 2018 and **Emmanuel Lyabonga v. Republic**, Criminal Appeal No. 257 of 2019 and **Mohamed Said Matula v. Republic** [1995] T.L.R. 3). With the above-mentioned contradictions which go to the root of the case the same have affected the credibility of PW3, PW4 and PW5 and the court cannot rely on their evidence in convicting the accused persons.

Having heard and analyzed the evidence of the Prosecution witnesses, I have to say that there is no any other evidence on record that this court can rely upon in the conviction of the accused persons and therefore the link between the accused persons and the incident of murder of Mwanzalima s/o Katwiga @Ndaki equally dissipates. From the totality of the prosecution evidence, this court cannot direct its mind and found a conviction based on what is otherwise an extremely deficient set of facts which does not connect the accused persons to the offence with that they stand charged.



The law is settled that in a criminal case, the burden of proof is on the prosecution to prove the case against the accused person beyond a reasonable doubt. The burden never shifts (section 3(2) (a) of the Evidence Act, Cap 6, R.E. 2002). Equally, the accused cannot be convicted on the weakness of his defence. The Court of Appeal in **Twinogore Mwambela v The Republic**, Criminal Appeal No 388 of 2018 observed that;

" In saying so, we are not shifting the burden of proof onto the appellant. Rather, we are alive to the position of the law that, an accused person in a criminal trial, can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

Based on my findings above, cumulatively, all the defects in the prosecution case lead to the conclusion that the evidence did not measure up to the requisite standard both in relation to credibility and reliability for this court to base its conviction on the two accused persons Julius s/o Joseph @Deus. the 1st accused person and Hoja Elias. the 2nd accused over the murder of Mwanzalima s/o Katwiga @Ndaki the deceased.

In the event, I find that the prosecution failed to discharge their duty as required by the law under section 3 (2)(a) of the Law of Evidence, Act Cap. 6 RE 2019 (now RE 2022) and consequently, the accused persons are both acquitted. I order Julius s/o Joseph @Deus the 1st accused



person and Hoja Elias the 2nd accused to be released from prison forthwith unless otherwise are lawfully held.

DATED at MWANZA this 31st MARCH 2023.




M.MNYUKWA
JUDGE
31/03/2023

The right of appeal in terms of Section 323 of the Criminal Procedure Act, Cap. 20 R.E 2019 is fully explained. .


M.MNYUKWA
JUDGE
31/03/2023