

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSIONS CASE NO. 64 OF 2017**

**REPUBLIC**

**VERSUS**

**EMMANUEL AGATON NDUNGURU**

**JUDGMENT**

*02/03/2023 & 17/03/2023*

**BWEGÖGE, J.**

The accused person herein namely, Emmanuel Agaton Ndunguru was arraigned on one count of murder contrary to section 196 of the Penal Code (Cap 16 R.E. 2002).

The particulars of offence allege that on 04<sup>th</sup> May, 2016 at Mkambarati Village within Kibaha District in Coast Region, the accused person did murder one Nemes Charles Shomari.

The accused person vehemently refuted the allegation of murder and the prosecution procured attendance of four witnesses in a bid to prove the charge preferred against the same. The prosecution case, in the interest of brevity, is as follows: The deceased person was a motorcyclist who operated the motorcycle taxi at Mbagala - Mgeninani area in Temeke District, Dar es Salaam Region. On the fateful day of 04<sup>th</sup> May, 2016 the deceased person didn't retire home as usual after his daily activities. Two days later, on 06<sup>th</sup> May, 2016 the deceased body was discovered at Mkarambati Village, within Kibaha District in Coast Region, whereas the finding based on the medical report suggested that the deceased person died a violent/unnatural death.

It is the prosecution case that on the fateful day of 4<sup>th</sup> May, 2016 the deceased person was on his usual business routine at Mbagala Mgeninani area. Allegedly, the accused person herein communicated with one Mariam Said Mfaume (PW2) requesting her to hire a motorcycle to take him to Kibaha town. The journey had to start at Keko herein Dar es Salaam where allegedly, the accused was stationed. PW2 went to the motorcycle taxi parking at Mgeninani. She had approached the deceased (victim herein) whom she was well acquainted with. They bargained and agreed on payment rate. Having communicated with the accused person,

the deceased left Mbagala to Keko to pick up the same. PW2 had continued with her business and retired home at the end of the day.

On 05<sup>th</sup> May, 2016, PW2 was visited by unfamiliar persons at her residence who informed her that the motorcyclist she had hired the previous day had not retired home. PW2 had given an explanation of what was in her knowledge. Her explanation didn't satisfy her accusers. Therefore, PW2 was escorted to the Local Government Authority Office nearby. Having heard the accusation, the Street Executive Officer escorted PW2 to the Kijichi Police Post for necessary action. The Policemen, having apprehended an explosive atmosphere, had opted to keep PW2 in police custody and later transferred her to Matumbai Police Station where she was interviewed and her cautioned statement taken. Later on, the blood-chilling information reached PW2 in that the motorcyclist she hired had been found dead. Thereafter, PW2 was transferred to Kibaha Police Station where the investigation of the alleged murder was ongoing. PW2 had stayed in police custody for a considerable period before she was released. Allegedly, based on the information provided by PW2, the accused herein was arrested.

On 06<sup>th</sup> May 2016 one E. 9830, Detective Sergeant Salehe, stationed at Kibaha Police Station (PW3 herein) was informed by his superior about

the body of the deceased person found at Mkarambati Village, Kibaha District and instructed to commence an investigation. PW3 had consulted the village Chairman, Lyangalile William, who had led him to the crime scene. PW3 witnessed a dead body of an adult person with a wire around his neck whereas the arms and legs were tied by ropes. PW3 had taken the body to the mortuary at Tumbi Hospital. On 07<sup>th</sup> May, 2016, PW3 escorted the relatives of the deceased person namely, Shangwe and Evelyn to Tumbi Hospital to identify the deceased body. The above mentioned persons identified the deceased person as NEMES CHARLES SHOMARI, the victim herein. PW3 tendered the sketch map of the crime scene, which was admitted in evidence as exhibit P2.

Later, PW3 interviewed PW2 who was the prime suspect in the alleged murder whereas PW2 explained that she hired the deceased person on, allegedly, instruction of the accused herein whom she claimed to be her boyfriend. After a prolonged investigation, on 18/8/2016, PW3 received information that the accused was in police custody at Mbagala Police Station. He had effected his transfer to Kibaha Police Station for necessary action.

It is also the prosecution case that on 07<sup>th</sup> May, 2016, Dr. Amina conducted a postmortem examination on the deceased body in presence

of a policeman and relatives of the deceased person. Her finding was to the effect that the cause of death was hypoxia and body injury. The report on post-mortem examination was admitted in evidence as exhibit P1.

Likewise, it is the prosecution case that on 18<sup>th</sup> August, 2016 one G. 5728 Corporal Salum (PW4) interviewed the accused herein at Mbagala Police Station in respect of the allegation of murder of the victim in this case whereas, allegedly, the accused confessed commission of the crime. Unfortunately, the confession statement was found inadmissible on technical grounds.

On the other hand, it is the defence case that the accused person herein was arrested on 16/08/2016 and detained at Mbagala Police Station for an undisclosed offence. The accused person hit the sky denying involvement in the alleged murder. He maintained he is a law-abiding member of the community, earning his living by working as a clothes vendor, at Karume commercial centre herein Dar es Salaam.

Likewise, the accused person hit the sky denying to have ever met PW2 or the deceased person, let alone instructing PW2 to hire motorcycle for him. He alleged PW2 for concocting evidence against him. He likewise, refuted to have confessed commission of the alleged crime.

The issues to be resolved by this court are as thus:

- (i) Whether the accused person died an unnatural death.
- (ii) (If the above in affirmative then) Whether the accused person herein was responsible for the death of the deceased person.
- (iii) (If the 1<sup>st</sup> and 2<sup>nd</sup> issues in affirmative then) Whether the accused person had, with malice aforethought, caused the death of the deceased person.

The issues aforementioned shall be canvassed in seriatim commencing with the 1<sup>st</sup> issue on whether the deceased/ victim herein died unnatural death. It is in the testimony of PW3 herein that on 06<sup>th</sup> May 2016, in the company of the village chairman namely, Lyangalile William, visited the crime scene at Boko – Mnemela ward, Mkarambati village. PW3 had witnessed the deceased body with a wire around his neck, hands tied at the back with cloth and legs tied by the sisal rope. PW3 had also deponed that two persons namely, Shangwe and Evelyn, identified the body as their relative who had disappeared the two previous days.

The testimony of PW3 is corroborated by PW1 who deponed in this court that she observed the body of the deceased person with injuries on the neck and head. PW1 opined that the head injury was perpetrated by the

heavy object, as the victim bled from mouth and ears. The finding on the report on post mortem examination (exhibit P1) depicts that the cause of death was severe hypoxia (oxygen deficiency in the blood and body tissues) and severe head injury. The document (PF3) depicts that the victim's relatives namely, Avelyn Charles and Shangwe Mhena were present during the post mortem exercise. These were the actual persons PW3 testified that they identified the deceased as their relative namely, Nemes Charles Shomary, the victim herein.

Therefore, on the above accounts, I hereby conclude that the deceased person herein had died unnatural death. It may be correctly stated that the deceased has died a violent death.

I now proceed to canvass the 2<sup>nd</sup> and pertinent issue in this case on whether the accused person herein is responsible for the murder. Admittedly, the evidence against the accused person is circumstantial in nature. Before revisiting the substance of the circumstantial evidence in this case, I find it pertinent to revisit the principle in the case of **Kibelo Mwana vs Republic**, Criminal Appeal No. 173 of 2008 (unreported) whereas the superior Court borrowing a leaf from the case of **Simon Musoke V.R** (1985) EA 715 at page 718 held as thus:

*"... in a case depending conclusively upon circumstantial evidence, the court must...find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty."*

In the same vein, in the case of **Chandrakant Joshubhai Patel vs Republic** (Criminal Appeal 13 of 1998) [2002] TZA 5 the court had this to say:

*"What has to be emphasized, however, is that the alternative possibility must not be fanciful. It must be plausible. Doubt about the guilt of an accused can count only if such doubt is reasonable. The circumstances must also be looked at, and considered, in their totality."*

From what is gathered above, it is the principle of law that circumstantial evidence must not lead to any hypothesis other than the accused guilty [**Republic vs Kerstin Cameron** (2003) TLR 85]. And, to sustain circumstantial evidence, the chain of evidence should not be broken. There should be no other inference, except the inference of the accused's guilt [**Hamidu Mussa Timotheo and Another vs Republic** [1993] T.L.R 125].

In the case at hand, at large, the accused person is implicated by PW2 herein and the whole prosecution case hangs on the thin thread of the



testimony of this sole key witness. And, I find it pertinent to revisit her testimony in *extenso*. Under oath, PW2 identified the accused person as her previous boyfriend in the year 2015/2016. That in the particular years mentioned above, PW2 used to stay with her parents at Mbagala, herein Dar es Salaam. Further, PW2 deponed that on the fateful day of 04<sup>th</sup> May, 2016, she received a phone call from the accused person requesting her to hire the motorcycle taxi to take him to Kibaha from Keko suburb. PW2 enlightened this Court that the explanation given by the accused for preferring motorcycle taxi from Mbagala was an attempt seek cheap transport. And, the accused offered TZS 50,000/= for the envisaged trip. Upon receiving the instruction from the accused, PW2 strolled to the motorcycle parking lot at Mgeninani whereas she has seen one Nemes, the motorcyclist she was well acquainted with. PW2 had made an offer to the said motorcyclist who had wholeheartedly accepted it. PW2 had seen the motorcyclist departing to Keko, the destination she had instructed the same to pick up the accused person after he had communicated with the same. During the evening, PW2 communicated with the accused who informed her he was with Nemes, the hired motorcyclist. However, when PW2 attempted to call the accused and the hired motorcyclist at night, she failed to reach them.

Apart from the above, PW2 testified that the following morning, she received a text message from the accused informing her that he had travelled and returned safely. However, later on, strangers checked with her at her residence. They wanted to ascertain whether she was the actual person who hired the services of the respective motorcyclist. Unsuspecting, PW2 ascertained the fact, and the strangers had left. Later on, a school of people appeared at the residence of PW2. They had informed PW2 that the motorcyclist she hired the previous day had not returned home and, or seen since the time they were seen together.

The narratives given by PW2, it seems, was not purchased by the victim's relatives who had opted to involve the Street Executive Officer. Likewise, the said executive Officer being suspicious opted to escort PW2 and her accusers to the Police Post whereas PW2 was held in custody for investigation purposes as she was the prime suspect for the alleged disappearance of the deceased person. PW1 was first held at Kijichi and Matumbai Police Posts before she was moved to Kibaha Police Station for further investigation. It suffices to point out that PW2 had been held in police custody for a considerable period pending investigation of the case. It was until her release that PW2 was informed that the accused herein was arrested to answer the charges herein.

PW2 had told this court that when she was under custody in Kibaha Police Station, pending investigation of the case, she provided the mobile phone number of the accused person to the policemen whereas attempts to reach him proved futile. In fact, PW2 informed this court that prior to her incarceration in jail, she managed to communicate with the accused person who had assured her that he had a pleasant trip. That he managed to return safely with the deceased person. However, on some occasions, the accused person intimated that he left the deceased person at Kongowe. Later on, the accused person absconded to receive phone calls made from her mobile phone.

During his defence, the accused person deponed a different version. He deponed that he was arrested on 16/08/2016 at Temeke - kwa Aziz Ally and put in custody at Mbagala Police Station. He vehemently disputed the allegation of murder of the victim in this case. He refuted to have known PW2, let alone being in sexual relationship with her. He likewise denied to have known the deceased person. In the same vein, he vehemently denied to have instructed PW2 to procure the motorcycle taxi for him. The accused contended that PW2 could not establish her alleged communication with him. The accused reiterated that he met PW2 at the first instance herein this court. He asserted that PW2 was induced to

concoct the evidence against him. Otherwise, he denied to have confessed commission of the crime before PW3.

Further, the accused contended that there is no evidence brought to the attention of this court connecting him with the deceased person namely, Nemes Shomari. That none of the deceased relatives ever testified in this court to establish the fact that the deceased actually died. On the above accounts, the accused concluded that he committed no crime. Hence, he prayed to be acquitted.

Admittedly, the defence marshalled by the accused person taxed my mind, specifically his statement that he has never met PW2. His assertion contradicts the testimony given by PW2 who testified that they were lovers. It is obvious that the opinions given by the gentlemen assessors herein were shaped by the defence case. One pertinent question arises herein on whether the accused defence is credible.

From the outset, I find it pertinent to state that I am alive with the operating principle in criminal law in that the accused person may only be convicted on the strength of the prosecution case, not on basis of the weakness of his defence [**Mohamed Haruna Mtupeni and Another vs Republic** (Criminal Appeal 259 of 2007) [2010] TZCA 147] as it is the prosecution side which has the burden to prove the charge preferred

against the accused person beyond reasonable doubt [**Simon Edson @ Makindi vs Republic** (Criminal Appeal 05 of 2017) [2020] TZCA 1730]. And, it is not the duty of the accused person to prove his innocence; it suffices that he raises reasonable doubt on the prosecution case. However, though the accused person has no duty to prove his innocence, this doesn't mean that *"he can tell any story of his imagination even when it is incapable of appealing to sense."* See Vicent **Ilomo vs Republic**, Criminal Appeal No. 337 of 2017 CA (unreported). In the same vein, it is the rule of law that *"lies of the accused person may corroborate the prosecution's case."* See in this respect the case of **Felix Lucas Kisinyila vs Republic**, Criminal Appeal No. 129 of 2009, CA (unreported).

Having recited the general principles of criminal law, I proceed to scrutinize the defence case. As aforesaid, the accused refutes the fact that he is familiar with PW2. I am convinced that the defence counsel had been aware of the facts deposed by the accused from the commencement of the trial. Upon scrutiny of the proceedings, the record of this case has it that in response to the questions put by the defence counsel during the cross-examination, PW2 had stated as follows:

*"Yes, Emmanuel Agathon was my boyfriend. I trusted him. Emmanuel had no duty of care to Nemes after they returned safely from the trip he hired him for. Yes, I was the person who was seen physically hiring Nemes."*

*We didn't communicate immediately after they came back. Later, I called Emmanuel and he told me that he left Nemes at Kongowe. **During our relationship, I have never heard that Emmanuel is a thief or otherwise engaging in any unlawful activities.***

*Both I and Emmanuel knew Nemes. Yes, Emmanuel did not communicate with Nemes on 04/05/2016 except via my phone. .... **If one hires a motorcycle he can't be aware of the whereabouts of the motorcycle rider after the end of their trip. I agree that Emmanuel could not be aware of the whereabouts of Nemes after their trip (emphasis mine).***

The bolded statement depicts the nature of the questions put by the defence counsel to the key prosecution witness (PW2). What has taxed my mind is the nature of questions put to PW2 taking into consideration the fact that the accused told this court that PW2 is a stranger to him and alleged that PW2 was employed to concoct evidence against him. The nature of questions put to PW2 during cross-examination doesn't support the accused defence. It is obvious PW2 was asked whether she trusted the accused during their relationship. Likewise, PW2 was asked whether the accused had a duty of care to the deceased having arrived safely from the trip he hired him for. In the same vein, PW2 was asked whether during their relationship, she had ever heard that the accused was a thief or otherwise engaged in any unlawful activities. In tandem with the above, PW2 was called upon to opine whether the accused was

supposed to be aware of the whereabouts of the deceased after they parted company. It is my considered opinion that the kind of questions put to PW2 during cross-examination contradicts the evidence given by the accused in that PW2 was the stranger to him.

It is likewise the defence case that PW2 had concocted the evidence against him. However, the accused failed to enlighten this court the motive for the PW2 to have concocted the evidence against him. It is my considered opinion that if PW2 was a stranger to the accused she would have no reason whatsoever to concoct a case against him.

It was also contended by the accused that none of the deceased relatives ever testified in this case to establish the fact that the deceased actually died. This issue need not detain this court. PW3 had in so many words told this court that on 07<sup>th</sup> May, 2016, two persons, namely, Evelyn and Shangwe had appeared at Kibaha Police Station to identify the body of the deceased person. That both persons identified the body of the deceased person to be of their relative, one Nemes Charles Shomari, the victim herein. This piece of evidence is corroborated by the testimony of PW1 in that the body of the dead person was identified to her by the deceased person's relatives. In fact, the report on post mortem examination (exhibit P1) depicts that the deceased person named in the

report was identified by Evelyn Charles and Shangwe Mhena. Hence, I am of the considered opinion that the death of the victim, in this case, was validly ascertained and I entertain no doubt in this respect.

It is a settled rule of law that witnesses are entitled to credence and their testimonies must be believed unless there are cogent reasons for not believing a witness. And cogent reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses [**Goodluck Kyando vs Republic** [2006] TLR 363 and **Khamis Said Bakari vs. Republic**, Criminal Appeal No. 359 of 2017 CA (unreported)]. I find no cogent ground(s) to impeach the credibility of PW2 herein. Therefore, it is my considered view that PW2 is the witness of truth in this court who has given an honest and true account of the facts rightly in her knowledge as far as the disappearance of the deceased person is concerned. It is in the defence case where I discern improbabilities and contradictory evidence. It is my considered opinion that the accused defence doesn't appeal to sense. I find the defence marshalled by the accused person an afterthought. For this reason, I refrain to accord weight to the defence case.



At this juncture, based on the prosecution evidence revisited above, I am of the settled view that it was the accused person who was the last person to be with the deceased person. Therefore, the accused was legally obliged to make a plausible explanation pertaining to the circumstances leading to the death of the accused. He failed to discharge this obligation. It is the applicable principle in criminal law that:

*"If the accused person is alleged to have been the last person to be seen with the deceased, in the absence of plausible explanation to explain the circumstances leading to the death, he or she will be presumed to be a killer."* See the cases of **Mathayo Mwalimu and Another vs Republic**, Criminal Appeal No. 147 of 2008 CA and **Makungire Mtani vs Republic** [1983] TLR 179, among others.

It suffices to state that the accused had given contradictory explanation to PW2 pertaining to his trip with the victim to Kibaha. In the first instance, the accused had informed PW2 that they travelled to Kibaha and returned safely. Later, he changed his version and stated that he left the deceased at Kongowe. These contradictions coupled with his defence in which he purports to dissociate himself from what was deposed by PW2, ascertains his guilty mind. It has been ascertained that the deceased was found dead two days after he carried the accused to Kibaha. The deceased body was found within the vicinity of the accused destination on 04<sup>th</sup> May, 2017.

Therefore, it is my considered opinion that the accused person herein is responsible for the death of the victim in this case.

Lastly, I proceed to tackle the last issue herein as to whether the accused person had malice aforethought at the time of the killing. Matters relating to what entails malice aforethought are provided forth under section 200 of the Penal Code. The apposite restatement of the law pertaining to prerequisites for establishing malice aforethought was given in the case of **Makungu Misalaba vs Republic**, Criminal Appeal No. 351 of 2013 CA (unreported) whereas citing the case of **Enock Kipela V. Republic**, Criminal Appeal No. 150 of 1994, CA (unreported) the apex Court held:

*"Usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the fact of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attacker's utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."*

As aforesaid, the report on post-mortem examination (exhibit P1) bears a record that the cause of death of the deceased person was severe hypoxia and fatal head injuries. PW1 deponed in this court that evidence of blood which oozed from the mouth and ears of the deceased person, coupled with visible fatal injury on the head of the accused person, suggested that the deceased was hit with a heavy object on his head. And the bruises on his neck coupled with the finding that the deceased had likewise suffered severe hypoxia collaborate with the testimony of PW3 in that he found a wire around the deceased neck which he recovered from the body of the deceased person.

On account of what was deponed by PW1 and PW3 coupled with the findings on the report on post-mortem examination (exhibit P1), I would safely conclude that the accused person had killed the deceased person with malice aforethought.

In the final analysis, I find that the prosecution case has proved the fact that it was the accused person who was the last person to be in the company of the deceased person who was later found dead. It has been proved beyond reasonable doubt that the deceased person was brutally killed. The circumstances leading to his death leads to the conclusion that it was the accused person, the last person to be in company with the

deceased person, who was directly involved with the alleged killing. And, the evidence depicts that the accused had killed the deceased with malice aforethought.

This conclusion draws divergence with the gentlemen assessors herein who had opined that they entertained doubts in respect of the testimony given by PW2 who had failed to prove beyond reasonable doubt that it was the accused who instructed her to hire the services of the victim herein. In their opinion, the person who was supposed to be prosecuted is PW2 herself. I preferred to differ with gentlemen assessors in the following respects: **One**, being fully aware of the danger of relying on the evidence of a single witness, this court finds PW2 as the witness of truth in this case, on whose evidence this court is constrained to act upon in determining the guilt or otherwise, of the accused person. **Two**, the credible evidence given by PW2 remains uncontroverted throughout the trial. **Three**, there is no material upon which this court may base a finding that PW2 had concocted evidence against the accused person. **Four**, the accused defence, being tainted with evasive denials, contradictions and falsehood, further aided the prosecution case. For the above reasons, among others, I elect not to converge with the verdict given by the gentlemen assessors.

In fine, I find that the prosecution has proved its case beyond reasonable doubt. The accused person is hereby found guilty of committing murder contrary to section 196 of the Penal Code and convicted forthwith.

**DATED** at **DAR ES SALAAM** this 17<sup>th</sup> March, 2023

