

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

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 236 OF 2019

THE REPUBLIC

VERSUS

HEMED TUMAIN MSAMI.....ACCUSED

JUDGMENT

9th & 30th March, 2023

MWANGA, J.

The accused, **HEMED TUMAIN MSAMI** is charged of murder contrary to Sections 196 and 197 of the Penal Code, Cap. 16 R.E 2002. It was alleged that, on the 20th day of October, 2017 at Chanika Area Ilala District within Dar es Salaam Region did murder one MICHAEL RENYIMA.

It is reasonably to traverse on the facts constituting the charge against the accused that; on the fateful date the accused is alleged to have hired a motorcycle to be driven to his home at Chanika. The hiring was not done in the normal cause of business, but rather on a revenge mission to the

deceased who was accused to have attacked the accused and his girlfriend before. When they arrival at the deceased's home, the accused asked the deceased to assist him unpack his bed for it to be transported somewhere within Chanika area. As they entered the room, the accused picked a hammer where he hit the deceased on the head. Consequently, the deceased fell down while blood oozing on his head.

As a result of the above, the accused covered the deceased body full of blood with his bedsheets. He then dragged the deceased body to unfinished building. Later, the body of the deceased was discovered in that building where the matter was reported at Chanika Police station. The police arrived and recovered the deceased's body.

The initial investigation showed blood stains leading the police to the house which the accused was residing. They entered the accused room and found pool of blood spread around. The police received information on whereabouts the accused. They arrested him at 'Kwa Dr. Chen Camp' where they found his possessions (clothes) containing blood stains believed to be that of the deceased. The clothes were seized and brought to the police together with the accused.

Upon further interrogation, the accused is said to have confessed the commission of the offence. Further investigation revealed that, the accused admitted to have taken the deceased's motorcycle which was later recovered where it was sold at Temeke Garage at Dar es Salaam. The autopsy of deceased body was conducted and the report revealed that, the cause of death was due to head injury. The accused was henceforth charged of murder of the deceased, MICHAEL RENYIMA.

During the hearing, the Republic was represented by Ms. Mwanamina Kombakono, learned Senior State Attorney while the accused was represented by Advocate Gerson Moshu. A total of six witnesses were produced by the prosecution and four exhibits. The defence produced one witness and no exhibit tendered.

The witnesses of the prosecution were paraded as follows; SP Abubakar Zebo who testified as PW1 stated that, on 20th October, 2017 at around 15:00 hours he received information on the murder incident that had occurred at Zavala Street. He visited the crime scene with a team of investigators and found the deceased body lying on the floor of the unfinished house. They saw blood oozing from head injuries. They took the

deceased body to Muhimbili National Hospital for autopsy to be conducted. In the course of investigation, they found traces of blood from where the deceased body was lying to the house where the accused was living. According to him, it is estimated to be a close distance of 35 footsteps where they found pull of bloods on the floor and besides the bed there was a mattress, unpacked bed and its screws. They were told by neighbours that the owner of the room was the accused person, **Hemedi Tumaini Msami**. They recorded the statements of the neighbours in the area.

On cross examination, PW1 responded to questions stating that he did not take any blood samples traced at the scene of crime, accused's clothes and that of the accused for DNA tests. On his part, the blood found at the scene may be that of human or an animal. He gave the evidence further that, he had not provided the names of neighbours whom he recorded their statements on that particular date. PW2 was Tito Joseph, a resident of Zavala since 2014. He saw the accused person passing over around Zavala area with a motorcycle make 'boxer carrying a big plastic bucket commonly known as "Jaba". The accused was coming from the direction of his parent's home. Soon after, he saw a lot of people around the home of

the accused whereby he went there and found the deceased body close to where the accused lived. Afterwards, the police arrived and preliminary investigation revealed some traces of blood which ran straight to the bed room of the accused. He also saw pull of blood on the floor, bed and the mattress in the room of the accused.

When he was subjected to cross examination, he responded that he had not seen the accused's killing the deceased. It was his testimony further that, the traces of blood were not tested to examine whether it was a human or animal blood. He also stated that, he had not told the court the type of motorcycle that was driven by the accused and that the room belong to the accused. PW3 was Cleoplace Nyangogo who was dealing with 'bodaboda' businesses and also owner of motorcycle with registration No. MC 974 BGR, black, make "boxer" which was stolen by the accused from the deceased. He recalled that, on 13/10/2017 he had hired his motorcycle to one 'Walli' to conduct bodaboda business where in return shall remit payments of Tshs, 8,000 /= per day. He told the court that, the motorcycle was purchased from Fair Deal Auto PVT at Tshs. 2,350,000/= where he was also given purchase receipt and the original registration card. The card shows the

registration number, chassis number, model and colour of the motor cycle. He made recollection that, on 20th October, 2017 at around 15:00 hours while at Pugu Kinyamwezi area, he was informed by the said Walli that they have lost brother “Range”, referring to the one Michael Aidan, the deceased person.

Subsequently, on 22nd October, 2017 at 11:00 hours he received a call from the police that they have arrested the suspect of murder of the deceased. He acceded to the call and took with him registration card (original) of the said motorcycle. He took them to the police station where he also identified his motor cycle. As part of investigation of the matter, he accompanied the accused and police officers to Tandika where the motorcycle was sold. When they arrived at the place, the accused showed two persons whom he had given the said motorcycles and they were arrested. That also led to the arrest of the 3rd person at “Temeke Mwisho” and lastly there was arrest of 4th person who bought the motorcycle at Mbagala Kimbangulile.

Apart from that, he described his motorcycle as the one having a black sit cover. The motor vehicle registration card with registration No. MC 974 BGR was admitted as exhibit PE1. On cross examination, PW3 confirmed to the defence counsel

that, the registration card in exhibit PE1 do not bear his name as the owner but rather the company's name called Fair Deal Auto PVT Ltd. It was also his response also that, he has not produced a contract of sale between the company and him and, if the facts are left to stand as they are, the owner of the motorcycle is the company which has its name appearing in the registration card and not him. Further to that, he had no business contract with the deceased called "range". PW4 was F 1123 D/SGT Hamadi, also a police officer. On 22nd October, 2017 he recorded the cautioned statement of the accused from 13:00 hours to 14:00 hours (just one hour). He stated that the statement was recorded in terms of questions and answers and the accused signed it. The cautioned statement of the accused was admitted in evidence as Exhibit PE2. He also drew the Sketch map of the scene of crime which was admitted as exhibit PE3. On 23rd October, 2017 he accompanied the accused to his camp site '*Kwa Dr. Chen*' where he conducted search and managed to seized one plastic bag commonly known as" Shangazi Kaja" with some clothes and shoes (rubber). He then filled in certificate of seizure and took the items back to the police station. During cross examination on whereabouts the hammer (nyundo) that was used to hit the

deceased, he replied it was at the police station, He also testified that, there was no any scientific evidence revealed that, the hammer “nyundo” used to hit the deceased was from the accused person. On the re-examination, he pointed out that he recorded the cautioned statement of the accused under S. 53 and 57 of the CPA by application of the general provision of S. 57 of the Act.

On his part, on 22nd October, 2017 PW5 G 2498 D/CPL Mahamudu accompanied deceased’s relatives to Muhimbili National Hospital for autopsy to be conducted on the deceased body. According to him, the report revealed that the deceased died due to excessive loss of blood occurred as a result of being hit with on object on the head. PW6 E7655 D/SGT Nyagere recalled that, on 22nd October, 2017 while at Chanika Police Station he received information through an “infomer” that the suspect of the incident of murder at Zavala area is one Ngabei and he was currently at the house of Dr. Chen. It was his testimony that, since he was given description of the suspect before he paid visit at the place and found the suspect inside the room alone. And upon interrogation, the accused told him that he knew the incident and he sold the stolen motorcycle at Tandika - Garage to one Mohamed Ally. They arrested him and

seized the said motorcycle. Pw6 prepared a certificate of seizure which was witnessed and signed. It was admitted in evidence as exhibit PE3 and the motorcycle was also admitted as exhibit PE4. During cross examination, PW6 stated that he did not sign the certificate of seizure as there was no place which required him to write his name and signature. And it took about two years for him to record his statement. As to the ownership of the said motorcycle, he reiterated the position that it belongs to Fair deal Auto PVT Ltd as it is indicated in the registration card.

Per contra, the accused denied the allegations. That, he did not even know the deceased. The version of his defence was that, on 20th October, 2017 he was at Kwazoo Zavala area and he recalled that on that particular date he left his keys to her neighbour called "Mama pili". He then left alone to the daladala stand on his way to Kwa Dr, Chen. The accused agreed that he was arrested on 22nd October, 2017 at around 11:00 hours and taken to Chanika Police Station at 12:00 hours. He was then taken to Tandika Police Post and back to Chanika Police Station.

As to his cautioned statement, the accused told the court that while at police station he recalled to have given his

particulars to SGNT Hamad (PW4) who was recording something throughout. And later, he was told to sign the papers for him to be released from the police custody but, he signed them without having knowledge of its contents.

I have seriously considered the evidence on record and fully applied my mind to the submission by the learned State Attorney and the defence counsel who appeared on behalf of the accused, which I will not reproduce. I have also fully considered the authorities availed to me in the final submission for which I am grateful.

It is a well-settled principle of law that, in criminal cases, the burden of proof lies upon the prosecution and it is beyond reasonable doubt. That was also the position in the case of **Pascal Yoya @Maganga Versus the Republic**, Criminal Appeal No. 248 Of 2017(Unreported), where it was held that: -

“It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence”.

In addition to the above, in the case of **Mohamed Haruna @ Mtupeni & Another v. Republic**, Criminal Appeal No. 25 of 2007 (unreported), the court had held that: -

"... It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

Again, in **Mwita and Others v. Republic** [1977] TLR 54 the court when hearing a criminal appeal put emphasis that: -

"The appellants' duty was not to prove that their defense was true. They were simply required to raise a reasonable doubt in the mind of the magistrate and no more."

Apart from the outlined principles, in murder cases, the prosecution must prove the existence of *actus reus* and *mens rea*. According to Section 196 of the Penal Code, Cap. 16 R.E 2022 the *actus reus* is unlawful killing and the *mens rea* is the intention better known as malice aforethought. As rightly submitted by the defence counsels on their final submission, the offence of murder has elements stated in the case of **Anthony Kinanila & Enock Anthony VR**, Criminal Appeal No. 83 of 2021(Unreported). In order for the court to mount

conviction against the accused, the following issues has to be resolved: -

- i. whether the deceased is real dead;
- ii. whether the dead was caused by someone unlawful;
- iii. whether there was malice aforethought that the accused person directly or indirectly took the position in the commission of offence.

On the other hand, the prosecution submitted that this was a case which based on circumstantial evidence and in essence it requires corroboration before acting on it. According to the case of **Mark Kasmiri Versus R**, Criminal Appeal No. 39 of 2017(Unreported) the court laid down principles on circumstantial evidence that: -

- i. the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within human probability the crime was committed by the accused and non-else.
- ii. The inculpatory facts are inconsistent with the innocence of the accused and incapable explanation upon any other reasonable hypothesis than that of guilty.
- iii. The evidence must irresistibly point to the guilty of the accused to the exclusion of any other person.

iv. The facts from which an adverse inference to the accused is sought must be proved beyond any reasonable doubt and must be connected to the inference is to be inferred.

In the present case, PW1 and PW4 stated that, the body of the deceased was recovered from the unfinished house nearby the accused's home. As clearly stated by the learned counsel, Ms. Kombakono the death of the deceased was unlawful. PW1 to PW6 testified that the deceased died unnatural death due to injuries sustained on the body. PW5 Mahamoud told the court that he went to the hospital accompanied the relatives of the deceased where the doctor revealed to him that the cause of death was due to injuries sustained by the decease on the head which caused excessive bleedings.

Regarding the issue on failure to produce in court post-mortem Report to prove the death is well taken care by the decision in **Mathias Bundala Versus R**, Criminal Appeal No. 62/2004 that not every death shall be proved by post-mortem Report. Under the circumstances, evidence of PW1 - PW5, was enough to prove to the court that the deceased died unnatural death.

The issue who killed the deceased was spotted by the investigators including PW1 and his team who found traces of blood which led them to the house and room of the accused. Then they found pool of blood inside the room, a mattress, unpacked bed and their screws; and a hammer which is suspected to be used to hit the deceased on the head. It was the defence counsel contention that such evidence suffers from some shortfalls. **One**, PW1 who visited at the scene of crime did not collect any evidence from the house or room which the accused was living. That, the said hammer (“nyundo”) and clothes with bloods which were seized by the investigators were not produced in court as a proof that such things really existed. **Two**, there was no DNA test which was conducted on the bloods found in the room of the accused with that of the accused and clothes seized. That would help the prosecution to establish the linkage it has with the accused person in relation to the charges against him. When PW1 was asked on whereabouts the collected pieces of clothes and hammer, he replied that they were at the police station, and there was no explanation offered as to why they were not brought in court to prove the allegations against the accused. There was also no investigation conducted in respect of those exhibits. Section

110(1) of the Evidence Act, provides that whoever alleges existence of a certain facts he must prove it. Section 110 (1) of the Act reads that: -

“Whoever desires any court to give judgment as to legal liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Similar view was also held in the case of **Abdul Karim Haji Versus Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported). In addition to that, there was no explanation given as to why the investigators of the case did not take the blood for DNA tests which would have been crucial to establish the linkage between the traces and pool of blood found in the room and pieces of clothes seized. The burden is always on the prosecution to prove the case beyond reasonable doubt. The link between the death of the deceased and the accused person is crucial in such circumstantial evidence. In the case of **Francis Alex Vs R, Criminal Appeal No. 185 Of 2017** (unreported), the trial court rejected circumstantial evidence which relied on evidence of trails of blood found at the compound of the appellant because the prosecution did not make any effort to ascertain

whether the blood was of a human being and more so of the deceased.

Since traces of blood was amongst the crucial piece of evidence which led to the arrest of the accused person, the same ought to be collected and tested, failure of which weakens the prosecution case. Again, PW 1 testified that, he prepared a certificate of seizure which was admitted in court as exhibit PE3. The same was not signed by him but with his superior who was sitting in the office and who never participated in the seizure of the said motorcycle. The ten-cell leader who signed in the certificate was not called to testify as to whether PW1 was actually the one who seized the motor cycle and prepared the seizure certificate or not. Worse enough, the purchaser of the motor cycle or even those who led to the discovery of where the motor cycle was sold by the accused were not called to testify for that matter. In connection to that, PW4 stated that he own the motorcycle (exhibit PW4) but during cross examination it was revealed that the registration card was in the name of the another person and, he did not testified to the fact that he had not re-registered his motorcycle in his name. His evidence would have been complemented by the said Walli whom he said had a business

contract with him because he was the one who gave his motorcycle to the deceased@ range but he never appeared to testify.

In that regard, I have found out that the prosecution evidence had a lot of patch marks which ultimately renders them not cogent and credible to prove the case to the required standard.

As to the evidence on cautioned statement, the accused denied any recording of his cautioned statement at the police. The defence counsel submitted that; **One**, the accused was interrogated on 23rd October, 2017 while he was arrested on 22nd October, 2017 which is outside the prescribed time for taking statement of the accused without extension of time. It was the counsel argument that, such interrogation violated Section 50 and 51 of the CPA. **Two**, the prosecution also failed to cross examine the accused who stated that when he was being interrogated there were presence of other police officers (Hamad and Sebo). The counsel added that, such failure to cross examine him is an admission that there were two police officers in the interrogation which is contrary to the law as it was stated in the **Friday Mbwiga @ Kamata V R**, Criminal Appeal No. 514/2017 at page 11, where it was held that

recording statement of the accused in the presence of other officers is an irregularity which infringes the right to privacy of the accused. Hence, the court should warn itself before such piece of evidence is acted upon. The counsel also cited the case of **Hemed Abdallah Vs R** [1995] TLR 172 where it was held that: -

“Generally, it is dangerous to act on repudiated or retracted confession unless it is corroborated and the court is satisfied that the same is true”.

On the other hand, the prosecution side stated that cautioned statement is the best evidence and the same can be used to corroborate the circumstantial evidence. The learned State Attorney cited the case of **Mboje Mawe & 30Others Versus R**, Criminal Appeal No. 86/2010(Unreported) where it was stated that if the accused’s confession led to the discovery, it is the best evidence.

I have no doubt that the confession statement being one of the best pieces of evidence because it is evidence from the accused himself. However, as the law put it right the court has to warn itself on the danger of acting on the same where such confession is repudiated or retracted. During the hearing this

statement was repudiated. The accused stated that he had never recorded the statement.

Be that as it may, the fact that the accused denied to have recorded any statement at the police and nothing in circumstantial evidence to corroborate it, it is equally weak to act on it. Therefore, I am equally differing with the learned State Attorney that in her cited case of **Mboje Mawe & 30others Versus R** (supra), the confession led to the discovery of the deceased body which was the subject matter of the charges against the accused while in this case, the accused led to the discovery of the motorcycle which in itself the question of ownership was at issue even during the defence hearing. Again, the purchaser (Mohamed Ally), the seller of the motorcycle was not called to testify and no explanation were offered for non-attendance. In lieu of that, this court is seriously hesitant to accord any weight to the said cautioned statement.

It was the defence counsel view that, the prosecution evidence has failed to meet tests so established because the evidence at the scene of crime was not collected, scientifically examined and the exhibits were not stored according to law. The counsel pointed further weaknesses of the prosecution case that; neighbours, relatives of the accused, workers at the

camp site “kwa Dr. Chen”, the informer and a medical doctor who examined the body of the deceased were not called on to testify. Though a case can be proved by a single witness, but where there are unresolved issues as a result of none attendance of some witnesses, that matters a lot.

On top of that, there was no evidence as to who owns the house which the accused was living or if it is his parent home, the same should have been clearly stated or if he had rented, it should have been also stated. Also, this court was told that the accused was arrested at the camp site at “Kwa Dr. Chen” but no witness was brought from the area to state how he witness the search and seizure of the clothes were done, and also on arrest of the accused. According to the case of **Trazias Evarista @ Deusdedit Aron Versus the Republic**, Criminal Appeal No. 188 Of 2020; the court held that:

“It is a peremptory principle of law that every person, who is a competent witness in terms of the provisions of section 127 (1) of the Evidence Act, Cap 6 R.E 2019 is entitled to be believed and hence, a credible and reliable witness, unless there are cogent reasons as to why he/she should not be believed”.

As I have shown, there is no cogent reasons why evidence of prosecution should be acted upon.

In light of the foregoing, I hold that the prosecution has failed to prove the case to the required standard, that is beyond reasonable doubt. Therefore, the accused **Hemedi Tumain Msami** is not guilty as charged and I acquit him of the offence of murder c/s 196 and 197 of the Penal Code, Cap. 126 R.E 2019.

Order accordingly,



H. R. MWANGA

JUDGE

05/04/2023

COURT: Judgement delivered in chambers in the presence Nura Manja, learned State Attorney for the Republic and Gerson Moshia, advocate for the accused and the accused in person.



H. R. MWANGA

JUDGE

05/04/2023