

IN THE HIGH COURT OF TANZANIA
AT SHINYANGA
CRIMINAL SESSION CASE NO. 10 OF 2022
REPUBLIC
VERSUS
KASHINJE KALONGA
JUDGMENT

7th June & 17th July, 2023.

S.M. KULITA, J.

The accused person, one Kashinje Kalonga stands charged with Murder contrary to Section 196 of the Penal Code [Cap 16 RE 2019]. It is alleged by the prosecution that, on 21st May, 2021 at Sekeididi village, within Kishapu District, in Shinyanga Region, the accused person murdered one Steven Ngalula.

The facts presented by the prosecution, which gave rise to this trial are the following; that, on 20th May, 2021 the accused and victim met at a coffee selling point at Sekeididi village. The facts show that, they stayed drinking coffee together from 1700 hours up to 2200 hours when they decided to leave. In leaving, they both used the victim's bicycle which was ridden by the accused person. On the second day the victim's body was found lying beside the road at Wizunza hamlet within

Sekeididi village. The matter was reported at the police station. When autopsy was conducted the cause of death was found to be pulmonary cardiac arrest due to hypovolaemic shock and intracranial injury. As the accused person was the last person seen with the victim, he was arrested and arraigned to court.

When the information of murder was read to the accused person during Plea taking and Preliminary hearing, he pleaded not guilty to the information. Further, on 6th June, 2023 when the case came up for trial, the charge of murder was reminded to the accused, he maintained his plea of not guilty.

While the Prosecution side was represented by Ms. Immaculata Mapunda, State Attorney, the Accused Person was represented by Mr. Frank Samwel, Advocate.

In discharging the duty of proving the charge against the accused, the prosecution summoned four witnesses and tendered one exhibit. The evidence of the prosecution and defense side can be summarized as follows:

Mandago Jilumba who testified as PW1 stated that, he is a coffee drink seller at Sekeididi centre. He said that on 20th May, 2021 he received different customers including Kashinje Kalonga, Steven Ngalula and Mwamba from 1700 hours to 2200 hours. He said that during their

stay, the victim one Steven Ngalula later wanted to leave the place but the accused did not allow him till 2200 hours when they left together with the victim's bicycle ridden by the accused. The witness added that, on the next day he got the information that the victim was found lying dead along the road. When cross examined, PW1 said that, he does not know whether the victim and Accused met with other people while on the way back to their respective homes. He said also that, when the accused and victim were leaving, Mwamba had already left. The witness added that, he witnessed the victim's bicycle alongside the victim's body.

Dotto Bujiku testified as PW2. His testimony is to the effect that, on 20th May, 2021 at the evening time he was among the people who attended the coffee drink point at Sekeididi Centre owned by PW1. He went on stating that, the accused person and the victim also attended that place for drinking coffee. He said that he left the coffee Centre for Mama Njile's resident at 2000 hours where he stayed for some time up to 2200 hours when he decided to go home. He said that, on the way he met with the accused and the victim on a bicycle heading to their home places, Wishiteleja. He added that, as the electric lights were shining, hence he identified them and they greeted each other. He said that, on the second following day, he heard alarm that the victim was found lying dead along the way to Wishiteleja. When cross examined PW2 stated

that, the victim had land conflict with his relatives but he does not know whether that conflict extended to the accused person. He added that, the accused attended the funeral but not Mwamba who had hidden himself in mountains.

Mahona John (PW3) testified to the effect that, on 24th May, 2021 he attended the victim's funeral ceremony. He said that the accused person also attended. By the time he was there, Sungusungu arrived and started looking for the accused person. PW3 further stated that he witnessed the accused person starting to run away before he was arrested. He said that on his arrest, he prayed for forgiveness and confessed to have killed the victim in corporation with one Zengo Emmanuel. When cross examined the witness stated that, he knows that the victim had land a conflict with his relatives.

The 4th witness for prosecution, Insp. Patrick Aman Mkude (PW4) stated that, on 21st May, 2021 he was the Head of the Police Station (OCS) at Maganzo. He said that on 21st May 2021 he received a call from the Village Executive Officer (VEO) for Sekeididi informing him that there was a dead body found lying in his village. He said that, he together with a Doctor had to go to the scene of crime. He said that at the scene they found many villagers gathered thereat. The victim's body was surrounded with blood. He added that after conducting the autopsy,

the Doctor narrated the cause of death being the injuries that the victim had sustained. He said that, thereafter the Post-Mortem Report (PMR) was filled.

PW4 tendered the PMR and the same was admitted as Exhibit P1. The said witness went ahead stating that, during their investigation they arrested 7 people mostly because the victim had a land conflict with them. He said that, after purification, others were left but only the accused stood for trial. He said, there is no way the accused can deny being with the victim before the victim was found dead on the material date. The witness added that, the accused told them that, he parted with the victim at a place where the victim's dead body was found.

When cross examined the witness stated that, according to the opinion of the Doctor, the victim passed away on 19th May, 2021 but he added that it was the accused who told him during the interrogation that on 20th May, 2021 he was with the victim.

On these four witnesses as I said earlier, the prosecution case got closed. In terms of the provisions of section 293(2) of the Criminal Procedure Act the accused person was found to have a case to answer. After being addressed in terms of section 293(3) of the Criminal Procedure Act the accused person opted to testify alone on oath.

In his defence the Accused person, Kashinje Kalonga (DW1) testified to the effect that, on the alleged date of 20th May, 2021 he was at his farm for birds' guarding up to 1730 hours when he went back home, then to the tailor one Thomas Charles at Wishiteleja to repair his clothes. He said that, he waited for the clothes up to 1930 hours in the presence of one Gabriel Paschal who was also there. He denied the allegations that he was at Sekeididi centre till 2200 hours on that alleged date. However, DW1 agreed to have been at Sekeididi centre together with the victim on 18th May, 2021 and they left together at 1900 hours for Wishiteleja. He averred that each of them had his own bicycle. He added that, he had no conflict whatsoever with the victim. DW1 went further stating that, before the committal court he had promised to call the tailor and the said Gabriel Paschal as his witnesses, though he never mentioned them during preliminary hearing.

DW1 went on stating that, on 21st May, 2021 during the morning he went to Sekeididi looking for his pigs' food. While he was starting to go back home, one person approached him and informed him that, the victim was found along the road lying dead. He further stated that, he went to witness the victim's body at the scene and that he attended the funeral as well. He added that, he was arrested on 24th May, 2021 at the

funeral place. Finally, he shifted the offence of murder to the victim's relatives due to the issue of land conflict that they had. He said that he was so told by Ngusa Emmanuel while in remand custody that the killer is somebody Mwamba and that he was paid for that. When cross examined he said that, he does not know whether the victim's death was due to land conflict.

That marked the end of both parties' evidence. Both parties also had an opportunity of filing final submissions to the case. The same will be referred in the course of analyzing the evidence that have been adduced. In view of the above evidence, the following issues call for determination: -

1. Whether the victim met unnatural death (if yes),
2. Whether the accused person is responsible for the death of the victim (if yes),
3. Whether the accused person, with intention/malice aforethought killed the victim.

Concerning the first issue, whether the victim met unnatural death; it is not in dispute that Steven Ngalula is dead. According to the post mortem report which has been admitted in court as Exhibit P1, the cause of the death of the victim is pulmonary cardiac arrest (respiratory

failure) due to hypovolemic shock (severe loss of blood) and intracranial injury (traumatic brain injury).

Further, the evidence from both sides reveal that, the victim's body was found lying alongside the road being covered with blood. Such situations, prove that, the victim met unnatural death. As there is no evidence disapproving this fact, I find no need of dwelling much on this issue. This issue is positively answered that the deceased, Steven Ngalula met unnatural death.

Concerning the second issue as to whether the accused person is responsible for the killing of the victim Steven Ngalula, the prosecution side relies on circumstantial evidence. This is because, there was no any prosecution witness who testified to have seen the accused person killing the deceased.

I am alive with the Court of Appeal position on circumstantial evidence as it was set in the case of **Shabani Abdallah V. The Republic, Criminal Appeal No. 127 of 2003 (unreported)** where it stated;

"The law on circumstantial evidence is that it must irresistibly lead to the conclusion that it

*is the accused and no one else who committed
the crime."*

The same position was underscored in many other cases like **Nkeshimana John @ Didone V. The Republic**, Criminal Appeal No. 229 of 2005, CAT at Mtwara, **Seif Selemani V. Republic**, Criminal Appeal No. 130 of 2005 (both unreported), **Simon Musoke V. The Republic** [1958] E.A. 715 at 718 and **Tiper V. Republic** [1952] A.C. 480 to name a few. The main question is, does the available circumstantial evidence meet the test of the above cited principle of the law?

The prosecution evidence we have on records in respect of that issue is that of PW1, the seller of coffee at Sekeididi centre who testified to have witnessed the accused on 20th May, 2021 telling the victim not to leave the point alone and early, but should wait for him and that they actually left together for home at 2200 hours by using the deceased's bicycle, ridden by the accused person. There is also evidence of PW2 that, while he was on the way back home he witnessed the accused and the victim on the same bicycle leaving together through the road to Wishiteleja on that same date, 20th May, 2021 at the night time and that they greet each other. Despite the fact that he struggled to distance

himself from the victim's death, according to those two witnesses the accused person was seen leaving with the victim during the night before the deceased's body was found lying beside the road on the next day morning.

This kind of evidence by PW1 and PW2 tells us that, the accused person was the last person to be seen with the victim before he was found dead on the next day. As that evidence shows that, the accused person was the last person to be seen with the deceased person, he was bound to offer a plausible explanation on the circumstances that led to the death of the deceased. See the case of **Mathayo Mwalimu and Another v. Republic, Criminal Appeal No. 147 of 2008, CAT at Dodoma** which provides;

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

In the case at hand, the accused person relied on a defense of *alibi*. He said that, he truly met with the victim at coffee point and left

together for Wishiteleja but it was on 18th May, 2021, not 20th May, 2021. He said that on 20th May, 2021 he was guiding birds in his paddy farm at Wishiteleja whereby he then went to collect his clothes from the tailor till 1930 hours. However, there was no any proof on that defense. There was nothing to corroborate what he had said. With this kind of defense, it is obvious that the accused person has not given any plausible explanation on the death of the victim.

There is also an evidence of PW3 who stated that, the accused started running when he was about to be arrested and confessed that he was not alone in committing murder in question. I am alive with the principle of law concerning oral confession as stated in the case of **Boniphas Mathew Malyango v. Republic, Criminal Appeal No. 358 of 2018** where the Court of Appeal referred its holding in the case of **Tumaini Daud Ikera V. R, Criminal Appeal No. 158 Of 2009** where it stated;

"we reiterated that oral confessions of guilt are admissible and can be acted upon, but we also emphasized that great caution is required before courts rely on oral confession to convict"

As rightly submitted by the counsels for the Republic in their final submission, that the fact that the accused person confessed to have committed murder before PW3, and that the said witness had never been cross examined by the accused person on that very material thing, the implication is that the accused person admitted the said fact. See the case of **CYPRIAN A. KIBOGOYO V. R, Criminal Appeal No. 88 of 1992** (unreported) in which it was held;

"Unfortunately, the appellant did not cross examine PW1 on this to shake her credibility. As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said"

Another piece of evidence that circumstantially pins the accused person to the murder of the victim is his conduct before murder of the victim. PW1 told the court that, the accused person did not let him go home early while they were at the coffee point on 20th May, 2021. This can be taken that, the accused was planning for a better time to leave with the victim, the time which could be conducive for killing the victim. In our societies, particularly the country areas, the later the night time,

the smaller the movement of people experienced, hence the time after that 2200 hours when the two left the coffee centre was conducive for such a crime to be committed than before.

It is an elementary principle of law that the accused person has no duty to prove his innocence, but there are times when the accused found telling lies such lies can be resolved against him. See **Felix Lucas Kisinyila V. Republic, Criminal Appeal No. 129 of 2002** (unreported).

In his testimony the accused person stated that, he was told by Ngusa Emanuel that Mwamba is the one who killed the deceased and that he was paid by the victim's relatives due to the land conflict they had. But when he was cross examined the same witness (DW1) stated that, he does not know if the victim's death was caused by the land conflict. These two conflicting statements for the same fact being stated by the same witness prove that the Accused was telling lies. As alluded above, this lie corroborates the prosecution evidence.

The accused defended himself on *alibi*, but the question is; does it exonerated him from this case? I have keenly considered this defence of *alibi* by the accused person. A good number of aspects pushes me to side with prosecution that this accused person is the killer of the victim

in question. Some of those aspects are; had the accused been farming and went to the tailor on that material date, 20th May, 2021 at 1930 hours he would have not failed to call or even to mention during the preliminary hearing, his house members or the tailor as his witnesses. Further, the accused person testified that he never had any conflict with prosecution witnesses. With this testimony, I see no point that PW1 and PW2 have lied that on 20th May, 2021 the accused person was the last person seen with the victim.

As I have endeavored to show above, all these pieces of evidence prove nothing but the accused person murdered the victim. On that account, I am of firm view that, this issue is answered in affirmative that the accused, Kashinje Kalonga murdered the victim, Steven Ngalula.

As for the last issue, whether the accused person killed the deceased with malice aforethought, this issue tends to prove whether the accused is guilty of Murder or Manslaughter. For a person to be convicted of murder the killing must have been committed with malice aforethought. In the case of **Enock Kipela v. Republic, Criminal Appeal No. 15 of 1994, CA** (unreported), it was stated that any or all of the items below can satisfy the presence of malice aforethought.-

*"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 factors, 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 was directed at or inflicted on**, (4) the number of blows, although one blow may, depending upon the facts of the particular case, (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 attackers before and after the killing**"*

The evidence available is to the effect that, the victim's body had injury on his head. This is a delicate/vulnerable part of a human body that a higher possible outcome for a directed blow on it is death. Further, the accused was seen leaving with the victim the night before, yet he struggled to distance himself from the victim's death. These circumstances tell us nothing but the accused person killed the victim in question with malice aforethought.

Before I pen down, I see it worth to talk on the difference in dates on the death of the victim. The post mortem report shows that, the death of the victim occurred on 19th May, 2021 while the evidence show that on 20th May, 2021 the victim was seen with the accused person drinking coffee and left together at 2200 hours. This difference of one day on dates is a very minor issue that does not go to the root of the case. The reasons behind are as follows; first, while testifying the accused (DW1) himself stated that he went to witness the victim's body and found it lying dead alongside the road on 21st May, 2021 with his bicycle parked nearby. This tells us that, had the victim passed away on 19th May, 2021 his body would have been discovered on its next day of 20th May, 2021 as it laid alongside the road with his bicycle parked nearby. Further, in the Post Mortem Report, the Doctor was just giving opinion on the possible date of death, it does not mean that he actually saw the killing being committed on that date. He can't be certain of the date for the victim's death, rather, it was just the opinion by that said expert. With these reasons, I am firm that, the difference on the date for the victim's death is a minor issue that does not affect the prosecution case, hence the argument disregarded.

All said and done, with what I have endeavored to explain plus the available evidence and for want of evidence from the defense to create reasonable doubt, I am settled that, the prosecution case has been proved beyond all reasonable doubts as required by the law.

In view thereof, I hereby find the accused person, Kashinje Kalonga **guilty** for the offence of **Murder** of the deceased, Steven Ngalula, contrary to Sections 196 and 197 of the Penal Code [Cap 16 RE 2019] and accordingly convicted.




S.M. KULITA
JUDGE
17/07/2023

