

UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IRINGA REGISTRY
AT IRINGA
CRIMINAL SESSION CASE NO. 61 OF 2022

THE REPUBLIC

VERSUS

- 1. ALEX SANGA**
- 2. FELIX MHAMI**

RULING

(IN TERMS OF SECTION 293 OF THE CRIMINAL PROCEDURE ACT, CAP. 20, R.E. 2022)

Date of Last Order: 21.07.2023

Date of Ruling: 24.07.2023

A.E. Mwipopo, J.

On 14th March, 2020, a tragedy occurred in Nyakipambo Village within Mufindi District in Iringa Region. The dead body of Bernard Mhami, covered with blood, was found lying in the kitchen of his house where he was living alone. The village leaders and Police from Igowole Police Post were informed about the incident on the same date. On 15th March, 2020, police officers visited the crime scene accompanied by a doctor. The sketch

map of the crime scene was drawn, and the doctor examined the deceased body. The report of examination of the deceased body shows that the cause of the deceased death is brain asphyxia secondary to haemorrhage resulting from severe brain injury.

The Police commenced an investigation, and they got information from an informer that deceased relatives were responsible for the deceased death. At the scene of the crime, the Police arrested three deceased's relatives including Felix Mhami (2nd accused person), who is the son of the deceased. Police also arrested Alex Sanga (1st accused person) on 17.03.2020 as responsible for the deceased death. The Police recorded the 1st accused's cautioned statement on the same date, and he admitted to killing the deceased after he was hired by the 2nd accused for the consideration of payment of shillings 200,000/=. After completion of the investigation, the 1st and 2nd accused persons were arraigned in this Court for the murder offence contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2019.

When the information was read over to the accused persons, both pleaded not guilty to the offence. The Republic summoned four witnesses

and produced two exhibits to prove the case. The first prosecution witness is the police officer with No. F. 8087 D/CPL Ally (PW1). PW1 testified that on 15th March, 2020, he was in his duty station at Igowole Police Post. Around 09:00 hours, he was informed by the O.C.S., namely A/Inspector Faustin Lukuba, that there was a murder incident that had occurred in Nyakipambo village, and he had to visit the scene of the crime for investigation. PW1 went to the scene of the crime together with other police officers after picking up Dr Almasi at Kasanga Health Centre. They arrived at the crime scene at Nyakipambo village around 13:00 hours. People who were around informed the Police the deceased was Benard Mhami. The doctor examined the dead body, which was in the kitchen. The deceased body had a cut wound on the head. PW1 drafted the sketch map of the crime scene, assisted by the Village Executive Officer, Erica Chilligati.

At the scene of the crime, Police recorded the statement of witnesses and received information that deceased children were responsible for the death of the deceased. Police arrested Felix Mhami and two other relatives of the deceased and took them to Igowole Police Post. At the police post, PW1 interviewed 1st accused, who denied committing the offence. 1st accused suspected Allen Kyusa of being responsible for the incident as he

narrated what transpired to him. Allen Kyusa was arrested at Lwang'a village on 16th March, 2020. In the interview, Allen Kyusa told the Police it was 1st accused person who killed the deceased. 1st accused was arrested by O.C.S. Igowole Police Post and other police officers at Kibao Village. PW1 tendered a sketch map of the crime scene as exhibit P1.

In cross examination, PW1 said he didn't remember when the 1st accused was arrested. The 2nd accused told him that Allen Kyusa mentioned the person who killed the deceased. Allen Kyusa did not mention the 2nd accused person as responsible for the deceased's death. At the scene of the crime, there were rumours that deceased children were responsible for the deceased death. When they arrived at the scene of crime, the 1st accused was present.

Erica Benjamin Chiligati (PW2) was the second prosecution witness. She testified that in 2020 she was a Village Executive Officer of Nyakipambo village within Mufindi District. On 14th March, 2020, around 16:00 hours, PW2 received an SMS from Alfred Mlyuka, a member of the village security committee, informing her of an incident at the village. Later, the village chairman, namely Vitalis Lutego, called and told her there

was a murder incident at Songambebe Hamlet in Nyakipambo village where Mr Bernard Mhami was killed. Bernard Mhami was a resident of Songambebe Hamlet in Nyakipambo village and was living alone. PW2 went to the crime scene, and she saw the deceased body lying bleeding on the ground in the kitchen of his house. She saw a big wound on the deceased neck. PW2 called the Igowole police Post and informed them about the incident. The Police visited the crime scene on 15th March, 2020 around noon, accompanied by a Doctor. They inspected the crime scene, and the doctor examined the deceased body. The Police interviewed villagers about the incident, but no information was obtained. Police left their numbers in case anybody has or got information about the incident. Police told her they got information through the SMS that family members were responsible for the deceased death. Police officers arrested three relatives of the deceased, including his son namely Felix Mhami (1st accused). The Police allowed the burial of the deceased to proceed, and they left with three suspects they had arrested.

In cross examination, PW1 said that the Chairman of the village did not mention the people responsible for the deceased death. An unknown villager sent an SMS to the Police informing them that the deceased

relatives were responsible for the death. Police told her that the villager had sent an SMS. She doesn't know the name of the police officer who informed her about the SMS sent by a villager. The 1st accused was not mentioned in the SMS to be responsible for the deceased death. The 1st accused was not a resident of Nyakipambo village. She knows the 2nd accused as a deceased person's son.

The police officer with No. F. 4838 Sgt. Yetus (PW3) was another prosecution witness. He said that on 17th March, 2020, he was working at Igowole Police Post. On the 17th March, 2020 the O.C.S. of Igowole Police Post, Faustin Lukuba, ordered PW3 to record the suspect's statement, namely Alex Sanga (1st accused), who was in a police lockup. PW3 went to the Police lockup and took the 1st accused to the interview room. He introduced himself to 1st accused person and informed him that he wanted to interview him on the murder accusation he was facing. He gave the 1st accused person the right to choose the language of the interview he is fluent with, where the interview has to be conducted, and the presence of a friend, relative or advocate during the interview. 1st accused informed PW3 he wanted the interview to be the Swahili language, the interview to be conducted outside the police station, and Mwamati Hamlet Chairperson

to be present during the interview. PW3 said he took the 1st accused to the Ward Office and called Hamlet Chairman, William Chalamila, to come to witness the interview recording. William Chalamila went to the Ward office.

PW3 said he introduced himself to Hamlet's Chairperson and informed the reason for calling him. Then, he started interviewing Alex Sanga around 09:30 hours and finished around 11:15 hours. PW3 said he read the statement to the 1st accused person and Hamlet's Chairman. Also, PW3 said he told them to read it. The 1st accused and Hamlet's Chairman said they were ready to sign, and they signed. PW3 also signed the statement. After recording the statement, he took the 1st accused back to the police station. PW3 said the detention register shows that the 1st accused was brought to the police station at Igowole Police Post around 07:00 hours in the morning on 17th March, 2020. The O.C.S. told PW3 he brought Alex Sanga to the Police Post around 07:00 hours.

PW3 tried to tender cautioned statement of the 1st accused person, but the Court did not admit the statement following an objection raised by the counsel for the 1st accused, namely Advocate Jonas Kajiba. The objection raised had two points. The first point is that the statement was

recorded out of 4 hours from the time of 1st accused arrest provided by the law, and the second point is the statement was provided after 1st accused was tortured by the Police. In its ruling, the Court found that the statement was recorded out of 4 hours after the 1st accused was arrested, and there was doubt that the statement was recorded voluntarily. During an enquiry trial, the Court found that the 1st accused was denied some rights during the interview. The court also found the 1st accused person was not cautioned about the consequences of recording his statement, was not informed of his right to alter, add or amend anything in the statement after it was read to him, and the person who witnessed the recording of the statement was known and chosen by the police officer who recorded the statement. Further, the court found there is contradiction on the evidence of prosecution witnesses giving to the first of their evidence.

In cross examination, PW3 said he didn't know if the 1st accused and the Mwamati Hamlet Chairman knew each other. The 1st accused person may request the presence of any person during the interview.

The last prosecution witness is Dr Clement Andrea Almasi (PW4). He testified that on 15th March, 2020, he examined the deceased body at

Nyakipambo Village. The deceased uncle, namely Joseph, identified the deceased body. After examination of the deceased body, he filled the report in the police form. He tendered the report on the post mortem examination of the deceased body (exhibit P2) as a prosecution exhibit. The Exhibit P2 shows the cause of the deceased death is brain hypoxia secondary to haemorrhage caused by severe brain injury. This was the end of the prosecution case.

From the evidence available in the record, there is no dispute that Bernard Athumani Mhami is dead. The testimony of the doctor who examined the deceased body (PW4) shows that he examined the body covered with blood. In his examination report (exhibit P2), he found that the cause of the deceased death was brain hypoxia secondary to haemorrhage resulting from brain injury. The report's summary shows that the deceased had one wound at the neck to the skull caused by a sharp object. The testimony of PW4 and evidence in the content of exhibit P2 is supported by the testimony of PW1 and PW2, who saw the deceased body. The evidence proves that the deceased is dead and his death was unnatural. The deceased sustained brain injuries inflicted by a sharp object which caused severe bleeding. This evidence means that somebody cut the

deceased with a sharp object and caused his death.

The only remaining issue for determination is whether the accused persons were responsible for the deceased death. No eyewitness saw the person killing the deceased in this case. The prosecution case relied on circumstantial evidence. For the Court to convict relying on the circumstantial evidence, the evidence has to lead to only one irresistible conclusion pointing to the accused's guilt. In **Hamida Mussa vs. Republic [1993] T.L.R. 123**, the Court held, I quote:

"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

From the above cited case, circumstantial evidence proves the case when the evidence establishing the accused person's guilt is not capable of existing together with his innocence. The only explanation of the evidence must be that the accused person is guilty of the offence. The burden of proving facts that justify drawing inferences from the facts to exclude any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused. The Court of Appeal for Eastern Africa stated the

position in **R. vs. Kipkering Arap Koske and Another (1949) 16 E.A.C.A 135.**

In the case of **Gabriel Simon Mnyele vs. Republic**, Criminal Appeal No. 437 of 2007, Court Appeal of Tanzania at Dar Es Salaam, (unreported), the Court of Appeal set out three tests to be satisfied when the case rests on circumstantial evidence. The Court held that:-

"It is common ground that for circumstantial evidence to found a conviction, it must be such that it irresistibly points to the guilt of the accused. From the authorities, we are settled in our minds that when a case rests on circumstantial evidence, such evidence must satisfy three tests:-

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established,*
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,*
- (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else."*

In this case, the prosecution relied on evidence adduced by its witnesses suggesting the accused persons were responsible for the

deceased death. The prosecution relied on the information PW1 received from Allen Kyusa and the confession of the 1st accused person recorded by PW3. The evidence in the record shows PW1 testifying that the 2nd accused person told him during an interview at the police post that he suspected that Allen Kyusa was responsible for the death as he told him how the deceased was killed. Police arrested Allen Kyusa. During the interview, Allen Kyusa said the 1st accused person killed the deceased. After that, the Police arrested the 1st accused. Allen Kyusa who informed PW1 that deceased was killed by the 1st accused person was not called as witness by the prosecution. No reasons for failure to call Allen Kyusa was provided.

I'm aware that no particular number of witnesses or exhibits is required in any specific case to prove any fact under section 143 of the Evidence Act. The position was stated in the case of **Yohanis Msigwa vs. Republic [1990] T.L.R. 148**. In the case of **Gabriel Simon Mnyele vs. Republic**, Criminal Appeal No. 437 of 2007, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), it was held on page 18 of the judgment that:-

"... under section 143 of the Evidence Act (Cap 6-RE 2002) no amount of witnesses are required to prove a fact - See Yohanis

Msigwa vs. Republic, (1990) T.L.R. 148. But it is also the law (section 122 of the Evidence Act) that the Court may draw an adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons – See Aziz Abdalla vs. Republic (1991) T.L.R.71.”

From the above cited case, even though no particular number of witnesses is required to prove any offence and the prosecution is at liberty to bring the witnesses of their choice to prove the case, the prosecution has to call certain witnesses to prove their case. This Court sitting at Dar Es Salaam in the case of **Francis Eliud @ Mnyamwezi vs. Republic**, Criminal Appeal No, 82 of 2021, High Court, Dar Es Salaam Registry at Dar Es Salaam, (unreported), held at page 9 of the judgment that, I quote:-

"Parties to the case are thus at liberty to decide the specific number of witnesses they need to produce. This liberty is, however, not absolute. It need be exercised cautiously not to omit the key witnesses whose absence may negatively affect the case."

I support the above position stated by this Court that the prosecution, in choosing witnesses to call in the criminal case, should not omit key witnesses whose absence may negatively affect the case. Where the prosecution fails to call such witnesses, the Court may draw adverse

inferences. In **Aziz Abdallah vs. Republic [1991] T.L.R. 7**, it was held that:-

"... the prosecution is under a prima facie duty to call those witnesses who can testify to material facts from their connection with the transaction in question. 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".

Failure to bring Allen Kyusa, who informed PW1 that it was the 1st accused person who killed the deceased without giving sufficient reason for not calling him, makes the evidence of PW1 to be hearsay. Section 62 (1) (c) of the Evidence Act, Cap 6 R.E. 2019, provides that oral evidence must, in all cases, be direct. If the oral evidence refers to a fact which could be perceived in any sense, or any other manner, it must be the evidence of a witness who says he perceived it in that sense or in that manner. Clearly, the section prohibits hearsay evidence. The evidence of PW1 was not perceived by his senses, but he heard it from Allen Kyusa. The same is inadmissible. Further, the Court drew the adverse inference that the prosecution did hide Allen Kyusa from testifying because his evidence might be in favour of the accused persons. Thus, the testimony of PW1 on what he was told by Allen Kyusa concerning deceased death is not

admissible and has no value.

Turning to the confession of the 1st accused person to PW3, the law is settled that a confession voluntarily made to a police officer by a person charged with an offence may be proved as against that person. The position is stated under section 27(1) of the Evidence Act, Cap. 6 R.E. 2019. The Court may convict the accused person relying on confession where it is satisfied that the confession is nothing but the truth even when he denies confessing or he made it involuntary as it was held in **Tuwamoi vs. Uganda (1967) E.A. 84** and **Hamis Athuman and Two Others vs. Republic [1993] TLR 110**. In the case of **Hemed Abdallah vs. Republic [1994] T.L.R. 72**, the Court held that:-

"Once the trial court warns itself on the dangers of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case, it is satisfied that the confession is true, it may convict on such evidence without any further ado."

In the present case, the Court did not admit the confession statement of the 1st accused person tendered by PW3 after it found in its ruling the statement was not made voluntarily. The Court held the prosecution witnesses evidence during enquiry trial was contradicting, the

1st accused person was denied some rights during the interview, the statement was recorded out of 4 hours provided by the law, and the witness of the interview was known to the police officer recording statement who called him to be witness. The witness of the interview was not known to the 1st accused person. The Court, in its ruling, held there is a possibility the statement was obtained through torture as the prosecution failed to prove the confession statement was made voluntarily. It is a settled law that the confessional statement obtained through torture is not admissible, as it was held in **Thadei Mlomo and Others vs. Republic [1995] T.L.R. 187**. In the case of **Paschal Petro Sambula @ Kishuu and Two Others vs. Republic**, Criminal Appeal No. 112 of 2005, Court of Appeal of Tanzania at Arusha, (unreported), it was held that, confession obtained through torture should not be admitted in evidence regardless of its truth. Further, the testimony of the police officer (PW3) who recorded 1st accused statement was not supported by any other evidence. Thus, the testimony of PW3 on the confession of the 1st accused person is worthless.

With such evidence on record, I find that the prosecution evidence was insufficient to require accused persons to defend themselves. The evidence available is hearsay, full of doubts, leaves a lot of gaps in the

chain and as a whole is not sufficient to prove that it was accused persons only and no other person who committed the offence of murder or any other offence of which, under the provisions of sections 300 to 309 of the Criminal Procedure Act, Cap. 20, R.E. 2022, they are liable to be convicted. Thus, I record a finding of not guilty against the accused persons namely, Alex Sanga and Felix Mhami, and they are acquitted from this case. It is so ordered accordingly.



A handwritten signature in blue ink, consisting of stylized, flowing letters that appear to read "A.E. Mwiopo".

A.E. MWIPOPO

JUDGE

24.07.2023