IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL JURISDICTION

CRIMINAL SESSION NO. 04 OF 2023

REPUBLIC

VERSUS

DENIS S/O KAMANDE

10/8/2023 & 07/09/2023

JUDGMENT

MWENEMPAZI, J.

The accused person in this case is arraigned in this court and charged with the offence of Murder contrary to section 196 and 197 of the Penal Code, [Cap. 16 R.E 2019]. It is alleged by the prosecution that the accused person on the 8th day of September, 2019 at Kawila-Mbuza Village within Kalambo District in Rukwa Region did murder one MICHAEL S/O FOROGWE.

When the charge was read over and explained to the accused person, he denied to have committed the offence. He also maintained his position by

denying the facts which were read over and explained to him by the prosecution except for his personal particulars and that he was arrested on the 9th September, 2019 for the allegation of committing the offence of Murder of one MICHAEL S/O FOROGWE. The accused also admitted that he was interrogated and recorded his cautioned statement for the offence of murder contrary to section 196 of the Penal code, Cap. 16 R.E. 2019, the offence for which he has been charged with.

At the hearing the prosecution was being served by Ms. Godliver Shiyo, Ms. Atupele Makoga, and Mr. Mathias Joseph learned state attorneys and the defence was manned by Mr. Deogratias Sanga, learned Advocate. The prosecution called a total of five (5) witnesses and also tendered two exhibits.

According to the evidence available, on the 8th September, 2019 a person was arrested at Mkowe Village for allegations of stealing goat. The affairs at the Ward Executive Officer's offices were being handled by an acting Ward Executive Officer one Ajuaye Kaduma. The acting Ward Executive Officer (WEO) called Ward Executive Officer (WEO), who in this case is Datus Lugasio, PW4. He testified on the date he had just returned from safari.

In the testimony of PW4 they made arrangement to transfer the suspect from Mkowe Village to the Police Station at Kalambo. The situation had become tense as people were furious and were threatening to break the lock up so that they may punish the suspect.

The suspect was Michael s/o Forogwe, he used to slaughter goats and sell goat meat at the Village. The Ward Executive Officer (WEO) testified that before transporting him to police, he called the police who instructed him that they should arrange and take the suspect to the police station. Three people were pointed out for the job Simon s/o Simba, Denis s/o Kamande @ Kibaya and one Michael.

They were able to find one motorcycle they decided the suspect and one militiaman (mgambo) and Simon Simba will board, on that one. That therefore motorcycle carried Simon Simba, Michael and Michael Forogwe. The second motorcycle was supposed to carry the goat, an exhibit. It is alleged, when the journey started, Denis Kamande joined the first motorcycle in the journey without carrying the goat (page 24 of types proceedings). That is according to the testimony of PW4.

The witness was able to identify Denis Kamande in Court at the accused dock. So Denis Kamande, Michael and Simba were supposed to take the suspect (now deceased) to the police station at Matai. At 19:00 hours he received call from police that the suspect has not yet been taken to the police, that is when he started to call those who had been assigned to take the suspect. The call to Simon Simba could not be picked and that of Michael was unreachable. He did not say anything as to whether he called Denis Kamande or not.

The police came and they started to look for the assignees by visiting their houses; they could not find them. Those who escorted the suspect were mentioned in a letter by Ward Executive Officer (WEO) to the police. Though the letter was not tendered as an exhibit.

According to the testimony of PW4 on the evening of the 8th September, 2019, when the police came, they did not go to the residence of Denis Kamande as he stays far. It is drawn from the testimony at page 27 of the proceedings. The next day Denis Kamande was summoned, he went at the office. He was left at the office but Denis Kamande says he was locked in. PW4 testified they did not arrest him, but when they went back and talked

to PW1 Konrad s/o Michael @ Mkali, he said he saw him, that is when they arrested Denis s/o Kamande. Konrad s/o Emmanuel identified Kibaya and Michael.

In the prosecution's evidence, they called Konrad s/o Michael @ Mkali as the first witness (PW1). He is a resident of Mbuza Village at Mkowe Ward, a devote Christian. He testified that on the date the 8th September, 2019 he came from church at 18:00 hours. As they normally came out at that time for the evening mass. He stays near the church, thus he went home, took his bicycle and left for his farm. At the bridge of river of Kalambo, he found three persons, one was hand cuffed with a sisal rope. It was around 18:00 hours. The person who had been hand cuffed ran towards him and asked to be rescued. Then another person came out from the bush holding a stone. That person not identified by name told him to leave as the person hand cuffed is a thief otherwise they will kill him (PW1).

In the testimony he testified that he identified Kibaya and Michael who were dragging the deceased. He knows them as he was seeing them at the office of the Ward Executive Officer (WEO). He left the scene and called the village chairman, PW2 Lautery Gerald @ Mgalla and told him the tale; when he

came, they could do nothing as it was already becoming dark. They left until next day when they met and launched a search for the deceased. Here in Court he identified the accused persons in the dock as Kibaya.

The next day PW1 showed the police and the village leadership the direction those people went and also a search for the deceased's body was mounted in collaboration with the police, and villagers from Mkowe Village and Mbuza Village.

It is a common story for PW1 and PW2, Lautery Gerald @ Mgalla that at first they found shoes belonging to the deceased and later the deceased body was fished out from water in the river Kalambo. It was found to have injuries and he was hand cuffed.

In this case there is no doubt that a person by the name of MICHAEL s/o FOROGWE died unnatural death. PW3 Dr. Edwin Mringi testified that on the 9th September, 2019 he received a call from the OC CID for Kalambo District. The police requested him to accompany them for examination of the dead body at Kalambo river. The body had been found at the river.

The body was identified to him as the body of MICHAEL s/o FOROGWE. The same was identified to him by Datus Logasio and Lautery Gerald @ Mgalla.

The body had injuries on the face. It had been hit by something with sharp edges, the wound was on the face. It was 4cm X 2cm. The victim (deceased) had lost a lot of blood and after being thrown into the water, the victim drowned. In exhibit P1, the Post Mortem Examination Report, cause of death was recorded to be drowning and severe bleeding.

The dead body was found immersed in water with multiple cut wounds on the forehead and occipital area which were approximately 4.2cm and 2.5cm.

It is indeed true that MICHAEL s/o FOROGWE has died an unnatural death. The question is who perpetrated the said death. The evidence tendered by PW1 point at the accused as one of the perpetrators.

PW1 says he found three persons; one was the deceased who sought assistance to be rescued and the other person was holding a stone coming from the bush. He was able to identify Kibaya and Michael who are militiamen he used to meet at the Ward Executive Officer's Office. Kibaya and Michael were dragging the deceased and the other one was holding a stone coming from the bush.

In the evidence by PW4, they asked Denis s/o Kamande to escort the suspect. He was supposed to carry the goat. When he left for his residence,

he came back and left without taking the goat with him. They PW4 and his colleague believed he did not take the said goat so that he may strengthen security. According to evidence, the accused was also on a motorcycle. Not clearly defined whose motorcycle and how did that come into the hands of the accused.

The accused testified as a defence witness. He says after he had been assigned, he told them he cannot ride a motorcycle while wearing sandals. He thus went home where he put on the jacket and sandals. That was a message he told the assigning officer, one Ajuaye Kaduma who was not called to testify by the prosecution.

When he came back he found Ajuaye and Datus Logasio. They told him he has delayed. Others have already left. They told him that they have assessed the security of the area. They have opinion it is about to be compromised. They decided to send the complainant and militiaman. The accused went back home where he continued with his activities.

In the evidence of PW4 it has been said generally, in the evening of 8/9/2019 when the police called and then came, they took them to the residence of those who had been assigned to escort the suspect (deceased) and they did

not find them. It is not categorical if they went to the residence of Denis s/o Kamande. However, it is said again generally, he stays far from the office. The defendant says when he was called by the Ward Executive Officer (WEO) and assigned, he went back home to change attire and upon coming back, he was told that he has delayed others have left; so he went home continued with his duties.

The next day he was a subject of blame as the matter has changed status. The suspect is dead and reasonably he was under the control of the ward authority in the process to be handed over to the police. There is a responsibility tag to the leaders at the ward level. The scapegoat seems to be the available easy target Denis Kamande. Reasonably I can see, there was a reason to shift burden. PW4 testified that:

> *"The reason I say Denis Kamande was involved is one, he was in the escorting team, two the witness PW4 saw him among those who were handling the deceased".*

I have reviewed the testimony by PW1 many times in contemplation of this matter. I still doubt that it was a firm and positive one. There is no witness who has been called to verify that Kibaya is the same and one with Denis

s/o Kamande. But how was it possible to drag a suspect and the same person run towards another person seeking for help. The two events cannot occur at the same time. It is possible if they were throwing anything to him. Dragging implies he was being held by the two persons. Again, PW1 found one motorcycle but PW4 say there were two motorcycles. One carrying Simon Simba suspect and Michael. The other was being rode by Denis kamande. Where was this other motorcycle?

The prosecution as well as the defence have filed their final written submission. The prosecution has referred to PW1 Konrad s/o Michael @ Mkali the sole eye witness of the incident and that his oral testimony narrated clearly and straight on how the incident occurred and identified the accused person as one of the perpetrators of the offence. His evidence is a direct evidence as per **Abas Konde Vs. Republic,** Criminal Appeal No. 472/2017 at page 17.

They have also cited the case of **Alfred Kwezi @ Alfonce Vs. Republic,** Criminal Appeal No. 216 of 2021 page 19 which affirm the position of **Anil Phalen Vs. State of Assam 1993 AIR 1462** that:

"A conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided that the sole eye witness passed the test of reliability in basing the conviction on his testimony alone".

They have thus called upon this Court to find that PW1 made a clear identification of the accused person; that PW1 was familiar with the accused person even before the date of incident and recognized him by his nickname, Kibaya. He even named him at the earliest possible time. They also cited the case of **Marwa Wangiti Mwita and Another Vs. Republic [2002] TLR 39** where the Court emphasized that the ability to name the suspect at the earliest opportune is an all-important assurance that the witness is reliable.

The prosecution have also introduced the principle of the last persons to be seen by the deceased in that the accused and two others were entrusted to escort the deceased. There is a presumption that they killed him unless they give a plausible explanation. For the point they have cited the case of **Miraji**

Iddi Waziri @ Simami & Another Vs. Republic, Criminal Appeal No. 14 of 2018 (unreported).

Also that the accused raised the defence of alibi that he was at home at the time the incident, occurred, the prosecution demand that he ought to have brought a witness to support his claims as it was stated in the case of **Sijali Juma Kocho Vs. Republic [1994] TLR 206.** Where it was held that:

> *"the appellant was under no legal obligation to prove the alibi but in the fact of the allegations made against him, one would reasonably expect him to call the person he was with at the time of the event".*

The prosecution argued they have proved their case beyond all reasonable doubt that the accused was responsible and he did that with malice aforethought.

The defence counsel has also filed a submission that the prosecution case has left grave doubts which in any circumstances cannot be overlooked and hold the accused persons guilty on such a serious offence of murder. If you look at the whole evidence, the only witnesses whose evidence would show a direction to point at the accused person is that of PW1 Conrad s/o Michael

(PW1) and that of PW4 Datus s/o Lugasio the Ward Executive Officer (WEO). However, that evidence is unreliable and purely contradictory on the following basis; one PW1 mentioned the accused as Kibaya whom in their view that is not the accused. Two, the witness PW1 did not recognize the person who was being beaten. He could not confirm after the body had been found. Three, PW4 testified that the deceased was handed over SIMON SIMBA and MICHAEL SOKONI who were assigned to take accused person to the police at Matai Police Station.

The defence counsel has also alleged that there are discrepancies in the prosecution evidence which raise doubt to the guilty of the accused person. He has cited the case of Jeremiah ***Shemweta vs. The Republic*** **[1985] T.L.R. 228** wherein it was held that:

> *"The discrepancies in various account of the story by the prosecution witnesses give rise to some reasonable doubts about the guilty of the (accused) appellant."*

The other complaint and or areas where the defence believe weaken the prosecution case is that the prosecution neglected to call or failed to bring material witnesses to testify. They have named Acting Ward Executive

Officer, one Ajuaye Kaduma and the Police officer who investigated the case at hand. The defence argue that these are material witnesses whose testimonies were so crucial to tackle the puzzle in the resolve of who is liable in causing the death of the Michael s/o Forogwe. They prayed this Court finds there are doubts and resolve in favour of accused person.

I have the opinion that the central issue for resolve here is whether the accused person was positively identified at the scene of event. I tried herein above to show the wavering testimony of PW1 and PW4 trying to link the accused. My opinion, that evidence is not firm and leaves doubts to be cleared.

Assuming that truly, Denis Kamande joined the first motorcycle which was carrying the suspect, Simon Simba and Michael. His motorcycle would be found also at the scene or place close to the scene as testified by PW1, who saw only one motorcycle and he testified that he saw Kibaya going to the motorcycle and then left him to attend the call by the village chairman.

Also, with me, the witness has not drawn a clear picture of the scenario at the bridge, who is who and what role were they playing. The linkage seems to be drawn from the general fact that the accused was transported to police

on the date and among the persons assigned is Denis Kamande, and now the suspect is missing and or dead. Three people were assigned Denis Kamande, Simon Simba and Michael.

However, I see a cloud in the description of the event by PW4 which may be, would have been cleared by Acting Ward Executive Officer (Ag. WEO) Ajuaye Kaduma if at all he would have been called to testify as he was one of the people at the point of departure. The accused story is clear, precise and when read together with the testimony of PW4, PW1 and PW2, it is clear he is coming in as a scapegoat because the leaders took the situation by default, things have turned worse, they would like to clear themselves by finding a responsible person. Finally, I find the accused was not identified properly and his explanation of his role is clear and was not shaken even at cross examination. Given the seriousness of the offence it will be unjust to rule otherwise.

Under the circumstances the accused is not positively linked to the murder of MICHAEL s/o FOROGWE therefore I proceed to acquit him of the offence of murder with which he is charged. He should be released forthwith unless otherwise he is lawfully being held.

It is ordered accordingly.

T.M. MWENEMPAZI

JUDGE

07/09/2023