

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

CRIMINAL SESSION NO. 02 OF 2023

(Originating from the District Court of Arumeru, P.I No. 03 of 2022)

THE REPUBLIC

VERSUS

1. NICHOLAUS S/O JOSEPH

2. WILLIAM S/O SHIWARIAEL @ AKYOO

JUDGMENT

22nd November & 12th December, 2023

BADE, J.

The prosecution preferred a charge of murder against the accused persons herein, contrary to section 196 and 197 of the Penal Code, Cap. 16 [R.E 2022]. It is alleged that on 15th May, 2020, at Nkwandua area within Arumeru District in Arusha Region, they did murder one Leonard Somi @ Kaaya. The accused persons pleaded not guilty to the charge.

In order to prove the case against the accused persons, the prosecution through Lilian Kowero, Carolyn Kasubi and Donald Mahuna, learned State Attorneys who appeared for the Republic, summoned a total five (5) witnesses. They also tendered two exhibits, namely: the Post Mortem Examination Report (exhibit P1) and Sketch Map of the scene of

crime (exhibit P2). The accused persons were represented by Messrs Nerius Lugakingira, Fridolin Bwemelo and Manili Mahimbali, learned advocates. The accused persons gave their defence on oath without calling witnesses or tendering any exhibit.

The tale resulting to arraigning and charging the accused persons with the murder charge can be gathered from the evidence adduced which is summarized as follows: Miriam Leonard Kaaya (PW1) and Elizabeth Leonard Kaaya (PW2) were the daughter and wife of the late Leonard Somi Kaaya respectively. It happened that on 15th May, 2020, both PW1 and PW2 were in their house sleeping. At about 02:00a.m, PW1 was awakened by torch lights which headed to their house. She woke up her mother and as they gathered at the living room, they heard a knock on their door. PW1 opened the door, when they saw two elders they identified as Aaron and Humphrey. Aaron asked PW2 if her husband was home and upon PW2 responding negatively, he told her to go and collect her husband's dead body.

While she remained put astonished by these utterances, Aaron and Humphrey went to Zablon Ndossy and retreated back with him. The trio demanded PW1 and PW2 join them towards the crime scene. As they were on their way, PW1 was faster leaving the rest behind. As she got closer, she found a crowd of people. Through torches from mobile phones

and the illuminating electric bulbs from the nearby houses, PW1 saw her father who was laying on the ground helplessly. He was being beaten by the 1st accused person who was holding a club/fito and the 2nd accused person who had a machete. The 1st accused was beating the deceased with the machete on the flat side of the blade as well as poking on his back while the 2nd accused was beating him on the head. She intimated that her father seemed hurt and in pain, and was asking for forgiveness from his assailants so that he could be let go. In attempt to rescue him, PW1 held William's hand so he would stop beating her father, but he spitefully pushed her aside.

PW2 who arrived after a while, saw the 1st accused beating her husband with a hoe handle on the head while the 2nd accused was beating him using a flat side of the machete. Zablon intercepted, stopping the accused persons from continuing to beat the victim. Aaron and Humphrey secured attendance of the chairperson who arrived in time. After his arrival, the chairperson asked whether there was any exhibit linking the deceased with the theft allegations. The accused persons along with another person left and came back with a bunch of freshy harvested green bananas and a bundle of firewood (fito). The chairperson ordered that the victim be taken to the police station. He was boarded in a motor vehicle, which took him to the police station. Meanwhile, PW1 went back home but her mother

joined the crowd to the police station. Later PW1 was informed by her mother that her father died.

At about 03:00a.m, the crowd that left for the police station arrived at Tengeru Police Station. They were attended by H 4281 D/CPL Katulebe Marcel Mshoki (PW5), who was the station officer on duty. PW5 noted that the victim who was allegedly a thief was seriously assaulted and sustained bruises on the cheeks and several other parts of the body. Since the victim was seriously assaulted and wounded, PW5 opened a case file on causing bodily harm, issued a PF3 and ordered those who brought in the victim to take him to the hospital since he could not put in police custody a person so seriously wounded. The next day, the victim succumbed to his injuries and passed away. PW5 along other police officers, D/CPL Elias and D/CPL James were assigned to investigate and gather evidence. They also went looking for the suspects who were mentioned to them by witnesses by visiting their residences several times but they could not locate them.

On 18/05/2020, H 1376 D/CPL James Angelus Malibiche (PW4), was assigned to investigate the murder file No. IR 415/2020 by the RCO Arusha. He recorded statements of the eye witnesses (PW1 and PW2) on the same day. Led by Wilfred Kaaya, PW4 went at the crime scene, drew the sketch map of the crime scene which was admitted as exhibit P2.

According to PW4, the 2nd accused was arrested in March 2022 and was interrogated by police officers at Usa River while the 1st accused was arrested in May 2022. PW4 accounted that he traced the 1st accused at his place for quite a number of times without success. He added that he did not interrogate any of the accused persons.

On the same day, Fredy Michael Laizer (PW3) a doctor at Mount Meru Hospital conducted a post mortem examination of the deceased's body. The examination was carried out in the presence of some police officers and two relatives of the deceased who identified the body as that of Leonard Somi Kaaya. In his examination, PW3 discovered that the death was caused by polytrauma. The body had multiple bruises and haematoma on the back, he also had ulcerations on the right-hand side, and his eyes were blood shot. He also had a bruise on the right-hand side, so it was his opinion that the death was caused by the polytrauma. PW3 also filled in the postmortem report, which was admitted as exhibit P1.

It was also put in testimony that after the burial ceremony, on 23rd May, 2020, the relatives of the accused persons visited the house of the deceased with sodas and masale seeking forgiveness so that the matter could be settled amicably. According to PW1 and PW2, women who were mourning in the house, caused commotions. Chairpersons from both

Nkwandua and Ambureni villages were notified and arrived in time. They noted the names of those who brought in the drinks and returned back their gesture signifying refusal to settle the matter amicably.

That marked the end of the prosecution evidence. Upon hearing the whole of the prosecution evidence, I ruled out that a prima facie case was made against the accused persons, calling for the accused persons to enter their defence. Each of the accused persons took the witness stand.

In his sworn defence, Nicholaus Josephat Mungure (DW1) denied any involvement in the commission of the offence. He stated that it is his family that lived at Ambureni village while he works in Monduli where he owns a farm testifying that on the fateful day, he was not in Ambureni, but rather in Monduli. He accounted that he was arrested on 21st March 2022 at Tengeru Sokoni, after being accompliced to a radio theft, which was in his possession. He was taken to Usa River police station where he was kept until 25th March 2022 when he recorded his statement and on 13th April 2022, he was arraigned in the committal court where he was charged of murdering the deceased, the allegations which were quite new to him and utterly denied. DW1 wondered how could the murder incident take place in May 2020 and his arrest be effected in March 2022, while he

did not abscond the village. He gave a narration on how he applied and secured a temporary job recording human settlement addresses on 2nd February, 2022. He insisted that he made the applications through the village offices, but there were no indications that he was being hunted by the police. It was his further testimony that the 2nd accused was known to him when he was joined in the case on 6th September, 2022 at Arumeru District Court, during committal proceedings. He denied to have any relationship with the deceased. DW1 insisted that the case was fabricated up against him because while in police custody, he heard the police saying that he would be given the case that was on the table.

On the other hand, William Shiwairiaeli Akyoo testified as DW2. He gave his evidence on oath distancing himself from the commission of the offence. He accounted that he was arrested on 28th May, 2022 at Shangarai Supermarket it being alleged that he was involved in a shamba dispute. He was taken to Usa River police station where he stayed until 30th May 2022 when he was forced to sign a blank piece of paper. On 9th June 2022, he was arraigned before Arumeru District Court where the charges of land dispute were replicated by murder charges. According to DW2, when the murder incident took place, he was at his home

(Ambureni) sleeping. He also denied to have sent a person to take some sodas to the deceased's family.

He accounted that he knew the 1st accused whom he met for the first time on 6th June 2022, when he was joined in the case. On 21st July, 2021, DW2 was fighting with 'mzee wa boma' over farm border dispute which he also reported to the ten-cell leader and he was declared the winner. The said mzee wa boma promised to revenge, connecting the charges facing him with the grudges he had with mzee wa boma because during hearing PW1 & PW2 failed to mention their second names stating that it was mzee wa boma who volunteered their names. He wondered how possible that he was not arrested earlier while he was at his home for the whole period the police said that they were tracing him. Both DW1 and DW2 inquired why did the prosecution fail to summon Aaron, Humphrey and Zablon as they were also mentioned as the persons who witnessed the incident, calling upon the Court to find their connection with the murder was only precipitated by appalling reasons. In essence, that marked the end of the defence evidence.

Having summarized the evidence of both the prosecution and defence sides, the following issues begs determination:

a) Whether there is an unlawful death of the deceased person

b) Whether it was the accused persons who committed the offence as charged; and

c) If the second issue is answered in the affirmative, whether the killing was perpetrated by malice aforethought.

In cases of this nature, prior to making a finding on whether the offence was committed by the accused persons, it has to be sufficiently proved that the deceased actually died unlawfully. Oral testimonies by all the prosecution witnesses point out without flicker of doubt that Leonard Somi Kaaya died on the material date. PW1 and PW2 thoroughly testified that the deceased died on 15th May, 2020. Their evidence was corroborated by that of PW3 who conducted the autopsy examination which revealed that Leonard Somi Kaaya died due to polytrauma. He filed in the postmortem report describing the cause of the death as manifested in exhibit P1, which entails that the deceased died of extensive haematoma on the back with multiple bruises. Similarly, PW5 who received the victim at the police station, issuing him with PF3 as well as PW4 who investigated the matter unanimously confirmed that the deceased died as alleged. Taking into account the totality of the evidence of all the prosecution witnesses and exhibit P1, there is no flicker of doubt that the deceased Leonard Somi Kaaya died on the material date, and his death was not natural one, thus the 1st issue is resolved affirmatively.

Having resolved that Leonard Somi Kaaya died of unnatural death, the next question leads to determination of the second issue that is whether it was the accused persons who murdered him. The prosecution mainly based on the evidence of two eye witnesses PW1 and PW2 who testified to have seen the accused persons attacking and assaulting the deceased. Looking at the circumstances of this case the question that remains to be answered is whether PW1 and PW2 were credible witnesses.

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. See, for example **Goodluck Kyando vs Republic** [2006] TLR 363. Although there are no rules of thumb in determining the credibility, truthfulness or reliability of a witness, the paramount considerations rests on how the demeanour of the witness has been assessed by the court. The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses. This is

notwithstanding the fact that PW1 and PW2 are all closely related with the deceased, PW1 being the daughter and PW2 the wife.

In any case, i am well alive to the position of the law that Courts do concur that relative witnesses were competent witnesses whose evidence could be considered on merit unless there was evidence proving that they teamed up to promote an untruthful story. The Court of Appeal is candid in this stance in **Paulo Tayari vs Republic**, Criminal Appeal No. 216 of 1994 (unreported).

Even this court for its part has made reference to the Court of Appeal decision in **Festo Mgimwa vs Republic**, Criminal Appeal No. 378 of 2016 (unreported) and **Mustapha Ramadhani Kihyo vs Republic**, [2006] T.L.R. 323 for the proposition that the evidence of relatives cannot be discredited unless there is evidence to prove they have a scheme to promote an untruthful story.

Having cautioned myself on the reliability of the prosecution evidence through two of the eye witnesses who are purportedly the key witnesses in the circumstances of this case, I am minded to examine in evaluation of the said testimony.

From the evidence on record, PW1 and PW2 claimed that they were at their home fast asleep on the material date, when they were awakened

by Aaron and Humphrey who told PW2 to go and collect the dead body of her husband. Unfortunately, the evidence of PW1 and PW2 who happened to be summoned to the crime scene, and eye witnessed the accused persons assaulting the deceased to his death gave contradictory evidence on how the incident occurred. PW1 stated that she found the 1st accused beating her father with a machete using the flat side of the blade, he was poking the deceased's back, while the 2nd accused was beating him on the head. At the same time when cross examined, PW1 stated that it was the 2nd accused who was beating his father using flat side of the machete. PW1 also testified that she saw another person who was poking on the deceased using sharp side of the machete and the deceased was bleeding. She also accounted that she was informed of her father's death on the same day at 1:00p.m. She testified that she knew the 1st accused (Nicholaus) because they would passed through a road near his house and her father used to call him uncle. She also testified that she knew the 2nd accused (William) as he was a camera man. That piece of evidence contradicts the evidence of PW2, who was also at the crime scene. PW2 testified that when she arrived, the 1st accused had a hoe handle beating the deceased on the head and the 2nd accused used a machete beating the deceased on the flat side of the machete. That is contrary to what

was said by PW1 regarding the weapons each accused person allegedly used to assault the deceased.

Further, PW2 said that at her arrival, the deceased was complaining saying, *"Willy my nephew why are you beating me so much while I had already asked for forgiveness."* That piece of evidence contradicts not only her own evidence but also PW1's evidence because they strenuously stated that it was the 1st accused (Nicholaus) who was the deceased's uncle. She also testified that she knew Nicholaus before because his mother is the deceased's sister. The fact that the deceased called Willy his nephew, was not only contradicting her own testimony, but also that of PW1's account. This is not to say how illogical and absurd it sounds that the wife of the deceased would not exactly know which person is the son of the deceased's sister.

Another contradiction is on the number of people who assaulted the deceased. PW1 on cross examination stated that she saw people beating her father, crowding him while the victim was at the middle. She named those people as the villagers. On the contrary, PW2 stated that it was only the accused persons who were assaulting the deceased.

That apart, between PW1 and PW2's account of the persons who allegedly took drinks (sodas) and masale to their house asking for forgiveness. While PW1 stated that the drinks and masale were brought to their

compound by Nicholaus' son and another person who was their employee, PW2 stated that she was informed by the chairman that the drinks and masale were brought to their compound by a son and a father from the boma of Nicholaus and William so that the matter could have been resolved amicably.

Further still, the testimony of PW1 and PW2 contradicts other prosecution witnesses. For instance, PW1 and PW2 testified that they recorded their statements on 19th May 2020 while PW4 stated that he recorded the statements of PW1 and PW2 on 18th May 2020. Another glaring contradiction is on the bruises the deceased sustained. PW1 and PW2 stated that the deceased had bruises on the cheek and he had cut wound at his back as he was poked using the machete or some other sharp object. This is contrary to what PW3 who conducted the postmortem examination stated, explaining that the deceased had neither bruises on the cheek nor had he had any cut wounds. He insisted that the bruises that he observed on the deceased were not caused by a sharp object. He also accounted that he did not witness any cut wound on his back. In essence, that also contradicts the evidence of PW5 who stated that the deceased had bruises on the cheek and other parts of the body.

The Court of Appeal has persistently insisted that where there exist inconsistencies and contradictions in witnesses' evidence, the court

becomes duty bound to resolve whether such inconsistencies and contradictions are minor or they go to the root of the matter. The case of **Mohamed Said Matula vs Republic** [1995] TLR 3 is quite instructive on this issue where it was held:

"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the contradictions are only minor, or whether they go to the root of the matter."

PW1 and PW2 being the only eye witnesses to the murder, were expected to give a consistent account of how the incident occurred and the involvement of the accused persons in the murder without any doubt. Given the above contradictions and inconsistencies which in my considered view are not minor, it has made the prosecution evidence shaky. The above contradictions could have been cleared had the prosecution bothered to summon other key witnesses mentioned by PW1 and PW2 to have witnessed the incident.

More importantly, failure of the prosecution to summon some of the important witnesses has prompted this Court to draw adverse inference since if a party to the case opts not to summon a very important witness, he does so at his detriment and the prosecution cannot take refuge under

section 143 of the Evidence Act. The Court of Appeal in **Samwel Japhet Kahaya vs Republic**, Criminal Appeal No. 40 of 2017 (unreported), quoted with approval its previous decision in **Boniface Kundakira Tarimo vs Republic**, Criminal Appeal No. 350 of 2008 (unreported), where it restated:

"... So, before invoking section 143 of the TEA regard must be heard to the facts of a particular case. If a party's case leaves reasonable gaps, it can only do so at its own risk in relying on the section. It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one."

With respect, I cannot say how surprising it is as to why the prosecution could not summon other crucial witnesses such as Aaron and Humphrey, who informed PW1 and PW2 that the deceased was being assaulted and that PW2 should go and collect his dead body, after which they all proceeded to the crime scene, with these two leading the way as to where the crime scene is. Further, the evidence of Zablon Ndossy who was also at the crime scene, and ordered the accused persons to stop beating the deceased as well as participating in taking the deceased to the police

station and later to the hospital, in my view, was vital. Further, it was PW1 and PW2's evidence that the chairperson was called and he arrived at the same time when PW2 arrived. However, the said chairperson was not summoned to testify despite him being at the crime scene on one hand, and he witnessed those who brought about the drinks and 'masale' to the deceased's compound on the other, hence his evidence was crucial. Failure by the prosecution to summon such key witnesses without any explanation, justifies drawing adverse inference against them, as I hereby do. The impact of drawing adverse inference against the prosecution evidence is to water it down and flop its case.

There is another aspect which I feel bound to address, as it defies logic and common sense; that is the delay by the prosecution to arrest the accused persons with no sufficient justification. PW1 and PW2 stated that they mentioned the accused persons to the police when recording their statements on 19th May 2020 albeit by first names basis only. However, PW4, PW5 and the defence witnesses stated that the 2nd accused was apprehended on 21st March 2022 while the 1st accused was arrested on 28th May 2022. There was no viable explanation put to the fore by the prosecution for the delay in apprehending the accused persons for about two years after the murder incident.

PW4 and PW5 accounted that they tried to trace the accused persons without success. There was no evidence whether they involved the village authority, because in their defence both accused persons denied to have absconded their villages. The 1st accused person went a milestone ahead, stating that he applied for a temporary job through the village office. Hence had he been hunted by the police, the village authority would have informed him or them of his availability.

In the case of **Issa Reji Mafita vs Republic**, Criminal Appeal No. 337 'B' of 2020 (unreported), the Court of Appeal while faced with an akin scenario, had the following to say:

*"We have taken time to carefully study the prosecution evidence on the record and we could not come across with any concrete evidence to suggest absence of the appellant from his residence for such a long time. **Indeed, there is nothing on the record to the effect that, the appellant had ever been traced and found absent. The general claim in the testimony of PW3 that the appellant was not present in the village is not, in our view, sufficient to establish the proposition.** This is more so because in accordance with the testimony of PW1, PW2 and PW4, the incident was reported to hamlet chairman on the same day and subsequently to police. The matter having been reported to police and the village*

authority, the duty to search and arrest the appellant was of those authorities.”(Emphasis added)

In the case at hand, the illogical evidence by PW4 and PW5 that they traced the accused persons in the village for about two years without success, is without prejudice, second thought and untenable. I hold this view owing to the seriousness of the offence they stood charged and the fact that there is no indication whether the village authorities were involved. In the absence of elaborate justification, the delay to arrest the accused persons for about two years cast serious doubts on the prosecution's case.

From the above deliberations, it is crystal clear that the prosecution evidence was tainted with contradictions and inconsistencies which go to the root of the matter. The prosecution also failed to summon some of the material witnesses which would have eliminated the unsubstantiated questions that remained unanswered. Noteworthy is, the prosecution failed to justify the delay in arresting the accused persons for about two years, which undoubtedly raised doubts whether the accused persons were involved in the murder.

Considering the accused persons' defence that the case was framed up against them, the prosecution has failed to discharge its burden. PW1 and PW2 admitted that they only mentioned the first names of the accused

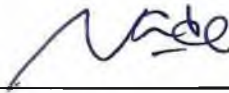
persons, but their second names were put on record by 'mzee wa boma,' who the accused persons claimed to have grudges with. As pointed out above, with the glaring and apparent shortfalls pinpointed in the prosecution evidence, the resultant effect is that the prosecution has failed to prove the case beyond reasonable doubts. In **Simon Cleoplace Balingana and Another vs Republic**, Criminal Appeal No. 442 of 2015 (unreported), it was stated inter alia:

*"In a criminal case the burden of proof is always on the prosecution to prove the case against the accused person beyond reasonable doubt. The burden never shifts. (Section) 3(2)(a) of the Evidence Act (supra). See also **Woolmington vs the DPP** (1935) AC 462. The conviction of the appellants cannot be based on the weakness of their defence."*

In the final analysis, and for the reasons assigned and the authorities cited, it is the finding of this Court that the Prosecution has failed to prove the case against the accused persons on the required standard. I therefore acquit the accused persons **Nicholaus Joseph** and **William Shiwariael @ Akyoo** on the charge of murder levelled against them.

Order accordingly,

DATED at ARUSHA on this 12th day of December 2023



A. Z. BADE
JUDGE
12/12/2023

Judgment delivered under my Hand and Seal of the Court virtually, this
12th day of **December 2023** in the presence of the parties or their
representatives/advocates.



A. Z. BADE
JUDGE
12/12/2023