

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

CRIMINAL SESSION CASE NO. 8 OF 2022

REPUBLIC

VERSUS

BENJAMINI SYLIVESTER MWANDATA1ST ACCUSED

ADAM BRAYSON SANGA2ND ACCUSED

OSCAR ELIAS MWAKABIKI3RD ACCUSED

JUDGMENT

Date of hearing: 16/11/2023

Date of judgment: 6/12/2023

NONGWA, J.

The accused persons Benjamini Sylvester Mwandata @ Mwasimba, Adam Brayson Sanga and Oscar Elias Mwakabiki stand Charged with the information of murder contrary to section 196 and 197 of the Penal Code [Cap 16 R: E2019 now R: E 2022].

It is alleged in the particular of offence that on 12th December 2019 at New Forest area within the district and region of Mbeya the accused persons

jointly and together did murder one Gasper Makinya. The accused denied the charged offence.

Briefly, investigation of the murder started with a cell phone of the deceased in which it was found that few hours before his death had communicated with two contacts 0757756344 and 0716567212. Joram from police cybercrime unit was charged to trace the contacts and through 0757756344 managed to arrest Oscar Elias Mwakabiki, 3rd accused. On interrogating him admitted to have murdered the deceased Gasper Makinya both orally before OCCD Luambano, Daniel, Joram and Saimon, the police officers and in caution statement which was recorded by Saimon.

That the 3rd accused mention the 1st accused Benjamini Sylivester, 2nd accused Adam Brayson Sanga and Venance Akunaga who is at large. Adam Sanga was traced with the help of the 3rd accused and on 15/12/2019 was arrested. On 16/16/2019 the police with the help of 3rd accused managed to arrest Benjamin Sylivester at his home. After interrogation of the trio, they admitted to the offence in their caution statements.

In a bid to prove the case the prosecution called a total of seven witnesses and had six real and documentary exhibits. Prosecution evidence

started with PW1 (Fred Makinya) who testified that the deceased was his young brother born from his uncle, on 12/12/2019, received information that he had been involved in the accident and was hospitalized at Mbeya Referral Hospital.

Reaching there he was given a phone of the deceased. He went to report to Police where he was received by Saimon who cross checked the phone and found that it had communicated with two contacts that is 0757756344 and 0716567212. The phone was seized and he signed a certificate of seizure. The following day went at the hospital to identify body of the deceased at the hospital and it was that of Gasper Makinya.

PW2 (PF.22847 A/inspector Gervas) stated that on 15/12/2019 was commanded by OCCD Luambano to arrest the suspect Oscar. He went at Chunya stand and arrested the said Oscar, he brought him at central police.

PW3 (Ben John Mwang'ombola) is the street chairman of New Forest, on 21/12/2019 witnessed the accused person showing the area where they committed the offence and hidden the motorcycle. He stated that it was the accused who were narrating the events and showing area.

PW4 (E.6796 D/SGT Vincent), testified that on 15/12/2019 was charged with duty to record statement of Oscar Elias Mwakibiki who after interrogation admitted to the offence and mentioned other accused which led to arrest by Benjamin Sylvester at ZZK Mbalizi. He added that on 21/12/2019 the accused volunteered to show areas where they had committed the offence. They went at forest where the chairman of new forest and VEO participated. He added that after that he recorded additional statement of the accused Oscar. The said confessional statement was received in evidence after trial within trial as Exhibit P1.

PW5 (Sefu Mkalimbaya) testified that in 2019 was a Police officer at Mbeya central police and on 16/12/2019 was commanded by OCCD Luambano to record caution statement of Benjamin Sylvester. He stated that the accused admitted to the offence. The said confessional statement was admitted as exhibit P2 after trial within trial.

PW6 F. 23362 A/Inspector Joram stated that on 12/12/2019 was given two contacts which had communicated with the deceased Gasper Makinya the first number was 075775644 and second 0712567212 he called that number 075775644 and found that he was a bodaboda at Iyunga. He went

at Iyunga and arrested him. He called the second number who arrest him and took to Afande Saimon.

PW7 (Saimon Mwasenjele) Sworn and stated that in 2019 was a police officer working at Mbeya central police. That on 12/12/2019 was arraigned to investigate the murder of Gasper Mwakinya who had been murdered at St. Mary's School in Mbeya. He was given the deceased mobile hand set and found that in the morning it had communicated with two numbers of 075775644 and 0716567212 the mobile hand set was seized, a certificate of seizure was admitted as exhibit P3 and the cell phone (hand set) as exhibit P4.

That the said phone number was given to Joram who traced it and managed to arrest Adam Bryson through number 075775644. After the arrest the accused was interrogated admitted orally to the offence and mentioned other co-accused. After that he was taken to be recorded statement.

PW7 went on to state that on 13/12/2019 went at Mbeya Referral Hospital with PW1 who identified the body of the deceased and that a post mortem report was handed to him. It was introduced in evidence as Exhibit

P5 and the accused were properly addressed in terms of section 291 of the CPA.

That on 21/12/2019 the accused person volunteered to go and show where they committed the offence the said visitation was done in presence of PW2, PW7 went on to state that on 22/12/2019 recorded additional statement of Adam Bryson. The statement was admitted as exhibit P6 after successful trial with trial.

This marked the end of the prosecution case. At that conclusion the court found that the case had been made out to all accused enough for them to enter defence under section of 293 of the CPA.

In defence, Benjamin Sylvester testified as DW1, in his sworn evidence he stated that he was arrested on 16/12/2019 at night at Ndola Mbalizi right from his arrest at home was beaten and later taken to central police. There he was tortured and harassed for several days demanding him to confirm to the offence of theft. Eventually one Seif went with some papers which he was forceful taken his thumbs and printed in the papers. He denied to ever been recorded any statement.

DW2 (Brayson Sanga) stated that on 12/12/2019 was called by a client requiring his service of Bodaboda and told to meet at Iyunga. There he met afande Saimon who arrested him and was taken to central police. They asked him if he communicated with Gasper but denied. He was taken to central police, on 14/12/2019 was taken to investigation room where he was beaten and forced to admit that to the offence. He denied to have given any statement, confessed or taken from police to show crime scene.

DW3(Oscar Elias Mwakabiki) testified that he was arrested by PW2 on 15/12/2019 at Chunya stand Mbalizi and taken to Mbalizi police station. There he was beaten and forced to confess to the allegation he did not know. That he was then taken to central police station, taken to investigation room where he was severely tortured requiring him to confess. Eventually some papers were brought to him to sign. He denied to know fellow accused and to have ever communicated with them.

From the above summary of evidence issues calling for my determination are

1. Whether Gasper Makinya died of unnatural death;

2. Whether the charge of murder has been proved against the accused persons.

From the evidence in record, it is not clear on the cause of death of the deceased, according to PW1 when he went at Mbeya referral hospital found the deceased with wounds on the head and face. This evidence was also testified by PW7. For death to be considered as unnatural it must be caused by violence or under suspicious circumstances or the body of any person is found dead without it being known how that person died or it happen in sudden circumstances.

In the present case evidence of PW7 as unveiled by the autopsy report (Exhibit P5), the death was due to fracture of occipital borne and the base of skull, subdural hematoma and brain laceration. None of the prosecution witnesses testified having seen the deceased sustaining the injuries. The defence did not dispute that Gasper Makinya is dead rather they distanced themselves from the commission of the crime. I therefore find that the prosecution proved to the hilt that a death of a person occurred and such death was due to unnatural cause.

Adverting to the second issue of whether the charge of murder has been proved. It is elementary cardinal of law that in criminal justice the duty to prove the charge is upon the prosecution and the standard is beyond reasonable doubt. The term beyond reasonable doubt has not been defined by statutes but case law has attempted to do so. In the case of **Magendo Paul and Another v. Republic**, [1993] TLR 219 where the Court stated as follows:

'For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed.'

In the oldest case of **Miller vs Minister of Pensions** [1947] 2 All ER 372 which has prominently featured in most cases of this jurisdiction, quoting Lord Denning who stated that;

'The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course, it is possible but not in the least probable the case is proved beyond reasonable doubt.'

Connected with the above is that the accused owe no duty to prove his innocence, what has to do is to raise reasonable doubts in the prosecution case and where a reasonable doubt arises, it is also the law, it has to be applied in favour of the accused person. See **Luthgnasia Simon Mushi @ Vumi vs Republic**, Criminal Appeal No. 209 of 2019 [2023] TZCA 17531 (TANZLII).

The case at hand depends solely on confession statement of the accused person both oral and written, this is due to the fact that no prosecution witness saw any of the accused person coming the offence. Oral confession in this case come from police officers who interrogated the accused persons, the law on this point is that an oral confession made by a suspect, before or in the presence of reliable witnesses, may be sufficient by itself to find conviction against the suspect.

Section 3(a) of the Evidence Act [Cap 6 R: E 2022] defines the term "confession" to include oral confession as words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence. In **Martin Manguku v. Republic**,

Criminal Appeal No. 194 of 2004 (unreported), the Court stressed that for an oral confession to be valid and form a basis for conviction it must have been made when the suspect to whom the words are imputed was a free agent when he said the words imputed to him.

In the present case PW7 stated that 2nd accused was the first to be arrested by PW6, after that was taken to OCCD Luambano where on interrogation admitted to the offence and mentioned other culprits. That the confession was made in presence of Luambano, Daniel and Joram. The question is whether the 2nd accused was free agent when the allegedly oral confession was made.

After reviewing evidence of PW7 I have come to the conclusion that oral confession of the 2nd accused was not voluntary because it was made after the accused being detained and before a group of police officers. There is no evidence that the accused was warned of the danger of the statement he was making before them. Faced with similar situation, in the case of **Boniface Mathew Malyango @ Shetani Hana Huruma & Another vs Republic**, Criminal Appeal No. 358 of 2018 [2020] TZCA 314 (TANZLII), the court stated;

'Failure by the police to warn the first appellant who they suspected prior to his making an oral confession took much weight away from this evidence ... PW10, a very senior police officer, had the best opportunity to caution the first appellant before receiving oral confession, he did not issue that warning.'

It has to be noted that the accused person throughout their evidence denied to have admitted commission of offence despite the torture they underwent save for caution statement to which I will come later. Although PW7 said after arresting the accused persons they confessed, in my view even if there was such a confession, it was before the police officers in the course of interrogating the accused, there is no evidence that they were warned of the danger of the confession.

In absence of such warning, it waters down value of such confession especially after the accused person denied to have made such confession. After all person before whom the alleged confession like Luambano was not called to support such assertion. On part of PW6 did not state in his evidence that the 2nd accused confessed to him, PW5 said after arresting handed the 2nd accused to PW7 and no more.

Coming to confessional statement of the accused person which was admitted in evidence, by PW4, PW5 and PW7, statements were retracted

and repudiated by all accused person. As a matter of the law the repudiated or retracted caution statement can form the basis of conviction but in practice it needs corroboration unless the court is satisfied that it contains the truth. The court pronounced itself in the case of **Flano Alphonse Masalu @ Singu vs Republic**, Criminal Appeal No. 366 of 2018 [2020] TZCA 197 (TANZLII) that;

'The law is trite that where an accused person retracts/repudiates his confession, the court can convict him on the uncorroborated confession provided that it warns itself of the dangers of acting solely on such confession and if it is fully satisfied that the confession cannot be but true.'

In the present case statements were admitted after the court had conducted trial within trial and satisfied that it was made by the accused person voluntarily but that does not relieve the court from examining it in detail to see its usefulness to the prosecution. In order for confession of the accused person to be admitted, it must pass the test of the law under section 3 of the Evidence Act [Cap 6 R: E 2022] which define what confession is.

The confessional statement must however, be both voluntary and must provide a true account. In **Emmanuel Lohay and Udagane Yatosha vs**

Republic, Criminal Appeal No. 278 of 2010 (TANZLII), the Court observed that;

'... the court described the essence of confessional statements as such that they should shed some light on how the deceased concerned met his death, role played by each of the accused person; such details as to assure the courts concerned that the person making the statement must have played some culpable role in the death of the deceased.'

To be noted is that the confessional statement of the accused is the prosecution evidence, it must be considered in all angles by looking at its veracity, consistence and trustworthy. This takes me to consider each statement separately. Exhibit P1 reads;

'Mimi nakumbuka kuwa mnamo tarehe 12/12/2019 saa 05:00hrs nilikuwa nyumbani nilipigiwa simu na Adamu ambaye ni dereva wa bodaboda Iyunga stand ambaye ni rafiki yangu.... Adamu alisema namba ya huyo mwenye pikipiki ninayo akasema naweza kupigia ilia je na tujue jinsi ya kuichukua hiyo pikipiki. Adamu alimpigia simu mtu huyo mwenye pikipiki kwa kumwambia aje kwa mwamnyange amchukue mteja. Wakati huo tayari tumeshapaona mahali pazuri pa kuporea hiyo pikipiki ndipo sisi wanne tulikubalina kuwa mtu mmoja ande nzovwe ili Adamu ampigie mtu huyo simu ili pande aje nayo huku forest tulikosisi. Ndipo Venance alichukua pikipiki ili aende nzovwe. Basi Adamu alimpigia simu yule dereva wa bodaboda

akamwambia kuwa kuna mteja yupo stand ya nzovwe na alimweleza jinsi alivyovaa na kumwambia akamchukue amlete kwa mwamnyange huko forest basi kukiwa bado hakujakucha Venance alikuja aikwa amebewa ktk pikipiki aina ya HONLG walifika hadi tulipokuwa sis forest mpya karibu na Barabara ya Lami. Wakati huo sis watatu tulijificha ktk majani na wakati huo benja au mwasimba alikuwa na upanga. Baada ya kufika pikipiki ilisimama Venance alijifanya amefika na anataka kulipa pesa ya nauli ndipo Venance alimkaba yule dereva wa bodaboda shingoni na kutuita jamani njooni. Sis tulijitokeza, mimi nilishika pikipiki benja au mwasimba alimpiga yule bodaboda na upanga kichwani yule dereva alipiga kelele...'

In exhibit P2;

'... Tulipofika meta mimi nilitelemka peke yangu na kumuuacha huyo akunaga evance atanguliye peke yake huko kwa mwamnyange mimi nilikutana na huyo dereva bodaboda tuliyemuelekeza tukutane maeneo ya shell hapo meta na kweli huyo dereva bodaboda nilimkuta hapo shell ananisubiri huku tayari huyo akunaga venance akawa ameshatangulia huko kwa mwamnyange mpaka napanda hiyo bodaboda tayari ilishafika saa 0600hrs na dereva bodaboda alikuwa anaendasha pikipiki aina ya HONLG rangi nyekundu nilipakiwa kwenye hiyo pikipiki na kumweleza anipeleke huko kwa mwamnyange na tulipofika maeneo hayo ya fighroad nilimtaka huyo dereva aende mdogomdogo ndipo mimi nilipomkaba huyo dereva eneo ambalo niliamini yupo mwenzangu venance na katika kukabana huko

pulukushani ilikuwa kubwa ilipelekea pikipiki hiyo kuanguka chini ndipo walipojitokeza wenzangu akunaga venance, adam na osca kuja kunipa msaada katika hali hiyo ndipo mimi nilichukua panga toka kwa venance na kumpiga nalo maeneo ya kichwani mara mbili ndipo nguvu zilimuushia nah apo nilimrudishia panga huyo akunaga venance na kutuelekeza sisi tuondoke yeye atamalizana nay eye ndipo sisi tuliondoka na ilo pikipiki hadi mitaa ya kanisa la babtist na kuificha maeneo hayo ya nyuma ya kanisa nikuwa nasubiri huyo akunaga na wale wenzangu...'

In exhibit P6 statement reads;

'... tarehe 12/12/2019 majira ya 05:20 hrs nilimpigia simu gasper na kumuuliza kama amemfuata mteja alidai ndiyo anakwenda, hapo ndipo nilitoka nyumbani na pikipiki yangu yenye namba za usajili MC471CDN aina ya boxer na kuelekea forest mpya kwa ajili ya Kwenda kuungana na wenzangu kumnyang'anya pikipiki gasper makinya. Baada ya kufika mahali hapo nilimkuta Oscar elias, venance na mwasimba hapo tukaanza kumsubiri gasper, majira ya saa 06:08hrs nilimpigia gasper makinya kuwa yupo wapi aliniambia you njiani maeneo ya JM, hapo ilibidi nimwambie mteja ametoka yupo pembezoni mwa shule ya ST. Marry's apite hapo wakati huyo mimi na wenzangu tulikuwa tumejificha maeneo hayo. Alipofika gasper makinya ndipo mwasimba alimsimamisha, alipo simama hapo hapo mwasimba alichomoa panga na kumkata nalo gasper kichwani, Oscar elias alimsukuma gasper alidondoka chini

nilichukua pikipiki ya gasper na kuondoka nayo nikiwa naiendesha, pikipiki yangu walikuja nayo mwasimba wakiwa wamepakizana wote watatu yaani osca elias, venance na mwasimba na aliyekuwa anaendesha pikipiki yangu ni mwasimba. Tulipita mabatini njia ya mabatini hadi karibu na kanisa la morovian simike wenzangu walikuwa wananifuata nyuma. Tulifika simike pikipiki tuliificha maeneo hayo kwenye kibanda ambacho hakitumiki...'

After considering the above three statements I have found that they contradict on several important aspects. **One**, while exhibit P2 tells that the 1st accused boarded the deceased motorcycle at Meta Shell, exhibit P6 indicates that it was at JM near St. Marry's school. I don't think Meta shell and JM is the same place.

Two, who held panga, exhibit P2 show that it was with Akunaga and the 1st accused took it from him and smashed the deceased but exhibit P6 has a different story, it shows that panga was with the 1st accused and directly smashed the deceased.

Three, exhibit P1 show that Venance is the one who boarded motorcycle of the deceased at Nzovwe and held the deceased, exhibit P2 and P6 mention the 1st accused.

In defence the accused person denied any involvement in the murder and therefore there is no any evidence to weigh against in this aspect.

After considering the contradictions found in the statements, I am of the view that it impacted on the prosecution case as to render case to collapse. The contradiction in my view goes to root of the case in explaining the role played by each and it water down the prosecution case.

Connected with the above, cell phone communication was not tendered, throughout the prosecution case the phone communication between the accused persons and the deceased exhibit P3 was the core in the commission of the offence and arresting 3rd accused.

Starting with phone communication between the deceased and accused, although it was introduced in evidence as exhibit P3, there was no explanation given to show that the 3rd accused communicated with the deceased. Evidence of PW5 show that 3rd accused communicated with the deceased, so the 2nd accused according to exhibit P1 and P6 but there was no any call logs brought by the prosecution.

It is my view that exhibit P3 was to be connected with production of print out from the mobile network to show that indeed the accused person


communicated with the deceased. More important in this even the mobile number of the deceased on which we are told it communicated with the accused was not disclosed by the prosecution. I have therefore failed to link exhibit P3 that it communicated with the accused persons. It was upon the prosecution to have print out data from the mobile network or TCRA showing the deceased did communicate with the accused. See **Tabibu Nyundo & Another vs Republic**, Criminal Appeal No.524 of 2021 [2023] TZCA 17310 (TANZLII).

In respect of communication between the accused themselves, it is evidence in exhibit P1, P2 and P6 that they were communicating through mobile phone leading to the murder, but the prosecution did not make any effort to establish such communication. DW3 denied to know other accused person prior to being arraigned in court. It was incumbent for the prosecution apart from relying on caution statement of the accused person which undeniably established that they were organizing themselves to commit the offence through phone communication to have sort assistance of mobile network or TCRA to establish that fact.

It must be noted that the prosecution is under duty to establish the guilt of the accused beyond reasonable doubt, in this case on the analysis of

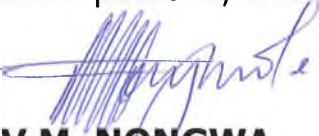
evidence above, it cannot be said such duty was discharged. For such duty to be achieved evidence must irresistibly point to guilty of the accused, which in this case has not been done.

In the event, I find and hold that the information of murder contrary to section 196 and 197 of the Penal Code facing the accused person has not been proved. Consequently, I acquit the said Benjamini Sylvester Mwandata, Adam Brayson Sanga and Oscar Elias Mwakabika of the information of murder of which they were charged and direct that they be set at liberty, unless to be held for any other lawful cause.


V.M. NONGWA
JUDGE
06/12/2023

Dated and delivered in presence of Mr. Augustino Magesa SA, Mr. Kamru Habib for defence and the accused persons, this 6th day of December, 2023.




V.M. NONGWA
JUDGE