

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM

CRIMINAL SESSION CASE NO. 09 OF 2021

REPUBLIC

VERSUS

- 1. ATHUMAN ALLY MPINGI**
- 2. MASOUD SHAMTE KITINA**
- 3. JAFARI ABDULRAHMANI MMANDE**
- 4. JUMANNE SAID @ BUNGWA**

JUDGMENT

S.M. MAGHIMBI, J:

On the 30/01/2017, there was a robbery at Comfort Bar in Chamanzi Mbagala situated within Temeke District. In due course of the robbery, one person by name of Maulid Jumanne, died, the question that faced the police thereafter was on who caused the death of the deceased Maulid Juma. In due course four people namely Athumani Ally Mpingi (1st accused), Masudi Shamte Kitina (2nd accused), Jafari Abdulrahman Mmande (3rd accused) and Jumanne Saidi @Bungwa (4th accused) were charged with the offence of Murder contrary to Section 196 and 197 of the Penal Code, Cap. 16 R.E 2019 ("the Penal Code"). The four accused were arrested at different times and places around the month of March, 2017 but it was not until the 18th day of

May, 2017 when the accused persons were first arraigned in court charged with the offence of Murder.

At the hearing of the case, the prosecution side paraded a total of seven witnesses to convince the court that the guilt of the accused persons was beyond reasonable doubts. It is however pertinent to note that of all the prosecution witnesses paraded, none of them was an eye witness.

At the conclusion of the prosecution case, having analysed the evidence adduced, this court was satisfied that there is no prima facie case established against the 1st and 4th accused enough to make them enter their defence. Therefore pursuant to the provisions of Section 293(1) of the Criminal Procedure Act, Cap. 20 R.E 2022 ("the CPA") they were found to have no case to answer, a plea of not guilty entered and were eventually acquitted of the offence they were charged with. As for the 2nd and 3rd accused persons, they were found to have a case to answer and made their defence which comprised of only two witnesses who were the 2nd and 3rd accused themselves.

In pursuit to prove their case the prosecution had seven witnesses. The first witness was the then OC-CID of Mbagala police who got information of the murder and set some police officers to the scene. He also went to the

scene of crime where he found the deceased and one casualty called Fakihi Hamisi who was the purported eye witness. PW2 was E7761 Sgt. Exaudi who amongst the police officers who participated in the arrest of the second accused. PW3 was the Doctor who performed the autopsy of the body of the deceased and PW4 was F18249 who supervised the identification parade in which the above mentioned casualty Fakihi Hamisi identified the 1st and 4th accused persons. On his part PW5 was E7700 D/Sgt Evodius who recorded the statement of the 3rd accused person and PW6 was the officer who arrested the 4th accused person while PW7 is the officer who recorded the statement of the 2nd accused person.

In their defence, both the accused persons denied the charge or having ever been at the scene of crime. They both testified to have been arrested at different times and the initial allegations were on the offence of being involved in terrorist acts and were eventually charged with murder.

Having heard the evidence adduced by both sides, I found that several issues were not in dispute. The issues included the fact that there is one person by the name of Maulid Mfaume who was dead, the issue remained whether the death of the deceased was caused by the two accused persons. Up until the close of their evidence, the prosecution side had no eye witness to the crime despite the fact that in their evidence, the PW1 and PW4

testified to have come across an eye witness by the name of Fakihi Hamisi who mentioned the accused persons. This evidence was however hearsay evidence. The only prosecution evidence that was not hearsay is the cautioned statements that were purported to be recorded statements of the 2nd accused (EXP4) and the 3rd accused (EXP3). In their defense, both the accused testified that they were arrested and interrogated in relation to the offence of terrorism, kept in custody for a while before they were arraigned in court. I will therefore analyse the two statements in relation to the available evidence and see whether they are sufficient to establish a case against the two accused persons beyond reasonable doubt.

I will start with the statement of the 2nd accused (EXP4) alleged to have been recorded by the PW7. The PW7 testified that he is the one who recorded the statement of the accused who did so voluntarily. However, during cross examination by the defence Counsel, the witness was asked as to why the statement was taken in narration form contrary to the provisions of Section 57(2) of the CPA. The witness did not have anything valuable to justify the style of recording. On my part, having gone through the said statement, indeed the same was recorded in a narration form which leaves a lot to be desired. The provisions of the referred Section 57(2)(a) of the CPA are clear that:

*(2) Where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes, during the interview, either orally or in writing, a confession relating to an offence, the police officer shall make, or cause to be made, while the interview is being held or as soon as practicable after the interview is completed, **a record in writing, setting out-***

*(a) so far as it is practicable to do so, **the questions asked of the person during the interview and the answers given by the person to those questions;***

In cross examination however, there was no clear answer as to how the contravention was reached to. It is also pertinent to note that although the 2nd accused is purported to have been arrested and recorded the statement on the 03rd day of March, as said earlier, the accused persons were first arraigned in court on the 18th day of May, 2017 no explanation was made or attempted to be tabled on the lapse of time between the arrest and the time the accused persons were arraigned in court. In the case of **Janta Joseph Komba, & 3 others Vs. R, Criminal Appeal No. 95 of 2006** (unreported), the Court held that:

"We agree with learned counsel for the appellants that being in police custody for a period beyond the prescribed period of time results in torture, either mental or otherwise. The legislature did limit the time

within which a suspect could be in police custody for investigative purposes and we believe that this was done with sound reason."

As for the case at hand, there is no explanation as to why the prosecution took more than two months holding the accused persons before they were arraigned in court. The above facts come into hand with the defence adduced by the accused persons that at the initial stages of their arrest, they were being suspected to be involved in terrorist act hence the case of murder came as an afterthought.

Going to the statement of the 3rd accused person (EXP3), it has the same fault as was observed in the EXP4. It was not taken in a question-and-answer form but just one long narration of the events. Further to that, there is no evidence of the prosecution that was adduced to show exactly when was the third accused arrested. The statement was also taken after the 2nd accused was arrested and made his statement. It is also the same scenario, that the accused persons were never arraigned to court until after two months.

All the above observations and findings make me come to one conclusion, that the EXP3 and EXP4 were not in conformity with the law in form and time that was taken hence not evidence worthy. That being the case, the two exhibits are hereby expunged from the records. Having so expunged the two exhibits from the records, the issue is whether the

remaining evidence is sufficient to warrant the conviction of the two accused persons.

As per the evidence adduced, apart from the evidence of PW2 who arrested the second accused after being tipped by an informer, PW7 who recorded the statement of the 2nd accused (EXP4) and PW5 who recorded the statement of the 3rd accused (EXP3) there is no any evidence that have established any direct or circumstantial connection between the murder incident and the two accused persons. For instance, PW1 and PW4 alleged that there was an eye witness by name of Fakihi Hamisi who allegedly saw the incident and was the one who identified the 2nd and 3rd accused at the identification parade. The witness was never brought to court and no reason adduced as to why he was not was brought to court. In the case of **Omari Hussein @ Ludanga and Another Vs. R, Criminal Appeal No. 547 of 2017** (unreported) the Court of Appeal cited with approval the principles made in the case of **Aziz Abdallah Vs. R [1991] TLR 71** where it was held:

"Failure to call such material witnesses who are within reach but are not called without sufficient reasons being shown by the prosecution is fatal."

In this case, there is no explanation as to why the witness was not called or whether he was out of reach. Hence the omission is fatal and warrant this court to draw an inference against the accused persons.

It is trite law that in criminal cases, the prosecution needs to convince the court that there is no other reasonable explanation for what occurred other than the guilt of the person charged. In this case, the evidence put forward by the prosecution must establish the defendant's guilt so clearly that they must be accepted as fact by any prudent man. In any case, where there is no evidence sufficient to prove the guilt of the accused beyond reasonable doubt, the court must acquit the accused.

In this case, the prosecution has failed to prove the guilt of the two accused persons beyond reasonable doubt. Consequently, I hereby acquit both the accused persons of the offence of murder c/s 196 and 197 of the Penal Code that they were charged with.

Dated at Dar-es-Salaam this 06th day of June, 2023



S.M. MAGHIMBI
JUDGE