

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 34 OF 2022

THE REPUBLIC

VERSUS

THOMAS NATHANIEL KOMBA @ PWAGU

JUDGEMENT

Date of last Order: 28/12/2022

Date of Judgement: 18/01/2023

U.E. Madeha, J.

To begin with, the accused person that is none other than; Thomas Nathaniel Komba @ Pwagu is charged with the offence of Murder Contrary to Sections 196 and 197 of the Penal Code (Cap. 16, R.E. 2019). As a matter of fact, the incident happened on 12th April, 2021 at Utiri Village within the District of Mbinga in Ruvuma Region. In that regard, it was alleged that the accused person murdered one Dastan Festo Lupogo.

It is important to note that, the accused denied the charge. In a bid to prove the charge against the accused person the prosecution called eight (08) witnesses and produced four (04) exhibits which are none other than:- the certificate of seizure exhibited as "exhibit P1", the Affidavit of Suzana Ebeart Komba to prove the ownership of the motorcycle exhibited as "exhibit P2", motorcycle with Registration Number MC 655 CSU, make Haojue exhibited as "exhibit P3", the Post- Mortem Examination Report exhibited as "exhibit P4" and the sketch map of the crime scene exhibited as "exhibit P5". In that regard, the accused relied on his evidence to fend his innocence.

Principally, the facts of the case are briefly narrated as follows: PW1, **G. 4378 D/CPL Ahmad** in his sworn evidence stated that, he works as a Police Officer at Mbinga Police Station. His responsibility is to protect the citizens and their properties; he works as an investigator at Criminal Department. On 14th April, 2021 at around 18:00 hours upon reaching at his working place he was called by his Officer In-charge of the Investigation Department, ASP Mwamba, who directed him to go at Utiri Ward where he would find the motorcycle that had been found.

On the same note, he wanted him to go to the crime scene. As a matter of fact, he went at Mwembeni area and found the motorcycle. In addition, there were two (02) citizens namely; Melkioni and Victor. Actually, these two (02) young men told them that when these two (02) men had arrived from Songea to Mbinga, their motorcycle ran out of fuel in that area. When they came closer to them the two (02) men who were riding that motorcycle ran away and left the motorcycle there.

It is worth considering that, he saw the motorcycle with the registration number **655 CSU**. They told him that there was a suspect who was arrested, but after interviewing him, he told them that he has a father in the next Village; and they took him to his father to satisfy themselves about his behavior.

To add to it, he directly went to the accused's father. Having arrived, at the village, the officer in charge of the police had already arrived. As a result, they conducted an oral interview with him regarding the arrest of the motorcycle. The accused told them that he was going home after attending church sessions at Mbinga town. To add to it, after being satisfied with the

accused's information he immediately returned back to Mwenge Police Station.

Furthermore, after arriving there he took the right procedure of taking the motorcycle which was in the possession of one person called Victor together with the other villagers. It is true that, he prepared the certificate of seizure and signed it with those who were around the crime scene.

As a matter of fact, PW1 identified the certificate of seizure; he prayed for the Court to receive the certificate of seizure as an exhibit. As a result, it was admitted and marked as exhibit P1. In addition, the seized motorcycle with Registration No. **MC 655 CSU** was admitted and marked as exhibit P2.

It is worth considering that **PW2**, is none other than **Melkioni Mathias Komba**, in his sworn testimony stated that he works as a farmer as well as a technician. On the same note, he told this Court that he has been living at Mwembe Village in Mbinga District for thirty-three (33) years. Notably, on 11th April, 2022 at around 20:00 hours he was at Mwembe Village together with two (02) other people that is, George and Chengula. While standing there they saw a motorcycle coming towards their direction and it was heading towards Mbinga direction. When it was nearly approaching

them it suddenly stopped. After seeing that situation they were so much interested to know what has happened and they moved towards the area it stopped, because they were not too far from the area the motorcycle stopped. After reaching at the scene of crime the accused person and his fellow who was not arrested started running away. In fact, they succeeded to catch the accused person after chasing him and they brought him at the crime scene. On the same note, they asked the accused's name and he told them that his name is Pwagu and his father is leaving at Magole Village. He further told them that he was coming from the farm at Miango and he was going to Utiri Village. They asked him if he was going at Magole but he replied that he was going at Lipumba Village although, he does not know the proper direction that is why he had to go towards Lipumba Village. Having found doubts on the accused's statements, they searched him and found that he was trimming his waist with a shoe sewing needle. Moreover, after that they went to the village chairman who is known as Hilary Ndunguru.

It is true that, the village chairman ordered him to take the accused to his father's house. Later on, he handed over the accused to Boniface Winfrid Ndunguru and Severini Botanu Kumburu and the motorcycle was taken by the Police Officers from the crime scene. PW2 identified the motorcycle with

Registration Number MC 655. Furthermore, he averred that the one who was arrested with the motorcycle is called Pwagu who was actually standing in the Court dock. Besides, he testified that he managed to identify the accused by using touch rights. Also, PW2 identified the certificate of seizure exhibit P1.

Particularly, **PW3, Victor Goodluck Mbuki**, in his sworn evidence, testified to the effect that he resides at Mtama Street in Mbinga District. In fact, on 11th April, 2021 at around 20:00 Hours, he was riding a motorcycle. It is true that, he met with one person, called Boniface Ndunguru at the road intersection from Mbinga to Songea. He found a large group of people and the young man called Pwagu who is the accused.

Basically, the accused person was telling them that he was not a thief and he told them that he was coming from the farm. To crown it all, he said that he was the son of an old man called Andrea. On his part, PW3 knows the old man called Andrea; he decided to move closer to the accused person and he identified him. He asked him where he was coming from and he told him that he was coming from the farm. Consequently, he phoned the accused father and asked him if he knew Pwagu. In that case, he was told

that he knew him and he was his own son. Notably, PW3 told the accused's father that the accused has been arrested. As a concerned parent, he directed him to bring him at home. Moreover, he called the Village Chairman, who replied that he was in great pain and that they should take him to the Police Station, after being given the PF3. On the same note, the accused should be taken to the hospital. It is true that, he took the accused person to his father's home.

Likewise, he told the Court that there was a motorcycle that had been driven to the crime scene and it was the property of the accused person. Moreover, PW3 advised them to call the Police Officers. He also told them to send the motorcycle to the Police Station. After arriving at the crime scene, the Police Officers were suspicious with the accused person and they went to the accused's home.

In the same note, he stayed at the accused father's home for a while, then left the accused person with his father. As a matter of fact, the following day he went to work, where he met the accused's father, called Andrea who told him that the Police Officers come to his home and where he questioned him about the accused who is none other than Pwagu and after recording

his statement they left leaving the accused person at his home. Also, after one (01) week he heard that the accused person had been arrested.

PW4, Andrea Julias Komba told this Court that he resides with his wife at Mbinga in Mtama Village in Utiri Ward. On 11th April, 2021 at around 20:00 hours. He was at home on that particular day he received a mobile phone call from Victor that is, (PW3) and told him that he was at Mwembe Ward. He further told him that there was a young man who has been arrested and after being interviewed he told them that he is his son and his name is Pwagu. On the same note, he asked PW3 to send Pwagu at his home. PW3 told him that they suspected him to be a thief. In that regard, he told PW3 that he had gone to the farm.

To add to it, the Village Executive Officer (V.E.O) told him that the accused person was to be sent to the hospital as soon as he can get treatment since he was injured. They told him that the accused person was arrested with the motorcycle. It is true that, the Police Officers went to his house and questioned the accused and recorded the accused's statements.

Moreover, the Police Officers were satisfied with the accused's statement and left him at home. The accused person left his father's home

and went to his home where he was living. Furthermore, he received a mobile phone call from someone who went to his home in order to interrogated the accused and after that he heard that the accused person was arrested. It was after thirty (30) days when the accused was released from the day he was arrested.

Additionally, **PW5, Emmanuel Lupogo**, a resident of Utiri on his sworn evidence stated that, on 12/04/20221 one (01) person arrived at his home and informed him that his brother has fallen. He immediately left and went to the scene of the incident. After reaching at Mwembe "D" area he met with one person called Dastan Festo Lupogo. Unfortunately, he found him injured in his left eye and he took him to Mbinga District Hospital after obtaining the PF3 at Mbinga Police Station. As a matter of fact, when he arrived at the hospital, he was told that the doctor examined the deceased's body and found that Dastan Festo Lupogo had already died.

It is worth considering that, **PW6, Suzan Komba** on her sworn evidence stated that; she resides at Mbinga she has got a family and her husband one Dastan Festo Lupogo who died on the 12th April, 2021.

Principally, she was shocked when she received the sad news that her husband had died.

It is true that, on that particular day her husband told her that he was going to work at Matemboni Village. She waited for a long time until the following day she was told that the deceased went to Mbinga Hospital for treatment. However, when she arrived there, she found the deceased had already died.

PW6 further added that, the deceased left a motorcycle with registration number **MC 655 CSU** with a red colour make Haojue. PW6 identified the motorcycle; she tendered a motorcycle card, which was not received as an exhibit because it had another registration name which was not the deceased's name. In fact, the owner of the motorcycle was G.S. Group Limited. PW6 added that she went to the Court in order swear an affidavit, which was received in evidence as exhibit P3. She stated that, the deceased was beaten thoroughly and in fact they took the motorcycle after beating him.

It comes as no surprise that, **PW7, Elia Jeladi Makonda** on his sworn evidence stated that he is a Medical Doctor. He studied at Mbeya and he has

been working at Mbinga District hospital for ten (10) years now. He was called to examine the deceased's body.

It is worth considering that, on 12th April, 2021 at around 12:00 p.m he was at his working station whereby he received the information that he was supposed to go and conduct the Post-Mortem Examination. He stated that the deceased's body was identified to him by Emanuel Kapinga. He found that the deceased died within twenty-one (21) hours and he had a lot of trauma inside the head. After further investigation he found that the deceased had died due to a heavy blow on the head that caused fractures on the skull. He prepared the Post Mortem Examination Report which he signed and handed to the Police Officers. The postmortem was admitted and marked as exhibit P4.

PW8, E. 8065 D/SGT Ayubu on his sworn testimony, he stated that he was the investigator in this case. On 12th April, 2021 he was at his working place and he was called by Inspector Komba who gave him a case file to conduct investigation. He went at Mbinga District Hospital where the victim was admitted for treatment. After arriving at the Hospital, he was told that the victim had already died. He reported the matter at the police station

whereby and he was directed to draw the sketch map of the crime scene. He drew a sketch map of the crime scene which was admitted in Court and marked as exhibit P5. As a matter of fact, the witness (PW8) identified the motorcycle with registration No. MC 655 CSU the property of G.S Group Company Ltd. Moreover, on 15th May, 2021, he went to arrest the accused person and charged him with the offence of murder.

DW1 Thomas Nathaniel Komba, in his sworn testimony he stated that he resides at Utiri Village in Mbinga District. On 11th April 2021, he was on his way from the church. Actually, he left the church compound at around 16:00 hours. He went to the market to buy some basic needs and passed to the farm. In his testimony, he stated that it was night time when he left the farm. He met people who arrested him and wanted to know where he was coming from. He told them that he was from the church and after the church session he had passed through the farm. Consequently, they started telling him that he has stolen a motorcycle but he denied. Also, he denied the charge for murder of the deceased.

As much as the evidence provided is concerned, I have considered the evidence from both sides and the law specifically. For the conviction of

murder to stand, according to section 196 of the Penal Code (supra), the prosecution has to prove the following major issues:

1. Who murdered the deceased? Does the killing amount to murder?
2. Whether the prosecution proved the case against the accused beyond a reasonable doubt.

To start with the first issue, that is who murdered the deceased and whether the killing amounted to murder?

As a matter of fact, the evidence brought by the prosecution is circumstantial. It is important to note that, the testimony of PW1 and PW2 shows that the accused after getting off from the motorcycle he ran away and they chased and caught him and it was night time.

It is true that, those who were involved in chasing the accused in order were three (03) people but later on the number increased to seven (07) people. Hence, due to the increase in the number of people. This raises a doubt on whether the accused was the one who was responsible for the commission of murder crime. In fact, they were in a rush they ran from two o'clock in the night until four o'clock in the night. The prosecution evidence does not link the accused with the offence of causing death to the deceased.

Secondly, the deceased's motorcycle had the registration name of GS Group Company Ltd and not the name of the deceased. Thus, the issue of ownership still causes problems.

To put it in a nutshell, the evidence is too circumstantial. There is no connection between the testimonies given by the prosecution evidence in order to associate the accused person with the offence he stands charged. The evidence from the prosecution side needs additional evidence from other sources to collaborate it. Reference is made to the case of **Sadiki Ally Mkindi v. The Director of Public Prosecutions**, Criminal Appeal No. 207 OF 2009 (Arusha Feb, 2012), the Court held that;

"We would therefore set out the general rules regarding circumstantial evidence in criminal cases as elucidated in Sarkar on Evidence, Fifteenth Edition, Reprint 2004 at pages 66 to 68. These are:

- i. That, in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the in-involvement of the accused in the crime must clinch the issue of guilt.*

- ii. *That, all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of the doubt.*
- iii. *That, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.*
- iv. *Where circumstances are susceptible of two equally possible inferences the inference favours the accused rather than the prosecution should be accepted.*
- v. *There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been made by the accused.*
- vi. *Where a series of circumstances are dependent on one another, they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.*

- vii. *Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify a conviction, even though the party offers no explanation of them.*
- viii. *If combined effect of all the proved facts taken together is conclusive in establishing the guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive."*

Exclusively, refer also the case of **Elisha Ndatanye v. Republic**, Criminal Appeal No. 51 of 1999 (Mwanza) the Court held that:

"Where the evidence against the accused is wholly circumstantial the facts from which an inference to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred".

As a matter of fact, in relation to the evidence given, it was two o'clock during night time when they started to chase the accused. Strange as it may sound, the witnesses have not explained the type of light that was used to help them identify the accused person. To put it in a nutshell, the Court of Appeal of Tanzania (at Bukoba) in the case of **Munziru Amri**

Mujibu and Another v. Republic, Criminal Appeal No. 151 of 2012

observed that:

*"There is no dearth of authorities restating the principles laid down in **Waziri Amani's** case on visual identification. These include **Raymond Francis v. Republic** (1994) TLR 100, **Jaribu Abdalla v. R.**, Criminal Appeal No. 220 of 1994, and **Issa Mgare @ Shuka v. R.**, Criminal Appeal No. 37 of 2005, **Said Chally Scania v. R.**, Criminal Appeal No. 69 of 2005 **Kulwa Mwakajape v. R.**, Criminal Appeal No. 35 of 2005 (all unreported). In **Jaribu Abdalla** (supra) the Court stated:*

... in matters of identification it is not enough merely to look at the factors favoring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence...."

It is worth considering that, from the first time or the very beginning they said that they had mobile phone torches, especially PW1, to check if the light of the torch could identify the accused at the crime scene. In the case of **Mohamed Musero v. Republic** [1993] TLR 290 (Court of Appeal of Tanzania, it was *inter alia* held that:

"Torch lights are not effective in identifying thieves; the High Court Judges remarks on torch beams were pure conjectures which have no room in Criminal trials".

Having gone through the evidence presented by the prosecution side, it does not prove the occurrence of murder offence. On the same note, PW1 is a policeman who went to the scene of the incident. He testified that he didn't saw the accused person at the crime scene.

As far as I can see, observing the crime scene PW1 stated that it is the same area where the motorcycle was stuck due to lack of fuel. It is a fact that, there are two (02) locations: the **first** being the location where the deceased's motorcycle was seized; the **second** being location was a place where the accused person was arreested. However, the investigators in this case never testified on the second (2nd) location where the body of the deceased was found dead.

Likewise, PW1 stated that he found the accused had already left at the crime scene and he took the motorcycle. PW1 did not find the accused at the crime scene where the motorcycle was found. In fact, PW2 said that they chased the accused person and succeeded to arrest accused person. He further stated that the accused person was chased with three (03) people

but later on they were seven (07) people. In that case, there is no other supporting evidence. It is important to note that it was during night hours, that there was no perfect source of light except from mobile phone's flashlight. Surprisingly, upon catching the accused the question is why did the other three (03) or seven (07) people who joined to chase the accused were not brought to testify in this murder case.

In fact, PW2's testimony seems to be different from the PW1's testimony who stated that he found the accused at the crime scene. However, PW2 testified that during that two-hour period that they had started chasing the accused and arrested him around four o'clock at night.

On the same note, they ordered people to take him to the Village Chairman, but PW3 testified that he found the accused where he was beaten for the ground that he committed the theft offence. Similarly, he helped by taking him to his father. It is true that, PW4 is the accused's father; he says that the accused was arrested after one a month; in that regard, the Police Officer came to write the accused's statement. As a matter of fact, he was satisfied with the statements given by the accused person and he left him.

Unfortunately, after one (01) month, they heard that the accused had been arrested. Other witnesses who confirm that the deceased died were PW5 and PW6 and they testified that the deceased died at Mbinga hospital. Moreover, PW7 stated that he drew a map of the incident and questioned the accused, who denied to have committed the offence. At the same time, observing the evidence presented by the prosecution, it is not consistent enough to prove that the accused has committed the offence of murder. As far as I am concerned, I still insist on saying that the prosecution has not proved its case to the required standards, that is proof beyond a reasonable doubt that the accused person is the one who murdered the deceased person.

It is worth considering that, the prosecution must establish a prima facie case. This is important because if no prima facie case is established, the benefit of doubt must always be given to the accused person and the Court must acquit him. Reference is made to the case of **The Director of Public Prosecutions v. Morgan Maliki and Nyasa Makori**, Criminal Appeal No 133 of 2013 (unreported), the Court stated that:

"A prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence

which he is charged or kindred cognate minor offence... the prosecution is expected to have proved all the ingredients of the offence or minor cognate are thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof".

It is the view of this Court that the evidence presented by the prosecution is insufficient to connect the accused person with the offence of murder contrary to sections 196 and 197 of the Penal Code (Cap. 16, R.E 2019).

In view of the above doubts and having warned myself as to the dangers of convicting the accused person for the grave offence of murder on the circumstantial evidence and in all fairness under the prevailing circumstances of this case, this Court holds that the guilt of the accused was not proved. Hence, I hereby acquit the accused person for the offence of murder contrary to sections 196 and 197 of the Penal Code (Cap. 16, R.E 2019). Order accordingly.

DATED and DELIVERED at SONGEA this 18th day of January, 2023.




U. E. MADEHA

JUDGE

18/01/2023

COURT: Right of appeal is explained to both parties, who is none other than Mr. Frank Chonja and Ms. Tumpale Lawrance (State Attorneys) for the Republic, the accused person and Mr. Denis Lazaro advocate holding brief for advocate Nestory Nyoni.




U. E. MADEHA

JUDGE

18/01/2023