

IN THE HIGH COURT OF TANZANIA
MUSOMA SUB-REGISTRY
AT TARIME

CRIMINAL SESSIONS CASE NO. 34 OF 2023

REPUBLIC

VERSUS

- 1. JOSHUA S/O MUGA JOSHUA**
- 2. OKOTH S/O AKUSO ALFREDY**
- 3. JANETH W/O JOSHUA MUGA**

JUDGMENT

15th& 22nd March 2024

M. L. KOMBA, J.:

The evening of 16/12/2022 twelve cows went missing at the cattle shed of Joshua Muga Joshua as were taken to pasture since morning. Joshua, the owner of 12 cattle held cattle keeper one David Tieng'o Oriema (David) liable for the loss of his cattle and on other side, Republic hold Joshua, his wife and the Hamlet leader of Centers B in Utegi village liable for the death of David. The trio accused denied the offence hence the case was prosecuted in full trial.

The first prosecution witness was ACP Michael Peter King (PW1) who is operation officer Tarime-Rorya police Region and in the year 2022 was OC-CID at Utegi Police Post and in-charge of Criminal Investigation. He testified that on 16/12/2022 during night he saw group of people went

to Utegi Police Post with local weapons while on foot but they had two motorcycles. One person dropped from motor cycle and informed police he sent two people suspected to steal his 12 cows. This witness went outside to see the said thieves. He saw David tied up with rope and he ordered to be untied. It was PW1 testimony's that David could not stand when he was untied and sat down. The second thief had wounds on his legs and were bleeding. Following the conditions of those two thieves he informed those people that police cannot accommodate those due to their conditions as they needed medical attention. He ordered PF3 to be issued and he proceeded to his other duties.

It was his further testimony that while in other duties he received a phone call from Cpl Adonious who informed him that David was died and immediately ordered Joshua Muga who was the complainant of cattle theft to be arrested and was at CRO when the news of the death of David was spread. PW1 the went to the hospital where doctor informed him that David died before he receive treatment. While he was in the hospital he ordered the second thief Evarist to be interrogated. From the interrogation this witness said Evarist mentioned Joshua, Wife of Joshua and Okoth hamlet chairman to be responsible for the death of the David. He participated in the arrest of second and third accused and all were sent to Utegi Police Post.

During cross examination he testified that there were many people who accompanied the accused of cattle stealing to police carry with them with local weapon like clubs, stick and machete and he managed to identify Joshua as he reported to CRO over the cattle stealing. Deceased had no injury except Evarist.

Doctor Judith Paul Manonga was listed as PW2 who on 17/12/2022 in the afternoon she saw Afande Pascal who requested for postmortem of David Tieng'o whose body was in Utegi Mortuary within the health centre. The body had a name tag David Tieng'o who according to doctor he was sent to Utegi Health centre while he was already dead. By physical appearance the body had marks at the neck, marks at the hands and bruises at the right ribs and feet. She informed this court that she filled post mortem report and according to her assessment the cause of death was compression at the neck which limited supply of the Oxygen.

During cross examination she testified that she don't know who is responsible for the death.

PW3 was H. 543 DC Cpl Joel who was assigned to draw sketch map of the office of the village. In performing that duty he was assisted by Evarist Mambula who was at Police station and took him to the place

where killing took place. It was in the Utegi village street office. The office was made of iron sheets and inside there was a table and a cupboard without partition. The suspects sit under the table on the floor. The drawn sketch map was admitted as exh P2.

The whole saga was investigated by Ass Insp Denis Selestine Kimanino (PW4) who in the year 2022 he was police constable. He testified that on 18/12/2022 he was instructed to investigate and was handled a case file. He noted suspects were six people who were all arrested but he not remembers the above-named accused. He then conducted interrogation to Evarist who was under treatment at Utegi health centre. Witness testified further that Evarist informed him that at night many people went to the place where he was living (Nyanduga) but he remembered Joshua, Okoth and Janeth. Those people requested him to escort them to Utegi village. Witness was further informed that after few steps like 5 steps they saw a group of people with David Tieng'o who was in bad condition. Those people started to assault Evarist asking where are the cattle. He was attacked by Joshua Okoth and Janet asking about the cattle.

It was his testimony that the two (Evarist and David) were taken to Utegi village chairman for interrogation and latter were taken to Utegi

police where PF3 was issued for treatment and both were taken to Utegi Healthy centre. He testified while at Utegi Police, David was alive but weak as he failed to stand up. According to doctor, David died on the same day 16/12/2022. Evarist identified Joshua, Okoth and Janeth but when arrested they denied to commit the offence. Investigator testified further that all accused were arrested on 17/12/2022.

During cross examination witness said David and Evarist were assaulted by a group of people. When they meet David on the road from the place Evarist was living, David was in bad condition. From the moment they took Evarist from his home they were with village chairman. He further informed this court that it was Joshua, Okoth and Janeth who took David and Evalist to Utegi Police Station.

Evarist Mabula was paraded as PW5 who testified that in the year 2022 he was a cattle keeper and was living with Alex Ounja and his family. He further testified he know David Tieng'o whom they meet at forest where they take cows to pasture although he did not know whose cows was kept by David.

PW5 proceeded that on 16/12/2022 at night (22:00 hrs) while at home they arrived five people including Joshua, wife of Joshua, Okoth and Thomas who needed witness. His elder allowed him to accompany them

as he know them. It was his testimony that after five (5) steps they started to beat him (mateke na mangumi) as they had no weapon. Then they walked up to Shirati road where he saw David who was tired and wounded while his hand was tied. David was on motorcycle and a group of people was with him. That group of people started to assault him demanding for cows. They were then taken to Utegi village office the office of the second accused Okoth and were assaulted by Joshua, his wife and Okoth. He testified further that in the office there was table and chairs and they sat under the chair on the floor while their hands were tied. While assaulted Joshua strung David at the neck at that time David was weak and was complaining of the hunger.

This witness does not end there, he testified that they were taken to Utegi police by using motorcycle, they were four people in one motorcycle. Thomas was driving, the two accused and one at the back holding the accused. Some people went to police too. While at police, Evarist informed this court that they were asked if they steal cattle and police ordered the two to be taken to hospital and few seconds David died. He was released from hospital on the following day. It was his further testimony that on 17/12/2022 he went to village office with the police where he was interrogated and put his thumb on the paper. When

they complete interrogation, he was returned to Alex home where he was before police interrogate him.

During cross examination by defence counsel this witness informed this court that people who took him from the house Alex had no weapon but the group of people which they meet latter had sticks and other weapons. Further David was in bad condition and was tied up. He clarified that he did not mention time spent while in the village office but the office was big and managed to identify activity done by every person. He further clarifies that when they were taken to hospital David was alive.

This court ruled that accused persons were implicated and they have a case to answer.

Joshua testified as DW1 who informed this court that on 16/12/2024 his cows did not return from pasture and was informed by his child that the 12 cows were missing. He went home and prove there was only two cows instead of 14 cows. When was asked about the cows, cattle keeper replied he don't know. He decided to inform village chairman of the incidence and when chairman asked David about the cows, he mentioned Evalist Mabula Yadeha. Following that information, 1st and 2nd accused decided to go to place where Evarist live. Upon introduction and

the purpose of their visit to that house, the guardian of Evarist allowed accused to take Evarist.

While on the road with Evarist, it was his testimony that they found a group a people with David who was seen to be tired by look it suggested he was beaten. That group of people started to attack Evarist. Following that attack, this witness informed this court that as a rescue, they decided to took Evarist in a motorcycle with a high speed and surrender them to Utegi police station so that he can report the cattle stealing crime. Police told him to take those two to the hospital as they were seeming to be tired after they gave him PF3. He took the suspects to Utegi Health center and were received by Dr Manonga.

After 10 minutes witness averred that David died and he decided to go to Utegi police to inform them about the death and report the cattle stealing offence and he was detained from that moment.

During cross examination he informed this court that David Tieng'o was one of the suspects of cattle stealing who was with group of people, in bad condition but he was speaking. he was employed within six months before the incidence. He confirmed to own cows which are said to be lost and the 3rd accused joined him because they jointly own cows. This witness was with his wife when they were looking for chairman so as to

inform him of the incidence. He insisted they met David and the group of people while from the house where Evarist was and he did not witness when David was assaulted.

Okoth Akoth appeared as DW2 and informed this court that on 16/12/2022 around 22:30 he received a phone call who reported a crime of cattle stealing. Being a village leader, he found was correct for the 1st accused (Joshua Muga) to inform him. When asked in details Joshua said cattle keeper has lost cows and upon asked, he said he handled cattle to Evarist. This witness decided to look for Evarist and together with the owner of the cows they went to place where Evarist live and took him. On their way along Shirati road while with Evarist they found a group of people with David Tieng'o. They stopped motorcycle, board David and sent him to Utegi Police station.

It was his testimony that it was not the first time Evarist is suspected of involved in crime within the village. At police they were given PF3 and took suspects to police and were received by Dr. Manonga. Thereafter he go to his home. At night he was wake up by police, they took him and on the way he was asked to mention people whom they were together in the incidence where David was injured and he did that.

While cross examined, DW2 informed this court that when they stop to take David, he saw Evarist was bleed in his legs but he did not saw blood before. The keys of his office is kept by Village Executive officer (Ndigo). He further confessed he did not witness when David was assaulted although he has a previous David history of being involved in cattle theft (one cow and four sheeps). He elaborated that the place they leave David to where they went for Evarist is like 500 meters. When he found David with group of people his hands were tied and he was weak. he confidently explained he did not escape after the death of David as he went to the police two times without any escort.

The last defence witness was Janeth Joshua Muga (DW3) whose testimony goes like this; she was nursing mother who delivered by operation on 20/10/2022. She is married to DW1 (Joshua Muga). On 16/12/2022 she was at home and her husband returned and confirmed there was no cows and she decided to escort his husband to look for cows. Together with her husband they went to the house where Evarist was living and started to move. She testified when they reached to tarmac road, a road to Shirati they saw a group of people with David whom she did not know his condition. They report the matter to Utegi police where they were given PF3 for the suspects to be treated and took suspects to hospital and she returned to their home.

It was her further testimony that in the following day around 10:00 am she saw their cows, some of them had rope on their neck which is the sign that something was wrong. She then saw a group of people and police who asked her to go to police for interrogation.

While cross examined by State Attorney this witness testified that when cows are going for pasturing they usually released without rope but when 12 cows returned in the following day they had ropes in their neck. He confirmed to know David Tieng'o as a cattle keeper of Joshua Muga. While on the way she managed to saw David by the light from the torch where the owner was flashing David. That make the end of testimony of witnesses.

Having gone through the evidence adduced by all witnesses, I find the pertinent issue to deal with is whether the prosecutions proved their case beyond reasonable doubt. It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution because a person is not guilty of a criminal offence because his defence is not believed, rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt. See **Galus Kitaya vs The Republic**, Criminal Appeal

No. 196 of 2015, **Joseph John Makune vs Republic** [1986] TLR 44 and **Pascal Yoya @ Maganga vs Republic**, Criminal Appeal No. 248 of 2017. In **Mohamed Haruna @ Mtupeni & Another vs Republic** (Criminal Appeal 259 of 2007) [2010] TZCA 141 (4 June 2010) the Court stated that: -

'Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.'

Accused persons herein are charged with the offence of murder contrary to section 196 of the Penal Code. In proving their case, prosecution has to prove elements of murder as said in **Philimon Jummane Agala @ J4 vs. The Republic** Criminal Appeal No. 187 of 2015, the Court of Appeal held that in murder trial, the prosecution must prove the elements of murder.

Prosecution has one eye witness who testified as PW5. PW5 testified that he was assaulted together with deceased. A person who saw when the crime is committed is an eye witness. Under the law his evidence is the best as per section 62 of the Evidence Act, Cap 6 and **Juma Makonge @ Mwansi vs Republic**, Criminal Appeal No. 128 of 2021

but, on the other side this type of evidence is crumbly and must be relied upon when all impairment has been eliminated because mistake is always done. See **Frank Joseph Sengerema vs The Republic**, Criminal Appeal No. 378 of 2015.

There is plethora of authority that provides for essential ingredients of the offence of murder. In criminal jurisprudence, in order to be victorious, the prosecution has to prove the followings elements that establish the offence of murder; **one**; There is the death of a person, **two**; The said death was caused by unlawful act or omission, **three**; It is the accused who caused the death of deceased, **four**; The accused acted with malice aforethought.

Regarding the first and second elements, it is undoubted throughout prosecution and defence evidence that **David Tieng'o** died and that his death was abnormal. Despite the fact that accused persons did not dispute the deceased death as they too testified on that, the evidence of PW2 and exhibit P1 (post-mortem examination report) proved that the deceased death was due to severe injury on neck, lack of sufficient air and marks on the right ribs. The issue to decide now is whether the deceased was murdered by accused persons at hand.

PW1 testified that he saw a group of people at police station carrying local weapons some were on foot others on motorcycle. Then 1st accused herein dropped from the motorcycle and informed police he has brought people who steal cows at his home. PW1 testified to see David at that scene who was not able to stand.

PW5 testified that he was at his home in the night of 16/12/2022 and upon being told was needed by accused persons, he agreed and escorted them, accused persons had no weapons. On their way while at Shirati road they found a group of people and David who was tied, tired and wounded. PW5 managed to saw David by using phone flash.

Prosecution witnesses PW1, PW4 and PW5 have the same story that David was with a group a people while tied, tired and wounded before he met with accused persons herein. It was night and the only source of light was a flash from the touch mobile phone. There is no detail description of the type of mobile phone and the intensity of the light bearing in mind there was a group of people and they meet on the road. Nobody observed the wounds on David body by that time.

All defence witnesses said they went and pick PW5 from his home and on their way, they saw a group of people with David. It was their testimony that David was weak, wounded and tired. The duty of the

defence is to create doubt. That David was tired and wounded before he met accused persons. See **Baruani Hassan vs Republic**, Criminal Appeal No. 580 of 2017. In **Yusuph Nchiravs The Republic**, Criminal Appeal No. 174 of 2007 (unreported) the Court stated that: -

'The appellant had only to raise doubts on his presence at the scene of crime and the prosecution had to prove its case beyond reasonable doubt. The appellants story need not be believed. He had only to raise a reasonable doubt and not to prove anything.'

It was the testimony of prosecution that after being beaten PW5 and David were taken to the chairman, they went in his office for interrogation. While in the office which he describe to be big office with many people they were beaten and he saw 1st accused attacked David on his neck. Thereafter PW5 and David were taken to Utegi police then to Health centre where after sometime David died.

I have got enough time to read and digest Exh P1. In that report doctor write she found nail mark at David neck and he lacks fresh air. It was PW5 testimony that he saw 1st accused attacking David on his neck while they were in the office of village chairman and doctor saw nail marks on the neck of deceased. Before I conclude that PW5 to be credible witness let have a look on the following prosecution testimony;

One; PW3 testified that he draws the sketch map of the scene where the killing took place but PW1, PW2, PW5 and PW4 who was investigator testified that David was alive when they were at police and PW4 and PW5 testified David was alive when they arrive to Utegi health centre.

Two; About arrest of accused person, PW1 testified that 1st accused was arrested on 16/12/2022 while at police reporting the cattle theft to the contrary, PW4 who was investigator informed this court that all accused were arrested on 17/12/2022.

Three; About involvement of the Village chairman, PW4 and PW5 testified that David and Evarist were taken to the chairman of the village for interrogation, PW4 insisted during cross examination that they went to the chairman after the attack on the road. Later on he testified David and Evarist were with the chairman all the time.

Four; PW5 was an eye witness as he assisted PW3 to make sketch map and assisted investigator (PW4) in his duties. PW3 testified that on 17/12/2022 he draw a sketch map with assistance of PW5 who was at police. On the other hand, PW4 testified that on 18/12/2022 he interrogates PW5 who was under treatment at Utegi Health Centre. In clarification he said by that timehe interrogate PW5 the sketch map was

already drawn. That being not enough, PW5 testified that on 17/12/2022 he assisted PW3 in drawing sketch map when they finish, he was taken back to the house of Alex where he was before going to assist drawing of the sketch and further he was released from hospital ward in the following day after the crime. (that is 17/12/2022). Prosecution witnesses are in variance on the location of PW5 after the crime.

Five; PW3 testified that when he went to the village office, he found the office is made of the iron sheet and there was cup board and table. His testimony is collaborated with Exh P2 which is the sketch map of the scene. To the contrary, PW5 who assisted PW3 to draw the said sketch map testified that in the office there was a table and chairs.

Accused herein are charged with offence a murder, it is considered to be a capital offence. The offence needs serious investigation for prosecution to win conviction.

I have provided summary of prosecution evidence, is there any possibility of ruling that prosecution had credential witnesses? The answer is no as inconsistencies pointed are not minor because, as presented, the witnesses relate different accounts on similar incident.

The only place where PW5 said all accused assaulted David is in the office of the village and it is where he testified to see the 1st accused attacking David on his neck. His testimony on the look of the office contradicted on whether there was a chair or table or cup board or none. If he fails to tell this court what was in the office how can this court believe on other things he testified to see while in the office. Was he really in the office of the village chairman? Court of appeal once said;

'a witness who tell a lie on a material point should hardly be believed in respect of other points.'

See **Mohamed Said vs The Republic**, Criminal Appeal No. 145 of 2017 and **Zakaria Jackson Magayo vs The Republic**, Criminal Appeal No. 411 of 2018.

In the case at hand, I find difficult to believe testimonies specifically of PW5 and PW3 as they contradicted each other on important points. This makes their testimonies to contain lying at some points and it is hard to believe them. I find the contradiction pointed is major. See **Dickson @ Shapwata vs Republic**, Criminal Appeal No. 92 of 2007 (unreported) and **Francis s/o Siza Rwambo vs Republic**, Criminal Appeal No. 17 of 2019. PW5 does not met the test of being a truthful witness.^{1st} accused was at police premisses when he was told to be under arrest, he went to inform police officers about the murder. Witnesses said David

and his fellow culprit were taken to village chairman while Evarist was with chairman since he was taken from his home. Actually, it was chairman who took him from his home. This court wonders to whom he was surrendered for interrogation before taken to Utegi police post.

As already pointed variance and contradictions, they brand the prosecution evidence with lies and it is not safe to rely on as they create doubt. Prosecution evidence leaves doubts for other inferences to be drawn. I find David was already injured by the time he met Evarist and accused person. The possibility of another person apart from accused persons to have been the one who assault deceased is eminent. The doubts always are decided in favour of accused persons. See **Hugo George Jimson vs DPP**, Criminal Appeal No. 144 of 2018, **DPP vs Stephen Gerald Sipuka**, Criminal Appeal No. 373 of 2019, **Hilda Innocent vs Republic**, Criminal Appeal No. 288 of 2019 and **Republic vs Mashimba Silingi**, Criminal Sessions Case 33 of 2022 and **Vitalis Sindano & 7 Others vs The Republic**, Criminal Appeal No. 61 of 2023. This being a criminal case the standard of proof is beyond reasonable doubt. See **Mohamed Haruna @ Mtupeni & Another vs Republic (supra)**.

In the circumstances, with much respect, I hold that, in totality, the prosecution did not prove the case against accused persons beyond reasonable doubt.

Eventually, I find **JOSHUA S/O MUGA JOSHUA, OKOTH S/O AKUSO ALFREDY and JANETH W/O JOSHUA MUGA** not guilty and I acquit them all of the offence of murder contrary to section 196 and 197 of the Penal Code [CAP 16 R.E 2022]. I order accused persons to be released from custody unless each of one is lawfully held.



NK
M. L. KOMBA
Judge
22nd March, 2024

Right of appeal is fully explained.

NK
M. L. KOMBA
Judge
22th March, 2024