

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MBEYA SUB - REGISTRY)**

AT MBEYA

CRIMINAL SESSIONS CASE NO. 155 OF 2022

THE REPUBLIC

VERSUS

- 1. DOTTO S/O WISTON**
- 2. ALEX S/O KRISANT**
- 3. MICHAEL S/O RAMADHANI**

JUDGMENT

6th & 27th May, 2024

POMO, J.

The accused persons, DOTTO S/O WISTON, ALEX KRISTANT and MICHAEL S/O RAMADHAN, stand arraigned before this court facing the information of murder contrary to section 196 of the Penal Code Cap 16, [R. E.2022]. They are accused of jointly murdering DOMINICK S/O STEPHEN on the 8th day of March, 2019 at Kilalmbo village within the district of Mbarali in Mbeya region. On 5th April, 2023 when this case came for plea taking, all the accused persons pleaded not guilty to the offence. Following the denial, the

republic fronted eight witnesses and tendered 3 exhibits in proving the offence.

On defence side, the accused persons testified themselves without calling any other witness and tendered two exhibits.

Tarsis Claud Mawala (PW1) a farmer and livestock keeper at Usangu Ranch Block No.13 the ranch which is found in Mapala and udingilwa villages within Mbarali district in Mbeya region was the first witness to testify. He testified that, had two herdsmen, Dominick Stephano (the deceased) and Daniel Mipata. On 8/03/2019 evening while he was in Mbeya township repairing his motor vehicle, received a phone call from Daniel Mipata telling him that from the grazing area, goats were returning to the kraal from the grazing area in small groups in absent of the herdsman. He ordered him to go from where the goats were coming from to find out what was wrong. At a distance of about 200 meters, Daniel saw his fellow herdsman was being beaten by three people. Seeing that, he ran back to the camp and phoned PW1 on that and together with his fellows residing at the camp went to the scene, only to find Dominic Stephano was already killed and the assailants had gone. That, Daniel managed to identified one of the assailants, the 3rd accused. PW1 physically reported the incident to Igurusi police post on the

very date. On 9/03/2019 morning, PW1 recorded his statement at Igurusi police post who then with three police and a doctor went to the scene of crime and met Dominick Stephano already died laid under the tree. That, the deceased's head and face were swollen and the doctor confirmed his death to be a result of being attacked in his head, face, mouth and shoulders. Having examined the body, allowed them take it for burial services.

On 12/04/2019 around 07:00 PM the village chairman of Kilambo village (PW2) phoned PW1 to go with the car to take the suspects to Igurusi police station. PW1 went to the chairman and met many people gathered and the accused were under arrest. He was told were the ones who committed the offence and have confessed. PW1 wanted to satisfy himself on this. He asked the chairman to ask them on the confession in front of him, in reply one of the accused denied but his fellow said he was with them in the commission of the offence. They then took them to Igurusi police post.

Cross – examined, PW1 stated that Daniel didn't know the 3rd accused by his name but identified him through his appearance. That, during the incident PW1 goats were stolen and were never found in the hands of the accused persons. That, it is the 2nd accused who refused to admit commission of the offence.

Moshi Sadili Ambali (PW2) is the then village chairman of Kilambo village during 2019. On 08/03/2019 received a phone call from Hamis Malipula who works at NARCO telling him about the goats which were returning in instalments from grazing area without a herdsman. This Hamis Malipula is a company mechanical technician at NARCO. Again, after half an hour told him the herdsman has died. PW2 went to the scene of crime and saw the deceased lying. He phoned Igurusi police post to report the matter who then on 09/03/2019 arrived at the crime scene and examined the body.

On 12/03/2019 PW2 received a phone call from a village council member telling him that the assailants of the deceased might be their village residents. Asked how came to know that, replied that during noon they were arrested having their uncle's motorbike and were seen worried of something and when asked if had stolen that motorbike, said no. Heard that, PW2 went to the ten-cell leader and after that took the 1st and 2nd accused persons to his office for interrogation about the killing of Dominick Stephano. Again, went to arrest the 3rd accused. Interrogated, the 2nd accused denied the offence but his fellow co-accused mentioned him as their fellow in commission of that offence. The 1st and 3rd accused admitted to the killing of the deceased. After that, took them to the Iugurusi police post.

Cross – examined, PW2 mentioned one Hadija Daudi Malenje who is the village council member to be a person who told him that the accused persons were the suspected assailants of the deceased. Although admitted to be family related to the 1st and 3rd accused, PW2 denied existence of a farm land conflicts between him and the 1st accused's father. Also, testified that Wiston, Hadija and the 1st accused are related.

SSP Masudi Kwileka (PW3) is the then head of criminal investigation of Rujewa police station. On 9/03/2019 was notified by inspector Mwaipopo of Igurusi post of this murder incident. Together with other police and a medical doctor went to the scene of crime and inspected it. Found the body was injured in the head and nose area by being hit with a blunt object. The doctor told them that his examination of the body revealed the deceased's death was due to excessive bleeding due to multiple injuries out of the beatings.

Again, on 13/04/2019 inspector Mwaipopo the OCS of Igurusi police post reported to him on arrest of the assailants, the accused herein. PW3 ordered them be brought to Rujewa police station and it was so done. On 16/04/2019 PW3 ordered D/CPL Didas to take the 1st

accused to the justice of peace for confession and was informed he confessed.

Matrida Mathias Ilumba (PW4) is a medical in charge of Igurusi Health Center who on 9/03/2019 examined the body of the deceased at Kilambo village. She testified that; at the scene the body was laid down in the bush. Her examination revealed the body of the deceased had severe injuries in his head, mouth and nose which were a result of being beaten by a blunt object. In proof of death and the cause of it, PW4 tendered a Report on Postmortem Examination which is admitted in court as **exhibit PE1**.

Khadija Masudi Chusi (PW5), is a justice of peace who on 16/04/2019 recorded the 1st accused's extra judicial statement. On the strength of the objections raised against its admission, this court declared it inadmissible it being not voluntarily obtained from the said 1st accused hence rejecting its admission.

E7769 D/SGT Shaban (PW6) is the police who on 13/04/2019 recorded the cautioned statement of the 3rd accused which is admitted by this court as **exhibit PE2**. PW6 testified that the accused admitted committing the incident of killing the deceased on 8/03/2019 together with

his fellow co-accused and thereafter stolen the goats then grazed by the deceased at NARCO.

Nickas Theodory Tarimo (PW7) is a retired police officer who on 13/04/2019 recorded the 1st accused's cautioned statement. The admission of which as exhibit was on 3/05/2024 refused by this court having upheld the objection that it was not voluntarily obtained from him. The same position obtains in the cautioned statement of the 2nd accused which was recorded on 13/04/2019 by **E4210 D/SGT Gosbert (PW8)** which on 6/5/2024 was declared by this court to have been involuntarily obtained from him. This brings to end of the prosecution evidence

In defence, **Dotto Wiston Malanje** who is the 1st accused testified as DW1. His testimonies go thus. On 8/03/2019 he was at home at Kilambo village in Mbarali district. Took his uncle's motorbike and went with it to fetch water. He met Moshi Ambali, Juma Mwandawala and Shida Mwandawala who told him that he was required at Kilambo village office. He went to that office and was told to have stolen his uncle's motorbike. He told them to have not stolen it but took it. They started beating him. Later his uncle came and said had not stolen the motorbike as he always come to pick it. The matter was settled although they were ordered to pay fine.

On 12/04/2019 around 9:00 PM night time, DW1 was arrested at his home by Moshi Ambali (PW2) the chairman of Kilambo village. Met him at home asleep. He was told his arrest was because he had failed to catch his father as they had farms land conflict with him. Took him to the village office, only to be told was involved in killing Dominic Stefano the deceased. Denied the offence which resulted into being beaten. Thereafter, was taken to Igurusi police post.

He testified further that on 13/04/2019 while at the police post, in forcing him to admit killing of the deceased, he was tortured to the extent of sustaining bodily injuries he came to be treated them at Ruanda remand prison. In proof of that he tendered a medical chit for his treatment which is admitted by this court as **exhibit DE1**

DW1 denied to have told PW7 that he was involved in killing the deceased asserting that what PW7 testified that on 12/04/2019 DW1 with co-accused went to kill the deceased is not true. DW1 denied his grandmother one Hadija Daudi Malanje to have mentioned him to PW2 as the assailant of the deceased together with the co-accused. If so, would have been brought in court to give evidence. Also, denied selling the allegedly stolen goats out of the committed crime to Mr. Waziri Jeremia.

That, if it was true, the said Waziri Jeremia could have been brought in court to testify to that effect.

Alex Chrissant (DW2) is the 2nd accused whose evidence can be narrated thus. He is a motorbike fixer as well a peasant at Kilambo village in Mbarali district. On 8/03/2019 did go for weeding his rice farm at Dodoma hamlet within the village of Kilambo and during noon returned to proceed with his daily routine of fixing motorbikes.

On 12/04/2019 he attended the 1st accused by fixing a rear tire of motorbike he had come with and was paid TZS 5,000/- for the work by him. Fixed it, the 1st accused went away. Later, the 1st accused's uncle one Sigawa Sagatangu passed by complaining about his motorbike which had gone missing. DW2 told him it is with the 1st accused and together with him did go for searching the 1st accused. At Mtama hamlet, they met the 1st accused's relatives and the said Sigawa asked them if had seen the 1st accused with his motorbike, they replied, yes. It marked the end of finding the 1st accused.

After that, DW2 went to Igalako village for his personal businesses. On the way returning back, met seven people who told him that he was needed before the village executive officer's office and with them did go to

that office. At the office, he met many people and was told to enter inside it. In it, he found the village chairman (PW2), the village security guard chairman one Shida Mwandawala and the village executive officer.

DW2 was asked by them the whereabouts of the very motorbike and his reply was it is with the 1st accused. They didn't understand him and beat him instead. He came into rescue when the 1st accused's uncle arrived and told them that his motorbike is with the 1st accused. Thereafter the 1st and 3rd accused were brought to where he was. The 1st accused's uncle questioned the village authority on such arrest of the accused persons while he had not reported any theft incident of his motorbike. PW2 responded by saying the 1st accused's clan are very despised. Then DW2 heard the 1st accused's uncle saying why not resolving your misunderstanding. The village executive officer (VEO) then ruled the office was being disturbed and thus fined Sigawa to pay TZS 70,000/- and paid it. They were then released and DW2 went back home at Dodoma hamlet.

Around 9:00 PM night time the village chairman (PW2) in a company of the hamlet chairman arrested DW2 saying he is facing a murder case. Again, he was taken to the village office and met the 1st accused tied with a rope. Later the 3rd accused was brought too. DW2 was told to have been involved in the

killing of one Dominick Stephen. The 1st and 3rd accused were also accused of the same offence. Thereafter the village chairman took them to his home and they were beaten by many people forcing them to admit the killing.

Later came Mawalla (PW1) with a car for taking them to Igurusi police post. PW1 asked the village chairman (PW2) saying, the person killed was my livestock keeper, are these the persons who killed him? I am asking, to find out if you have not caught wrong persons. PW2 replied, if these people have managed to steal the motorbike, how can they fail to kill a person? These are the ones who killed him. Thereafter were taken to Igurusi police post and arrived there at midnight.

Morning of 13/04/2019 DW2 was taken out of police lockup and tortured in order to admit his participation in killing of the deceased. He sustained injuries of which he came to be treated at Ruanda remand prison and tendered in court a medical chit for the said treatment which is admitted in court as exhibit DE2.

DW2 denied to have killed the deceased and giving a statement before the police therefore PW8 assertion that DW2 admitted before him the killing is not true.

Michael Ramadhan (DW3) is the 3rd accused and last witness. His testimonies are more less the same to what DW1 and DW2 stated. On 08/03/2019 he was made a co-accused to the motorbike theft with the co-accused persons herein. Again, on 12/04/2019 was joined with the co-accused herein accused of being involved in murdering one Dominick Stephen. Denied the offence and testified that at Igurusi police post was on 13/04/2019 tortured by police called Shaban who cut a piece of his right-hand side ear leading to bleeding. He denies one Daniel Mipata the herdsman of the PW1 to have seen him at the scene of crime beating to death the deceased. DW3 questions that if real did so him was to be brought in court to testify, of which has not been so.

Cross-examined, DW3 stated that he was framed this case because in the previous case of motorbike, was the co-accused in the same manner herein. This marked the end of defence evidence

Both sides applied and were granted leave of filing their respective final submissions. All complied the order and I am thankful to them for their industrious reached submissions. I will consider them in determining the case

Having gone through the information of murder laid down against the accused persons as well both sides' adduced evidence for and against it, the

issue for determination is whether the instant information of murder against the accused persons is proved to the required hilt.

The offence of murder is provided under section 196 of the Penal Code, [Cap. 16 Revised Edition, 2022] (the Penal Code). It reads thus: -

"S.196. - Any person who, with malice aforethought, causes death of another person by an unlawful act or omission is guilty of murder."

Therefore, what is to be proved by the prosecution are, **one**, occurrence of a death of a person which death had to be unnatural; **two**, that the accused persons are responsible in the commission of unlawful act resulting into the death of that persons. And **lastly**, in the cause of commission of the unlawful act, they acted with malice aforethought.

As regards the first component, Dominick S/O Stephano, on 8th day of March, 2018 died unnatural death as undisputedly exhibited by the Report on Postmortem Examination (Exhibit PE1) tendered in court by Dr. Matrida Mathias Ilumba (PW3). The same indicates the deceased's death was due to severe bleeding after sustaining severe head injury and cut wounds at the mouth and nose showing a sharp instrument was inflicted to him. Also, Kilambo village chairman (PW1) and Tarsie Mawala (PW2) the then employer

of the deceased witnessed the deceased's body being examination by the doctor.

Next is, who are the deceased's assailants? Are they the accused herein? Under this, the prosecution had a duty to link the accused persons as the assailants of the deceased. In **Ami Omary @ Senga and 3 Others versus Republic**, Criminal Appeal No. 233 of 2013 CAT at Tabora (unreported), the court of appeal, at page 11, had this to state: -

*"While we are on this point, we wish to state that **it is trite law that on a charge of murder the onus is always on the prosecution to prove not only the death but also the link between the death and the accused**".*

[Also see: **Inspector Baraka Hongoli and 2 Others versus Republic**, Criminal Appeal No. 238 of 2014 CAT at Tabora (unreported); **Mohamed Said Matula versus R** [1995] TLR 2 and **Daimon Malekela @ Maunganya versus Republic**, Criminal Appeal No. 205 of 2005 CAT]

From the adduced evidence, what links the accused persons to commission of the incident? Vividly, there is no eye witness to the commission of the incident was ever led in evidence. On the fateful date, the only eye witness allegedly to had seen the assailants attacking the deceased

is Daniel Mipata who is mentioned by Tarsis Mawala (PW1) in his testimonies, as his herdsman. PW1 testified that Daniel Mipata during the commission of the incident, did managed to identify the 3rd accused herein among the assailants. This Daniel Mipata, who could be an eye witness was not called in court to testify hence PW1's evidence that Daniel Mipata saw the 3rd accused committing the offence remains to be a hearsay thus incapable of establishing any link that the accused herein are the assailants of the deceased on the fateful date.

The other person is Hadija Daudi Malenje who is the village council member of Kilambo village. She suspected the accused persons as the culprits having seem them in a worry state. **Moshi Sadili Ambali (PW2)** the village chairman of Kilambo village testified before this court that he arrested the accused after being told by Hadija Daudi Malenje that had seen them in a worry state on **12/03/2019** at the time they were called at the village office for the allegedly lost motorbike suspecting them to have stolen it. Therefore, might be the assailants of the deceased and PW2 acted on that information and arrested them. This entails that Hadija Daudi Malenje did not see the accused committing the incident of killing the deceased. She only linked them with the incident out of her suspicion. She was never called in

court to testify on this. As long she didn't testify here in court, be it true or not that she suspected the accused persons to be the culprits as PW2 has testified, the truth of the assertion is left with her and undisclosed to the court.

Therefore, out of the said suspicion by Hadija Daudi Malenje against the accused, they are linked to the commission of the incident. It is a settled law that mere suspicion, regardless of its gravity, cannot serve as the basis for a conviction in a criminal trial. See: **Masota S/O Jumanne versus Republic**, Criminal Appeal No. 137 of 2016 CAT at Tabora and **MT. 60330 PTE Nassoro Mohamed Ally vs. Republic**, Criminal Appeal No. 73 of 2022 CAT (both Unreported). For instance, in the latter, at page 12, the Court of Appeal had this to state: -

"In our view, the case against appellant was based on suspicion which cannot be a substitute of proof in court. Suspicion, however grave, is not a basis for conviction in criminal trials."

[Aaslo see: **MT 60330 PTE Nassoro Mohamed Ally versus Republic**, Criminal Appeal No. 73 of 2002]

That apart, there is nothing linking the accused persons to the commission of the fateful incident save the 3rd accused's cautioned statement (Exhibit PE2). This confession statement was retracted by the accused hence needs corroborations before being acted upon by the court. The corroborating evidence comes from PW1 the village chairman and PW2 the livestock keeper who lost his herdsman, the deceased in the incident.

PW1 testimonies is that the accused confessed before him. But Hadija Malenje (who reported to him the suspicion she had against the accused persons); the 1st and 3rd accused; these are relatives. During cross-examination of PW1 as well in accused's defence, the issue of grudges is said to exist between them due to family farm land conflicts existing between PW1 and the 1st and 3rd accused's father. No any other independent witness apart from those closely related to the accused ever came to testify on the alleged confession at the village level. PW2's testimonies that they confessed, was when the accused were under arrest before a group of villagers preparing to take them to Igurusi police post. The mode taken by PW2 in finding out confessions of the accused to commission of the incident was to require the arrester, the village chairman (PW1) to ask them if they

do confess. In my view, this is not an independent confession which can be separated from that allegedly done before the village chairman (PW1).

The republic is of the argument, in their final submission, that as long the accused gave oral confession before PW1 and PW2 to have murdered the deceased, thus are guilty of the offence and in supporting that stance cited the case of **Chamurigo Kerenge @ Chamuriho Julias versus Republic**, Criminal Appeal No. 597 of 2017 CAT at Mwanza (unreported) at page 21, the court of appeal held thus: -

*"It is settled that an oral confession of guilty made by a suspect before or **in presence of a reliable witnesses**, be they civilian or not, maybe sufficient by itself to ground conviction against the suspect."*

The cited case is distinguishable to the scenario at hand hence misapplied. As said in that decision, witnesses have to be reliable which is not the case here where they are in grudges with the accused hence with his interest to serve. Also, reading that case as a whole, the court of appeal acted on such oral confession having satisfied itself on the following: **one**, oral confession by the accused led to the discovery/retrieving weapons used in commission of the incident so as to build its reliability. Here, nothing is said if there is anything ever retrieved out of such confession in connection

to the killing of the deceased. And **two**, absence of allegations of grudges between the accused and to those before whom he confesses, but here the same do exist. Therefore, in my considered view, the oral confession allegedly made by the accused persons to PW1 and PW2 do not have probative value to corroborate the cautioned statement of the 3rd accused linking them with the commission of the offence

Following the above, I find the offence of murder unproved against all the accused persons and hold that they are not guilty of the offence. consequently, I hereby acquit them of the offence and order for their immediate released unless are held for other lawful cause. It is so ordered.

Right of Appeal explained



DATED at MBEYA this 27th day of May, 2024

167.
MUSA K. POMO
JUDGE
27/05/2024

Judgment delivered in presence of Ms. Anastazia Elias, learned state attorney for the republic and all the accused represented by Mr. Samson Suwi, learned defence counsel

167.
MUSA K. POMO
JUDGE
27/05/2024