

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MBEYA SUB - REGISTRY)**

**AT MBEYA**

**CRIMINAL SESSIONS CASE NO. 162 OF 2022**

**THE REPUBLIC**

**VERSUS**

- 1. ADES S/O AMBONISYE MWAKISAMBWE**
- 2. LUSAJO S/O AMBONISYE MWAKISAMBWE**
- 3. JUMA S/O AMBONISYE MWAKISAMBWE**

**JUDGMENT**

*8<sup>th</sup> & 23<sup>rd</sup> May, 2024*

**POMO, J.**

The accused persons herein, ADES S/O AMONISYE MWAKISAMBWE; LUSAJO S/O AMBONISYE MWAKISAMBWE and JUMA S/O AMBONISYE MWAKISAMBWE stand arraigned before this court facing the information of murder. They are accused of murdering their father, Ambonisye Mwakisambwe, on the night of 22<sup>nd</sup> May, 2020 at Lubanda village within Tukuyu district in Mbeya region. They pleaded not guilty to the offence, as such trial ensued. In proving the offence, the republic fronted 9 witnesses

to testify in court as well tendered four exhibits. The evidence by both sides can be narrated as follows: -

**Bahati Ambonisye Mwakisambwe (PW1)** is a daughter of the deceased residing at Ngubate hamlet in Tukuyu District. Testifying, she stated that on 22/05/2020 was informed of the death of her father, Ambonisye Mwakisambwe. Went to her father's home which is Lubanda village where she met many people already gathered mourning. Shortly, saw many people coming beating the 3<sup>rd</sup> accused asking him how their father died and was responding by saying we are the one who killed him.

**Wema Ambonisye Mwakibibi (PW2)** is a village chairman of Lubanda village in Tukuyu district in which the deceased resided. Testifying, he stated that on 21/05/2020 received a phone call from Nekta Mwasango (PW3) informing him about people from his village who had approached him in need of selling to him a cow mentioning their first names as Ades and Juma. PW2 told him that no one is allowed to transport cattle outside the village without a permit issued by the village. Nevertheless, on the next day, without obtaining a permit, they took for sale a cow to PW3. PW3 phoned PW2 who wanted him to let him talk to the sellers. He talked to them and was told they had a sick person whom they wanted to take to Malawi for

treatment. PW2 mentioned the seller he talked to as the 3<sup>rd</sup> accused. PW2 allowed Nekta (PW3) to buy the cow and required him to take them photo with the cow and also at the time of handing them the purchase money.

PW2 met one Mwalyose the neighbour to the father of the accused persons. Asked him who was sick in the accused persons' family, replied that all were fine. PW2 told him about selling of a cow done by the accused so as to get money for treating a sick person within their family. He told him that he was to pass by at home and let him know. That, Mwalyose met the accused's mother and the 3<sup>rd</sup> accused and asked them if had a sick person but he was told no one who was sick. The response by the family member made PW2 be suspicious. He asked Mr. Mwalyose to find out Ambonisye Mwakisambwe so that he can talk to him but was told he was not around. His effort to trace the whereabouts of Ambonisye Mwakisambwe proved failure to him. Following that, PW2 asked Mr. Mwalyose to give his phone to the 3<sup>rd</sup> accused in order to talk to him about Ambonisye Mwakisambwe, but replied had run away when heard PW2 was talking to Mr. Mwalyose.

From there PW2 didn't waste his time. He took militiamen in search of the 3<sup>rd</sup> accused as had sensed there must be something which was not normal. Together with other villagers, searched for the 3<sup>rd</sup> accused. Some

went on the southern side and others to the north side of the house of Mr. Ambonisye Mwakisambwe. Seeing that, the 3<sup>rd</sup> accused ran to the river bank. He was chased but before they could catch him, he started apologizing saying it is not me, it is not me but Ades is responsible. They asked him what Ades had done and replied are the ones who have committed the offence. They thought the offence which the 3<sup>rd</sup> accused meant was that of selling a cow. Took him home to Ambonisye Mwakisambwe. There, met his mother seated outside. They asked the 3<sup>rd</sup> accused Juma as to why did he run away from them? Replied, was going to inform his sister residing at a neighbouring village. Again, asked him what information was he taking there? He didn't reply and remained in a puzzle. A woman talked to him in a local language that tell them you went there to inform your sister the death of your father who was inside the house. They asked the 3<sup>rd</sup> accused, is it true you father is dead? Replies, it is true. Again, asked when? Replied, since last night. He took them inside the house where the body of the deceased was.

After that, took the 3<sup>rd</sup> accused's mother outside and asked if she was aware of the death of her husband. She replied, yes. Again, asked when her husband started being sick, her answer was he had fever. Her sister-in-law one Sophia intervened saying, "it is just yesterday I was with my brother,

you have killed him". Asked her again, on her failure to report the incident, replied, if she could have reported, would have been killed too. She told them that she was threatened by the accused persons who are her sons.

Then they entered inside the house and found Ambonisye Mwakisambwe dead laid on the bed covered with a khanga on his chest. By then the 3<sup>rd</sup> accused was outside under custody of the militiamen.

After that, PW2 reported the matter to Tukuyu police station. While awaiting the police to come, PW2 continued making inquiry from the 3<sup>rd</sup> accused and his mother on the cause of death and was told there is complaint that the deceased was a witch and had a long-standing dispute on that to the extent of banning the 1<sup>st</sup> accused from coming to the deceased's home. PW2 turned to the 3<sup>rd</sup> accused and asked him the money out of the cow they sold for treating the sick person. He told him that he was only given a little money as fare from Ushirika area and his fellow didn't return. He said, they went to Uyole and will be back after announcing mourning of the death and had a plan to announce it when night time starts. The 3<sup>rd</sup> accused said, after killing their father is when they unfolded the cow and went selling it at Ushirika in the morning.

The police came around 7:00 PM together with a medical doctor. Examined the deceased's body in presence of PW2 and found that he was strangled his neck.

**Nekta Wilson Mwaisango (PW3)** testified that. He owns a meat butchery at Ushirika area in Mpuguso village in Tukuyu district. He is a buyer of a cow sold to him on 22/05/2020 by the accused persons who had taken it to him from Lubanda village without a village authority permit. Before he could buy that cow, PW3 communicated with Lubanda village chairman (PW2) to that effect. PW2 having talked to the sellers, the accused persons, assured PW3 that the sellers are good persons and allowed him to buy it. Also, stated that PW2 required him to take them a photo with a cow and at a time of paying them. PW3 bought the cow at a price of TZS 260,000/- and took them photo in the manner he was asked to do.

Later in the evening of that date, PW3 received a phone call from the village chairman (PW2) apologizing for proving to him something which was wrong, saying, the persons he had told him that are trustful have put him into shame. That, have killed their father and then stolen the cow sold to him so that they can get fare for escaping. Such news shocked PW3 and reported the matter to Tukuyu police station then returned back the cow

**Fadhil Charles Mboya (PW4)** is a villager who together with PW2 and the militiamen searched the 3<sup>rd</sup> accused. Corroborated the testimonies adduced by PW2 on the aspect of searching the 3<sup>rd</sup> accused and what transpired thereafter regarding the death of Ambonisye Mwakisambwe

**Angela Ambonisye (PW5)** is a daughter of the deceased aged 19 years on the date of giving her evidence here in court. Testifying, she stated that on 22/05/2020 she was at home in Lubanda village with her mother. During night, she slept together with her mother in the seating room while her father, the deceased, slept in the bedroom. Asleep, did hear her father screaming for her help. Early in the morning she reported the matter to her uncle one Lwaga and together went back home and met her mother crying. Many people had gathered and saw her brother Juma, the 3<sup>rd</sup> accused, arrested by the villagers and didn't know the whereabouts of the 1<sup>st</sup> and 2<sup>nd</sup> accused who are also her brothers

Cross examined by Ms. Gladness, PW5 stated didn't see the accused persons killing her father, the deceased, neither did she see them breaking his bedroom.

**H840 D/CPL Ibrahim (PW6)** is police who investigated this case. He testified that on 22/05/2020 was notified of this incident by the head of

criminal investigation (OC - CID) of Tukuyu police station. Together with him; other police and a medical doctor went to the crime scene the residence of the deceased at Nyamisi hamlet in Lubanda village within Tukuyu district. There, met many villagers gathered and the village chairman (PW2) received them. The OC CID interviewed the 3<sup>rd</sup> accused who was under arrest by PW2 and admitted killing the deceased in cooperation of his other two fellows, the 1<sup>st</sup> and 2<sup>nd</sup> accused herein. Then they were shown the body of the deceased where it was laid in the bedroom covered with a bedsheet. That, the doctor examined the body and it was revealed that the death was due to his neck strangulation. PW6 drew the sketch plan of the scene which is admitted in court as **exhibit PE1**. After that, they took the 3<sup>rd</sup> accused and his mother to Tukuyu police station.

On 23/05/2020 PW6 was assigned an investigatory role of this matter. He was handed a police case file. It had in it the cautioned statements of the 3<sup>rd</sup> accused and his mother and report on postmortem examination of the deceased body. Having read the 3<sup>rd</sup> accused's cautioned statement, he discovered that had admitted killing the deceased in cooperation with his young brothers residing at Rujewa in Mbarali district. This information led into arrest of the 1<sup>st</sup> and 2<sup>nd</sup> accused on 4/6/2020 and 8/06/2020 respectively



at Rujewa in mbarali district. Thereafter, he received the cautioned statements of the 1<sup>st</sup> and 2<sup>nd</sup> accused.

Having completed the investigation, PW6 forwarded the case file to the National Prosecution Services (NPS) who in turn discharged the accused persons' mother who since then is untraceable. Also, PW6 tendered Reported on Postmortem examination which is admitted in this court as **exhibit PE2**.

**G220 D/CPL Alex (PW7)** is the police officer, among others, who on 22/05/2020 together with PW6 did go to the crime scene at Lubanda village. Apart from narrating what they saw and done at the scene as testified by PW6; he recorded the cautioned statement of the 3<sup>rd</sup> accused of which this court rejected its admission as exhibit on a reason that the 3<sup>rd</sup> accused being a person who lost all his fingers and toes due to leprosy disease could not sign it by a thumber he doesn't possess.

**H1351 D/CPL Elimokozi (PW8)** is police who on 8/06/2020 at Rujewa police station recorded the 1<sup>st</sup> accused's cautioned statement. He tendered it and was admitted as **exhibit PE3**. PW8 testified that the 1<sup>st</sup> accused admitted killing his father one Ambonisye Mwakisambwe on the 22/05/2020.

Lastly is **G9928 D/CPL Didas (PW9)**. He is police who recorded the 2<sup>nd</sup> accused's cautioned statement on 4<sup>th</sup> May, 2020. He tendered it and was admitted by the court as **Exhibit PE4**. PW9 testified that the 2<sup>nd</sup> accused admitted participating in killing his father in a cooperation with his two relatives, the co – accused persons herein. This marked the end of prosecution case.

Defending, **Ades S/O Ambonisye Mwakisambwe**, the 1<sup>st</sup> accused adduced his evidence as DW1. He testified that on 20<sup>th</sup> to 21<sup>st</sup> May, 2020 was at Rujewa in Mbarali district where he resides since 2014. Denied to know anything about the killing of Ambonisye Mwakisambwe and never committed the offence of killing him. He came to know the death upon his arrest by the police on 8/06/2020 as the deceased lived in Tukuyu while DW1 lives at Rujewa in Mbarali district. DW1 denied to have admitted killing the deceased saying has never given any statement before the police. Agreed with what Angela (PW5) testified in court that she didn't see him committing the offence as he lives at Rujewa far from the scene of crime.

That, as PW2 and PW3 who testified in court that took them photo while selling a cow, DW1 stated that such testimony is not true, because he

had never owned a cow. Also doesn't know if the deceased had ever been a cattle keeper.

**Lusajo Ambonisye Mwakisambwe (DW2)** is the 2<sup>nd</sup> accused. He testified that he knows nothing about the offence he is charged with. He lives at Rujewa in mbarali district too since 2016 and came to know the death of the deceased on his arrest on 4/06/2020 by the police who then told him about that death.

As to Didas (PW9) who testified that DW2 admitted killing of the deceased in the cautioned statement, he testified that it is not true asserting to have not recorded any statement before the police. That, Wema (PW2) testimonies that DW2 and his co-accused who are his brothers participated in killing the deceased, he stated that is not true. That, on 22/05/2022 allegedly the deceased was strangled, said he was at Rujewa in Mbarali district while the deceased lives in Lubanda village in Tukuyu district.

As to Nekta (PW3) who testified that on 22/05/2020 took them a photo he said is not true, as on that date he was not at Tukuyu rather at Rujewa. DW2 agreed with what Angela (PW5) who testified that she was at the scene of crime on the date of incident and that she didn't see him. That he was at Rujewa on that date. That, this is what was as well testified by Bahati (PW1).

**Juma Ambonisye Mwakisambwe (DW3)** is the last defence witness. Testified that before his arrest to this incidence, was living in Tukuyu at Lubanda village at Inyamisi hamlet. Being a disabled person, had no activity to be engaged in instead his life depended solely on his father Ambanosye Mwakisambwe. Had a separate house at his father's residence in which he lived. Lived with his father, mother Aida Makwao and his sister called Bahati Ambonisye mwakisambwe (PW1). He owned no property and lived alone in his own house but eating food to his father. Had no wife.

On 21<sup>st</sup> & 22<sup>nd</sup> May, 2020 he was at home in Lubanda village at Inyamisi hamlet. On 22/05/2020 morning, Angela (PW5) went to him at his house who informed him that their father has died. He went to his father's living house and met his mother crying. Asked her why was she crying; replied to him about his father's death, Ambonisye Mwakisambwe. He entered inside to see his father and met him laid on the bed. He was informed his father had passed away since last night. He sent his younger sister one Angela (PW5) to report the incident to Luhaga Mwakisambwe who is the brother to the deceased and on his side went reporting it to his sister one Bahati Ambonisye Mwakisambwe (PW1) whom he didn't meet at her home rather her husband whose name is Mika. Told him on the death of

their father and returned home. At home, he met his uncle Luhaga Mwakisambwe already arrived at the crime scene and one Matija. His mother was inside and Angela (PW5).

They started informing neighbours on the death of their father and thereafter continued staying mourning at home. Later, number of people increased and the graveyard was dug for burial of the deceased. The village chairman called Wema Mwakibibi (PW2) came in a company of other people from Lubanda village. Having asked about the death of Ambanisye Mwakisambwe, he asked Luhagwa Mwakisambwe, his uncle. The village chairman was wondering that DW3's father is dead. His uncle asked as to why had he not heard him saying to be sick. He was replied that he was sick for about three days then. He had stomach diarrhea. And that reply come from the deceased's wife, DW3 said.

Later, DW3 and his mother were put under arrest by the village chairman and around 07:00 PM evening the police came. The police entered inside the house leaving DW3 outside. Thereafter recorded the statements of Sofia Mwakisambwe, Bahati mwakisambwe (PW1) and Angela Mwakisambwe (PW5) about the death of their father. They took the statement of Wema Mwakibibi (PW2) as well. They were recorded their

statement while DW3 was at the crime scene and none stated as to who killed Ambonisye Mwakisambwe.

He testified further that, Ibrahim (PW6) interrogated him at the crime scene and told him they were wondering on the death of their father. Having completed their duties, took them to Tukuyu police station. He was beaten, kicked and slapped by the police in the police car so as to tell them the cause of death, asking was he real sick or what? Despites such beatings, he didn't tell them anything. They arrived at Tukuyu police station at night and were taken into police lockup where they stayed for three days

DW3 stated that what Wema (PW2) testified that he ran away when he talked to one Mwalyosi, is not true. Also, stated it is not true that he ran away from him when he was with other people, upon seeing him. That, what Nekta (PW3) said, that DW3 and the co-accused are the culprits in killing their father, the deceased, are not true. Also said, it is not true on what PW3 said that they sold him a cow and took them photo. He concluded by testifying that he knows nothing about the death of Ambonisye Mwakisambwe. This marked the end of defence case

Having heard the evidence for both sides of the case, the main issue for determination is whether the prosecution has managed to prove

the offence of murder against the accused persons, the standard of which being that of proof beyond a reasonable doubt.

In **Abel Orua @ MATiku and 2 Others versus Republic**, Criminal Appeal No. 441 of 2020 CAT at Mwanza (unreported) the court of appeal, at page 24, had this to state: -

*"It is a settled position of the law that **in proving the offence of murder under section 196 of the Penal Code, it must be established that the death of a human being occurred, that the death was unnatural and was caused by unlawful act or omission, that it was the accused person who did the unlawful act or omission leading to the death of the deceased and finally that the death was caused with malice aforethought.**"*

[Also see: **John Dickson @ Ngongole versus Republic**, Criminal Appeal No. 477 of 2021 CAT at Dodoma]

In the instant case, there is no dispute as established by both side that Ambonisye Mwakisambwe died on 22/05/2020 his death being unnatural one. He was strangled his neck while asleep in his bedroom. This is evident from the evidence given by Bahati Mwakisambwe (PW1) who is the

deceased's daughter and the report on postmortem examination (Exhibit PE4) tendered by H.840 D/CPL Ibrahim (PW6).

Now, are the accused persons herein the ones who killed the deceased? That is the next question to be determined. From the evidence given, there is no eye witness to the commission of the offence. Even Bahati Mwakisambwe (PW1) who was at the crime scene during incident commission, only testified to the effect that while asleep she heard her further screaming for her help and mentioned to have seen no one committing the offence.

The evidence connecting the accused persons to the commission of the offence are the cautioned statements of the 1<sup>st</sup> and the 2<sup>nd</sup> accused persons admitted in court as exhibit PE3 and PE4 respectively. They all give an elaborate explanation on how the mission was planned, participation of each in killing the deceased and the reason for so killing their father, Ambonisye Mwakisambwe, which they mentioned to be he was a witch and had killed their brothers and were the next to be killed. Having accomplished that exercise of killing the deceased, did took from a kraal a cow and sold it so as to get money for their fare back to Rujewa and funeral services.



These exhibits, the cautioned statements of the 1<sup>st</sup> and 2<sup>nd</sup> accused (Exhibit PE3 and PE4 respectively) which give full account on how the crime was committed, stood retracted in court by them. However, the contents therein are corroborated by the evidence of PW3 the buyer of the cow which was sold to him by the accused and the village chairman of Lubanda village (PW2) who talked to the accused at the time of selling it to PW3 as they had no livestock movement permit from him. There is nothing said by the accused as having any grudges with these two witnesses. In my considered view, during their defence, denial by the accused persons on what PW2 and PW3 testified in court is nothing but an afterthought.

It is a settled law that the best evidence always comes from the accused himself. See the case of **Shaban Daudi versus Republic**, Criminal Appeal No. 28 of 2000 CAT as referred in **Galus Kitaya versus Republic**, Criminal Appeal No. 196 of 2015 CAT at Mbeya (unreported) at page 8, where the court of appeal held thus: -

*"...the credibility of a witness is the monopoly of the trial court but can only in so far as the demeanor is concerned. The credibility of the witness can also be determined in two other ways: one, when assessing the coherence of the testimony of*

*that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including the accused”.*

Therefore, the assertion by the 1<sup>st</sup> and 2<sup>nd</sup> accused that on the day of 21 and 22 May, 2020 were at Rujewa in Mbarali district and didn't go to Lubanda village in Tukuyu stating that that they only came to know the death of their further on 4<sup>th</sup> and 8<sup>th</sup> June, 2020 upon their arrest at Rujewa, is an assertion which can not be believed taking into account what they confessed themselves in exhibits PE3 and PE4 respectively which evidence gain support from those who saw them selling the cow within Lubanda vicinity on the date of the incident, PW3 being among.

From the above evidence therefore, I have no hesitation to hold that the prosecution has proved the offence of murder against all the accused persons herein. Consequently, I hereby convict the accused persons for the offence of murder contrary to section 196 and 197 of the Penal Code, [Cap. 16 R.E.2022]. It is so ordered

DATED at MBEYA this 23<sup>rd</sup> day of May, 2024

<sup>107.</sup>  
**MUSA K. POMO**

**JUDGE**


**23/05/2024**

## **SENTENCE**

Subsequent to conviction is sentencing. For the offence of murder, there is only one sentence under the law, death by hanging as provided under section 197 of the Penal Code, [Cap. 16 Revised Edition, 2022]. That being the position, I hereby sentence the accused persons, ADES S/O AMBONISYE MWAKISAMBWE; LUSAJO S/O AMBONISYE MWAKISAMBWE and JUMA S/O AMBONISYE for murdering their father, AMBONISYE MWAKISAMBWE, on the day of 22<sup>nd</sup> May, 2020 at Lubanda Village in Tukuyu District in Mbeya region

It is so ordered



  
**MUSA K. POMO**  
**JUDGE**  
**23/05/2024**

**COURT:** Judgment and sentence pronounced in presence of Ms. Lilian Chagula, learned state attorney for the republic and also in presence of all the accused persons represented by Mr. Yona Frank, learned defence counsel. Right of appeal fully explained

  
**MUSA K. POMO**  
**JUDGE**  
**23/05/2024**