

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB- REGISTRY OF MANYARA)

AT BABATI

CRIMINAL SESSIONS CASE NO. 51 OF 2023

REPUBLIC

VERSUS

ABDALLAH KHALIFA.....1ST ACCUSED PERSON

ELIZEUS LUCAS @ DUDUBAYA.....2ND ACCUSED PERSON

Date of last order: 14/2/024

Date of judgment: 23/2/2024

JUDGEMENT

MAGOIGA, J.

Abdallah Khalifa and Elizeus Lucas @ Dudubaya, (hereinafter referred to as the first and second accused persons respectively) were arraigned before this court on charge of murder contrary to sections 196 and 197 of the Penal Code [CAP 16 R.E 2022]. According to the information laid against the accused persons, it was claimed that on 29th June 2023 at Godown Hamlet in Endasak village within Hanang' District, the accused persons did murder one Suzana Barikiel Mushi (the deceased).



The information was read over and explained to the accused persons who pleaded not guilty. Hence full trial ensued. In attempt to prove its case the prosecution paraded three witnesses namely Dr. Upendo Nyaki, Shaban Ally @ Stephano and Zainabu Mohamed Rajabu who testified on oath as PW1, PW2 and PW3 respectively. The prosecution also tendered one documentary exhibits namely the post mortem examination report as exhibit P1. The accused persons were the sole witnesses for the defense and tendered one exhibit namely the Government Chemist report as exhibit D1.

At the hearing of the matter the Republic was represented by Ms. Grace Christopher and Mr. Leonce Bizimana learned State Attorneys. Messrs. Eric Machuwa and Joseph Mwita Mniko, learned advocates represented the first and second accused persons respectively.

Before embarking on determining whether the prosecution has managed to prove the case against the accused persons beyond reasonable doubt, a brief summary of the evidence for both sides is necessary.

Shabaan Ally @ Stephano testified as PW2 under oath told the court that on the night of 29/6/2023 at around 23.00 hours, who is co-tenant with the 1st accused person, went outside of his room to ease himself. While outside, he



met the first accused person. He recounted that inside the room which was used by the first accused person he was able to see the second accused person together with the deceased. PW2 stated that he was able to see inside the room because there were solar lights which were on in the room. PW2 claimed to know both the accused persons and the deceased as well, whereby the first accused person is his village mate while the second accused is resident of nearby village. As to the deceased, PW2 claimed to have seen her several times at the house of the first accused person. PW2 narrated that on 30/6/2023 in the morning he heard an alarm as the deceased's body was recovered near his home.

Zainabu Mohamed Rajabu testified under affirmation as PW3 recalled that on 29/6/2023 at around 23 hours she went to the shop to fetch some mobile phone vouchers. She contended that while on the way she saw the first and second accused persons together with the deceased walking. She contended there was a brief conversation in which she asked the deceased as to where she was going but the latter never replied. PW3 claimed that on the next morning which was on 30/6/2023 she was informed that the deceased's body was recovered near the house of brother "K".

Upendo Nyaki under oath testified as PW1-a medical doctor, was assigned to conduct post mortem of the deceased. She told the court that the cause of death was due to rape, sodomy and the deceased's neck was swollen with bruises indicating that the deceased was suffocation. PW1 tendered post mortem report and it was admitted as exhibit P1.

After the prosecution had closed its case, the court revisited the evidence adduced and satisfied itself that prima facie case has been established against the accused persons. The court invited the accused persons to enter defence of which they did under oath.

Abdallah s/o Kahalifa under affirmation testified as DW1. In his testimony, he recalled that on 29/6/2023 he was with the second accused person and it was Eid holiday and they went to the house of one Seif Mwarabu where they stayed till 8 PM and returned to his house where the duo spent the night.

DW1 added that on 30/6/2023 he woke up and proceeded to the market but around 10 am an alarm was raised and he went to see what had transpired and he saw the deceased's body. DW1 narrated that while at the scene, he was called by the hamlet chairman and asked him if he knew anything about



the incident. Later on, the police came and search was conducted in his house in which a shawl and bra belonging to his wife were taken. DW1 narrated that the police also took his trouser and an underwear and went to the police station. He added that while at the police station, PW1 extracted from him some samples such as mouth swab, blood and finger print for investigation. He added that the report of the examination was read to him during committal proceedings. Dw1 tendered the forensic report on DNA dated 18/9/2023 as exhibit D1. DW1 claimed that, according to the report, he is not responsible with rape, sodomy and strangulation (suffocation) which were done against the deceased. DW1 denied to with the deceased on that fateful night and claimed that the prosecution witnesses did not see him with the deceased.

Elizeus s/o Lucas @ Dudubaya testified under oath as DW2. DW2 testimony is more or less similar with that of DW1. He narrated how he went to celebrate Eid with DW1 then returned to the house of DW1 where they slept till morning. He added that on the next day (30/6/2023) he parted with DW1 and he went to his farm where till evening when he was arrested by police officers for allegations that he killed the deceased. He said that he denied to have killed the deceased but he was tortured.



DW2 recalled that his samples such as mouth swab, blood finger prints and clothes were taken for analysis. He narrated that during committal proceedings the report of the samples taken was read in which DW2 was not involved in the commission of the offence at hand. DW2 claimed that PW2 and PW3 did not tell the truth because he (DW2) never got out of the house of the DW1 on that fateful night. DW2 admitted to have known the deceased but he could not recall when he saw her last.

After closure of the defence case, parties' learned trained minds had a chance to make final submissions. I am grateful for their inputs and the authorities referred. In determining the matter, I will take into account the submissions made.

Having gone through the prosecution and defence cases respectively it is the duty of the court to analyze the evidence to determine whether the case against the accused persons has been proved beyond reasonable doubt.

In the case of **Laurent Kisingo v Republic** Criminal Appeal No. 123 of 2013 Court of Appeal of Tanzania at Arusha (unreported), the court expounded three essential elements in proving the offence of murder. It stated thus;



*It is now settled law that for the offence of murder to be proved; three ingredients have to be established. One, that the **person is dead**. Two, it is **the accused who killed the deceased**. Three, the killing was done with **malice aforethought**. [Emphasis added].*

Starting with the first element, there is no dispute that death has been proved. There is post mortem report (exhibit P1) and oral accounts of PW1, PW2 and PW3. They both saw the deceased's body and the cause of death according to PW1, was due to strangulation, rape and sodomy. On the other hand, DW1 in his defence readily admitted he went to the scene where the deceased's body was. Suffice it to say the first element has been established.

As to the second element whether the accused persons killed the deceased. In their final submission, the prosecution maintained that there is strong circumstantial evidence which is strong enough to establish that the accused persons killed the deceased.

The prosecution argued that the accused persons were last persons seen with the deceased alive as aptly stated by PW2 and PW3 who identified the accused persons on the fateful night. To this the prosecution relied on the



case of **Mathayo Mwalimu & another v Republic** Criminal Appeal No. 147 of 2008 (unreported) in which it was observed that;

"if the accused person is alleged to have been the last person to be seen with the deceased, in absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer.

The prosecution submitted that the time when the deceased's body was recovered is just a few hours from the time the deceased was seen with the accused persons. The prosecution argued that the doctrine of last seen has been corroborated by evidence of the time in which the deceased's body was recovered. Reference was made to the case of **Ijumaa Issa @ Athuman v Republic** Criminal Appeal No. 53 of 2021 (unreported).

The prosecution also argued that the place where the deceased's body was found is not far from where the deceased was last seen. They also argued that the evidence of PW1 established the cause of death. As to exhibit DE1, the prosecution argued that the DNA test failed to give out the results as the



amount of samples taken was too low to enable the machine to give out the result.

Lastly DW1 and DW2 did not deny the fact that they were together during the night of 29/6/2023 and they did not dispute to have slept together, hence this piece of evidence tallies with that of PW2 and PW3.

On defence, the accused persons filed a joint final submission, they distanced themselves from the commission of the offence. They argue that evidence of visual identification was weak. PW2 did not tell the intensity of the light inside the room and the distance he was. Equally the evidence of PW3 that she claimed to have seen the deceased, the defence argued that PW3 was able to identify the colour of the shoes worn by the deceased on the fateful night but she could not remember the colour of the dress of the deceased during the day.

The defence argued that the case which depend on visual identification, such evidence must only be acted upon when possibilities of mistaken identity are eliminated. Reference was made to the case of **Hamis Ally & others v Republic** Criminal Appeal No. 596 of 2015 (unreported).



The defence also argued that there is no evidence connecting the accused persons with the offence at hand. They argued that exhibit DE1 namely the Chief Government Chemist report does not link the accused persons with the offence at hand. They argued that there is no any reliable evidence to establish that the deceased was last seen with the accused persons.

Having considered the submission as to whether the prosecution managed to establish whether the accused persons killed the deceased, I must point out that in the evidence adduced, there is no direct evidence linking the accused persons with the offence at hand.

I will start my deliberation with the prosecution's argument that the accused persons were last seen with the deceased. It is imperative to note that, the application of the doctrine of the last known person to be seen with the deceased alive is only based on a presumption that where no plausible explanation is given by an accused person as to circumstances leading to the death of the deceased, then, the accused is presumed to be the killer. In the case of **Mathayo Mwalimu and Another v. Republic**, Criminal Appeal No. 147 of 2008 (unreported), the Court stated that:



"... if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer."

In the case of **Ijuma Issa @ Athuman v Republic** (supra) the Court of Appeal observed thus;

"Therefore, it is our considered view that, it is not always that where an accused appears to be the last person to be seen with the deceased, then, automatically he is the killer."

In the case of **Japhet Kalanga v. Republic**, Criminal Appeal No. 332 of 2016 (unreported) the Court of Appeal quoting with approval the decision of the Supreme Court of India in **Ramreddy Rajeshkhanna Reddy & Anr v. State of Andhra Pradesh** JT 2006 (4) SC 16, observed that the doctrine of the "last known person" has to be corroborated by other evidence.

Guided by the above authorities, in the instant matter there is no any evidence corroborating the last person seen with the deceased. The



arguments by the prosecution that the deceased's body was found near the DW1's, house the time on which the deceased's body was found do not corroborate the last known person. After all, going through the evidence on record, the identification evidence by itself leaves a lot to be desired. For instance, PW2 claimed to have seen the deceased inside DW1's room at 23 hours. He claimed that there was solar light. PW2 claimed that he knew the deceased and accused persons before. However, familiarity alone is not sufficient.

This was pointed out in the case of This was underscored in the decisions of **Boniface Siwingwa v. R**, Criminal Appeal No. 421 of 2007 and **Mabula Makoye and Another V. R**, Criminal Appeal No. 227 of 2017 (both of which are unreported);

"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown that the conditions for identification were not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witness must give



details as to how he identified the assailant at the scene of the crime as the witness might be honest but mistaken."

In the instant matter PW2 just stated he was able to see the accused persons with the deceased without giving detailed explanation on the appearance of the deceased and for how long such identification took place. Equally, PW2 further explained that he was able to identify with the help of the solar light but its intensity was not explained.

Both PW2 and PW3 told the court to identify the accused persons at the same time and hour i.e 23 hours in different places. But none explained why the accused persons were able to be in different places at the same time. This raises a doubt as to whether at the same time the accused persons were inside the room of the 1st accused and, in the shop, where PW3 saw them. This is not a minor doubt but a serious one and it goes to the root of the identification that it did not eliminate improper identification. Not only that but PW3 said he talked to the trio she alleged to saw that night with the deceased but none responded. This non response was not explained and it has to be resolved in favour of the accused persons.



I have also considered that, taking into account the manner in which the offence was committed the DNA report would have played a significant role in connecting the accused persons with the offence at hand but rightly as argued by the defence the said report does not connect the accused persons with offence at hand.

In final analysis, I find that the prosecution has not established that the accused persons killed the deceased, despite high suspicion which by itself is not enough to mount conviction, however, strong. I, therefore, find the accused persons not guilty of the offence charged. Consequently, I hereby discharge the accused persons forthwith and order that they be set free unless lawful held for another lawful cause.

It is so ordered.

Dated at Babati this 23rd day of February, 2024.



S. M. MAGOIGA

JUDGE

23/2/2024