

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT MBULU

CRIMINAL SESSIONS CASE 2620 OF 2024

THE REPUBLIC

VERSUS

SAMASON SHAYO @ EMANUEL SHAYOACCUSED

JUDGMENT

5th & 10th June, 2024

Kahyoza, J.:

Abdallah Hashim met his demise untimely on 4^h October, 2021, at Gidas village within Babati district. According to **Solomon Asantaeri Kweka (Pw1)**, a medical officer, **Abdallah Hashim's** death was due to heamorrhage shock and severe head injury. **Abdallah Hashim's** assailant inflicted several wounds on both abdominal flanks, which together with the head injury forced him to succumb to death on spot. **Abdallah Hashim** was a motorcycle taxi operator commonly known as "*bodaboda*", who upon his brutal death, the motorcycle went missing.

Samason Shayo @ Emanuel Shayo was suspected to kill **Abdallah Hashim**. Police arrested **Samason Shayo @ Emanuel Shayo** and

arraigned with an information of murder contrary to sections 196 and 197 of the Penal Code, [Cap. 16 R.E. 2022]. It was alleged that **Samason Shayo @ Emanuel Shayo** did, on 4.10.2021 at Gidas village within Babati district, murder **Abdallah Hashim**. **Samason Shayo @ Emanuel Shayo** denied the information of murder.

The prosecution had a duty to prove not only that **Abdallah Hashim** is dead but also that **Samason Shayo @ Emanuel Shayo**, the accused person is responsible for killing him and did so with malice aforethought. To discharge its burden, the prosecution summoned nine witnesses and tendered three exhibits, the post mortem report (exhibit P. 1), a certified copy of the motorcycle registration card (exhibit P. 2) and the caution statement of **Samason Shayo @ Emanuel Shayo** (exhibit P. 3).

The prosecution's account is that on 4.10.2021 **Abdallah Hashim**, a rider of a motorcycle taxi (bodabada) operated his business as usual. In the morning of the fateful day, **Abdallah Hashim** gave a ride to Petro Lagwen Baraa (**Pw5**) from the latter's village to Bonga. Petro Lagwen Baraa (**Pw5**) went to Babati town. On his way back at 03:00 pm, Petro Lagwen Baraa (**Pw5**) requested **Abdallah Hashim** to ride him from Bonga to his home place. According to Petro Lagwen Baraa (**Pw5**), **Abdallah Hashim** obliged.

Petro Lagwen Baraa (**Pw5**) was the owner of the motorcycle **Abdallah Hashim** was riding. He bought the motor cycle, with Reg. MC 295 BNZ, make boxer, black in colour from Fair Deal Auto Pvt Ltd and that he had not transferred it to his name when it went missing. Hashimu Haima (**Pw2**), **Abdallah Hashim's** father and Hiti Dawi Kwaa (**Pw4**) supported Petro Lagwen Baraa (**Pw5**)'s evidence that **Abdallah Hashim** was riding motorcycle with the Reg. MC 295 BNZ, the property of Petro Lagwen Baraa (**Pw5**).

Hashimu Haima (**Pw2**) deposed that he saw his son alive, for last time on 4.10.2021 at 04:00pm whilst at centre of Gidas village (kijiweni). **Abdallah Hashim** asked Hashimu Haima (**Pw2**), his father, if, he had seen his elder brother. Hashimu Haima (**Pw2**) replied that he was just around the centre.

Another person who saw **Abdallah Hashim** on the fateful date was Fotina Micheal Mvile (**Pw3**). Fotina Micheal Mvile (**Pw3**) was a primary school teacher and a petty business woman. She owned and operated a small shop (kiosk) at Mndani area within Gidas village. On 4.10. 2021 at 05:00 **Abdallah Hashim** went to her kiosk with his motor cycle, boxer black

in colour with Reg. No MC. 295 BNZ packed it and bought biscuit, juice and a bread, each costing Tzs. 500. He paid a total of Tzs. 1,500.00 and left.

According to the prosecution's evidence, Fotina Micheal Mvile (**Pw3**) was the last person to depose that she saw **Abdallah Hashim** alive. After **Abdallah Hashim** bought items from Fotina Micheal Mvile (**Pw3**)'s kiosk, was never seen alive again. **Abdallah Hashim** who lived with Hashimu Haima (**Pw2**) did not return home that fateful date. It was also Petro Lagwen Baraa (**Pw5**)'s testimony even though **Abdallah Hashim** was required to return the motorcycle every night to his home place and pick it the next morning. On the fate day, **Abdallah Hashim** did not return his motorcycle and he did not see his motorcycle once again.

Petro Lagwen Baraa (**Pw5**) tried to reach him vide his cellular phone in vain. There was no one to pick it. The following day, that is on 5.10.2021 he went to **Abdallah Hashim**'s parents find out the whereabouts of **Abdallah Hashim**. They told him that, **Abdallah Hashim** did not return home the previous night. At around 04:00 pm while going to Gidas village centre, Hashimu Haima (**Pw2**) met one Hussen Hamad driving herds of cattle to the gorge or canyon for drinking water. He requested him to look for his missing son. After some minutes, that person rang and told him that

the body of Abdallah Hashim was in the canyon. Hashimu Haima (**Pw2**) took the hamlet chairperson and other people went to the gorge (Korongoni). They found Abdallah Hashimu's body in the gorge. They shouted for help. People including respondent and Petro Lagwen Baraa (**Pw5**) gathered. Police got information.

Police including A/Insp. Chisano Bigolame (**Pw7**) went to the scene of crime. They examined the body and found that that **Abdallah Hashim** (the deceased) sustained a severe back of the head injury. A/Insp. Chisano Bigolame (**Pw7**), Hashimu Haima (**Pw2**), Hiti Dawi Kwaa (**Pw4**) and Petro Lagwen Baraa (**Pw5**) deposed the dead body was dirty and in a pool of dry blood, with a head injury. It had bruises which showed that it was pulled to that area. The police took the body to Mrara hospital mortuary.

On 7.10.2021, Solomon Asantaeri Kweka (**Pw1**) examined the dead body at Mrara hospital in the presence of Hashimu Haima (**Pw2**) and Elikana Haima, who identified the dead body and in the presence police officers. Solomon Asantaeri Kweka (**Pw1**) established that the person died of hemorrhagic shock secondary to severe head injury. He added that the deceased's assailant inflicted the injury with a blunt object. He prepared a post mortem examination report which he tendered as exhibit P.1.

A day after **Abdallah Hashim** was discovered dead, the elders of Gidas village convened a meeting to find out who killed **Abdallah Hashim**. Hiti Dawi Kwaa (**Pw4**) and Fotina Micheal Mvile (**Pw3**) attended. Hiti Dawi Kwaa (**Pw4**) informed the gathering that while driving his herds of cattle from the pastures to his home place on 4.10.2012 at 06:00pm, met Samson Shayo (the accused person) riding a motor cycle with Reg. No. MC 295 BNZ. He deposed that motor cycle with Reg. No. MC 295 BNZ was black in color, make boxer, the property of Petro Lagwen Baraa (**Pw5**) and that **Abdallah Hashim** used it as motor cycle taxi "*bodaboda*". Fotina Micheal Mvile (**Pw3**) confirmed that Hiti Dawi Kwaa (**Pw4**) informed the gathering that he saw Samson Shayo (the accused person) riding a motor cycle with Reg. No. MC 295 BNZ, which the deceased's property. Hiti Dawi Kwaa (**Pw4**) was emphatic that he knew the deceased and the accused persons very well since they very younger boys.

The elders resolved at the meeting to trace Samson Shayo. They nominated people to trace Samson Shayo (the accused person). They did not manage to trace him. Later in October 2023, Hashimu Haima (**Pw2**) got information that police arrested Samson Shayo (the accused person) suspected to commit the offence of stealing a motorcycle. He was at Majengo

police station within Moshi municipality. He notified A/Insp. Chisano Bigolame (**Pw7**).

A/Insp. Chisano Bigolame (**Pw7**) after confirming that Samson Shayo (the accused person) sent D/Sgt Lushita (**Pw8**) to bring the suspect to Babati police station. He deposed that Samson Shayo (the accused person) was suspected to commit the offence of murder and the police opened a police case file in 2021 and assigned it reference number BAB/IR/2098/2021.

On 8.10.2023 D/Sgt Lushita (**Pw8**) went to Moshi police station and met A/ Insp. Mickson (**Pw6**). A/ Insp. Mickson (**Pw6**) testified that he arrested Samson Shayo (the accused person) on 1.10.2023 after he received information from the OC CID that a person suspected to steal a motor cycle got an accident. He went to the scene where he found Samson Shayo (the accused person) unconscious and with injuries. He rescued him and took him to police station. While in the way to Moshi police station, Samson Shayo (the accused person) regained consciousness. After they reached Moshi police station, A/ Insp. Mickson (**Pw6**) the police doctor who attended Samson Shayo (the accused person). A/ Insp. Mickson (**Pw6**) handed Samson Shayo (the accused person) to D/Sgt Lushita (**Pw8**) on 8.10.2023.

He deposed that Samson Shayo (the accused person) sustained injuries in the accident he encountered on 1.10.2023.

D/Sgt Lushita (**Pw8**) travelled back to Babati police station with the accused person where he arrived at on the same day, that is, on 8.10.2023. He handed Samson Shayo (the accused person) to Babati police station charge room (CRO) at 05:30pm and notified A/Insp. Chisano Bigolame (**Pw7**). A/Insp. Chisano Bigolame (**Pw7**) instructed E. 5478 D/ SGT Julius (**Pw9**) to interview the suspect, Samson Shayo (the accused person).

E. 5478 D/ SGT Julius (**Pw9**) deposed that Samson Shayo (the accused person) admitted or say confessed to commit the offence. He recorded and tendered Samson Shayo (the accused person)'s caution statement, which was admitted, after a trial within trial, as exh. P.3.

Samson Shayo (**Dw1**), the accused person, denied on oath to commit the offence. He refuted to have freely confessed to the police. He admitted that he was involved in an accident at Majengo Moshi. He fell unconscious. He regained consciousness and found himself in the police motor vehicle.

He deposed that he lived at Magugu from very young age until 2020 when relocated to Majengo - Moshi until 2023. He narrated that on the day he was involved in an accident he was riding his friend's motor cycle. Bosie

gave him the motor cycle to refuel. He refueled it, while coming from the petrol station he got an accident. Police took him to Moshi police station charged him with the offence of stealing a motor cycle. He added on the day Bosie informed the police that he was not interest with the case, he wanted his motor cycle back, the police told him that he had a case at Babati police station.

He deposed that a police from Babati went for him, and on their way to Babati, they spent a night at Arusha. Police tortured him and forced him to sign a document. During his defence, he stated that he was 19 years old. At a later stage during his testimony, he deposed that he lived in Gidas village since when he was very young and left Gidas village in 2019. He knew Abdallah Hashim as a motorcyclist (Bodaboda) and a resident of Gidas village. He refuted to know Hashim Haima and Hiiti Dawiti.

During cross-examination, Samson Shayo (**Dw1**) testified that he did not tell the Court that he lived at Magugu from when he was young boy but from 2019 to 2020. He deposed that he lived at Magugu for one year. He deposed that he lived Gidas from when he was a young boy.

Did Abdallah Hashim die unnatural death?

One of the prosecution's duty was to prove beyond reasonable doubt that Abdallah Hashim died unnatural death. Solomon Asantaeri Kweka (**Pw1**), a medical officer deposed Abdallah Hashim's death was caused by heamorrhagic shock secondary to severe head injury. He added that, the deceased's assailant inflicted the injury with a blunt object. He prepared a post mortem examination report which he tendered as exhibit P.1. Solomon Asantaeri Kweka (**Pw1**)'s evidence was supported the testimonies of A/Insp. Chisano Bigolame (**Pw7**), Hashimu Haima (**Pw2**), Hiti Dawi Kwaa (**Pw4**) and Petro Lagwen Baraa (**Pw5**) who deposed that they saw Abdallah Hashim's body in a pool of dry blood, dirty and with a severe injury on the back of the head.

I find that the prosecution established beyond reasonable doubt not only that Abdalah Hashim is dead but also that, he died unnatural and brutal death.

Was a person who killed Abdallah Hashim with malice aforethought?

Having found that Abdalah Hashim died unnatural death, the next question is whether the killer had malice aforethought. In **Mosses Michael alias Tall V R.** [1994] TLR. 195 the Court of Appeal held that-

- (1) *malice may be inferred from the amount of force which an offender employs in inflicting fatal injury; and further that*
- (2) *the conduct of the accused may be indicative of the malice aforethought as it was in this case where the appellant was persistent in beating the deceased for long time for long time and prevented intervention by persons who wanted to help the deceased.*

The fact that Abdalah Hashim sustained a severe head injury and died immediately on the spot and his motor cycle stolen, the attacker must have intended to kill or cause grievous harm and steal the motor cycle. I have no doubt in my mind that the attacker intended to kill Abdalah Hashim, thus, the attacker killed Abdalah Hashim with malice aforethought.

Did Samson Shayo (Dw1), the accused person, kill Abdallah Hashim?

The remaining and hard-hitting issue is who killed **Abdallah Hashim**, the deceased. There is no eye-witness. The only prosecution seeks to rely on circumstantial evidence, the testimony of Hiti Dawi Kwaa (**Pw4**) who deposed that he witnessed the accused riding the deceased's motor cycle on

the date the deceased is reported to vanish and **Samson Shayo's** caution statement.

It is a settled trite principle of law that in a criminal case in which the evidence is based purely on circumstantial evidence, in order for the court to found a conviction on such evidence, it must be satisfied that the evidence irresistibly points to the guilt of the accused, to the exclusion of any other person. Hiti Dawi Kwaa (**Pw4**) deposed that while driving his herds home from grazing saw and recognized the accused person on 4.10.2021 at 06:00pm riding the deceased's motor cycle with Reg. No. MC 295 BNZ. He recognized him as it was still daylight as the sun had not set down. He knew the deceased and the accused person very well since their childhood. They lived in the same village. He described the motor cycle that it was black in colour and make boxer, with Reg. No. MC 295 BNZ. During cross-examination, Hiti Dawi Kwaa (**Pw4**) deposed that Samson Shayo, the accused person rode the deceased's motor cycle nine (9) metres away from him.

The accused person refused to have been in Gidas village on the alleged day and time. He raised the defence of *alibi* without complying with section 194(4) of the **Criminal Procedure Act**, [Cap. 20 R.E. 2022] (the **CPA**). It is settled that when the defence of *alibi* is given in violation, the

trial court has a discretion to accord it no weight. The Court of Appeal in **Magabe Gokoya v R.**, Criminal Appeal No. 254 "A" of 2010 (CAT unreported) restated its position that-

*"As on the issue of ALIBI, we think that this point should not detain us, because the law is very clear. The learned State Attorney cited to us the decision of this Court in **Mwita Mhere and Ibrahim Mhere v. Republic** [2005] TLR 107, where basically it was stated that **prior notice has to be given and such defence would be relied upon when the requirements under section 194 of the CPA are complied with.** In the instant case, the record shows that the court's below accorded no weight to the appellant's defence of ALIBI. This is compliance with section 194(6) of the CPA which provides that: -*

"If the accused raises a defence of alibi without having first furnished the prosecution pursuant with this section, the court may in its discretion accord no weight of any kind to the defence."

I find that the accused defence was an afterthought, it did not raise doubts to the prosecution's evidence of recognition. Hiti Dawi Kwaa (**Pw4**) saw and recognized the accused person. He stated at the meeting convened a day after Abdallah Hashim was found dead, that he saw the accused person riding the deceased's motor cycle. Fotina Micheal Mvile (**Pw3**)

confirmed Hiti Dawi Kwaa (**Pw4**)'s testimony that he named the accused person as the person who escaped with the deceased's motor cycle on 4.10.2021 at 06:00 pm.

I find that the prosecution proved that Samson Shayo was seen riding with the deceased motor cycle with Reg. No. MC 295 BNZ, black in colour, make boxer on the day the deceased disappeared. In the absence of the reasonable explanation, that piece of evidence was enough to prove that the accused person not only stole, the deceased motor cycle but also, he is the one who killed him.

The prosecution tendered Samson Shayo's caution statement. The prosecution took a person that the accused person made a caution statement freely. The accused deposed that he did not make a statement and that he was tortured and forced to confess. The court, after a trial within trial found that the accused person was a free agent when he made the caution statement. The accused person while admitting that he got a motor cycle accident to the extent that he became unconscious, he denied to have sustained scars. He deposed that he sustained injuries during the police torture. The police evidence was that he sustained injuries in a motor cycle accident.

I was unable to believe the accused person that a person would encounter a serious motor cycle accident to the extent of becoming unconscious still sustain no injuries. He must have sustained injuries. I am alive of fact that a trial within trial was a case different from the main case, but one would expect the accused person's account as to his torture to be the same. The accused person gave two different accounts on how and who tortured him. In his defence during the trial within trial, the accused person deposed that he was tortured by police officers at Majengo-Moshi, while defending himself in the main case, he stated that he was tortured by Babati police officers at Babati. Not only that but also, during the trial with trial, the accused deposed that only one police officer went to Moshi to pick him but during his defence in the main case, he testified that two police officers picked him from Majengo and took him to Babati police station. He was not consistent.

It is settled that an accused person has no duty to prove his innocence but he has a duty to tell the truth. The accused person also told the court that he lived at Magugu from his young age and left Magugu in 2020. He changed the narrative that he lived Gidas village during his young age.

During cross-examination, he deposed that he lived at Magugu for one year from 2019 to 2020 when he moved to Majengo Moshi.

It is settled law that every witness must be trusted unless, there is a cogent reason to question his credibility. See **Goodluck Kyando v. R.**, [2006] TLR 363 and in **Edison Simon Mwombeki v. R.**, Cr. Appeal. No. 94/2016 CAT unreported) the Court of Appeal stated that-

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

In the present case, I was unable to believe the accused person's evidence. He was not telling the truth.

In addition, I examined the caution statement. The caution statement was so detailed to the extent that, E. 5478 D/ SGT Julius (**Pw9**) would not have fabricated it. The accused explained why he hide himself after he stole from his stepfather and how he requested the deceased to buy him bread, juice, and biscuit to deliver them to where he was hiding. He explained that the deceased took to him items and told him that he bought the bread, juice, and biscuit each for Tzs. 500.00. He explained that the deceased demanded to be paid Tzs. 1,500.00 as costs for items and Tzs. 1,000.00 as *bodaboda* taxi charges.

The accused person's statement that the deceased brought him biscuits, bread, and juice costing Tzs. 1,500.00 matched with Fotina Micheal Mvile (**Pw3**)'s evidence that the deceased bought from her kiosk (shop), biscuits, bread and juice each costing Tzs. 500. It was at 05:00pm when the deceased bought the items and left with his motor cycle. Fotina Micheal Mvile (**Pw3**) gave her statement to police on 11.10.2021 two years before the accused person was arrested and interrogated. I find that the accused person's statement was a true account of events and he gave it to police.

It is settled law that to ground conviction on the accused person's confession, confession must be true and voluntarily made as pointed out in the case of **Shija Luyeko v. R.** (2004) TLR 254. Reliability or otherwise of a statement regarded to be confession is based on assumption that it was voluntarily made. The court is bound to rule otherwise if it may be convinced that such confession was obtained by torture, threat, or promises held out by a person in authority. The legal position was aptly expounded in the case of **Tuwamoi v. Uganda** (1967) EA 84. In that case the law on confessions is summed up as follows-

"A trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully

*satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and **usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court.** But corroboration is not necessary in law and the court may act on a confession alone if it **is satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.** (emphasis added).*

In **Tuwamoi v. Uganda** (*supra*) it was further held:-

*"If the court is satisfied that the statement is properly admissible and so admits it, **then when the court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted.** In assessing the confession, the main consideration at this stage will be, is it true" (emphasis added).*

In another case of **Shishobe Seni and Another v. R.** (1992) TLR 330 the Court of Appeal held that-

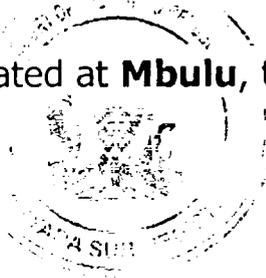
*"...once the confessions are repudiated, albeit during the defence stage the trial **judge should suo motu check on their voluntariness, validity and/or seek corroboration thereof**" (emphasis added).*

I am satisfied that the accused person made the statement voluntarily, and it is valid one. In addition, the accused person repudiated confession was corroborated by the evidence of Fotina Micheal Mvile (**Pw3**) together with the accused person's lies that he sustained injuries through the police torture while accepting that he encountered a serious accident. The accused person's lies corroborated the prosecution's case.

In the end, I am of the view that the prosecution established by circumstantial evidence and by the accused person's confession that **Samason Shayo @ Emanuel Shayo** killed **Abdallah Hashim** and did so with malice aforethought. I was not convinced that I ought to draw adverse inference on the prosecution's failure to call certain people to testify as by the nature of this case there was no key witness left out. I find **Samason Shayo @ Emanuel Shayo** guilty and convict him with the offence of murder of **Abdallah Hashim** contrary to sections 196 and 197 of the Penal Code, [Cap. 16 R.E. 2022].

It is ordered accordingly.

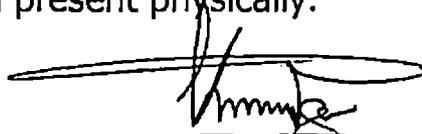
Dated at **Mbulu**, this 10th day of **June**, 2024.



A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', written over a horizontal line.

J. R. Kahyoza
JUDGE

Court: Judgment delivered in the physical presence of the accused person and his advocate and in the virtual presence of Ms. Rose Kayumbo, the state attorney. B/C Ms Fatina present physically.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', is written over a horizontal line.

J. R. Kahyoza

JUDGE

10.6.2024