

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CRIMINAL SESSION NO. 14 OF 2022

REPUBLIC

VERSUS

1. NASSORO ALLY@ RAJABU

2. SANDE JOHN @FRANCIS

JUDGMENT

MKWIZU, J: -

The accused persons are indicted for murder contrary to the section 196 and 197 of the penal code (Cap 16 R.E 2022). It is alleged that **NASSORO ALLY RAJABU** and **SANDE JOHN FRANCIS** here in referred to as the 1st and 2nd accused persons respectively jointly and together on the 24th day of February 2020 at Saku Mwisho area within Temeke District in Dare salaam Region, with malice aforethought caused the death of **REBEKA DAUDI MWALUSAKA**

At the material time, the deceased was staying with her mother Neema Noah Mwakisuli (PW2) who was at the material time working with Twiga security company as a security guard. On the fateful date, which is on 23/2/2020 PW2, entered the office at 18.00 pm and left the office at 6.00am and went straight to his food business (Mama Ntilie) at the Posta area close to her office. At around 9.00 hrs she received a call

from her Paster's wife, Elizabeth Biengo requesting her to go back home as her daughter, the deceased was unconscious. She rushed home where she found a crowd of people weeping. She lost control of herself and went unconscious until the following day when she was then informed of the murder of her daughter and that the deceased body was already taken to Muhimbili Hospital. According to PW2, they buried the deceased on 26/2/2020 at the City Saku cemetery. After the burial ceremony, she said, they were informed of the arrest of the suspects including her neighbour Sande John. And on her interview with the police at Mbagala police station conducted two weeks after the incident, she told the police about the deceased phone which went missing after the murder incident and her mobile phone which was stolen few days before the incident. PW2 was able to identify the said mobile phones at the police and before the court. She also managed to identify the second accused Sande John as her neighbour since 2012.

On her part, PW5, Happy Daudi, the deceased sister left home to her working station early morning on the material date leaving the deceased at home asleep. She was notified of the incident while at the office that morning. She rushed back home where she found a crowd of people gathered. She went straight inside the house and found the deceased body lying down with some cut wounds on her neck. Unable to manage the situation, she lost conscious and came to her senses later after the deceased had already been taken to the Hospital. Like PW2, this witness told the court that they buried the deceased on 26/2/2020 before they were informed of the arrest of the suspects of the murder.

On interrogation with the police, PW5 said, she informed them of the loss of the deceased mobile phone on the material date and her mother's phone which got lost two weeks before the murder.

PW3, Stella Maiko, is a businesswoman, selling bites around the street at Saku Mbagala. On 24/2/2020, she as usual went around the street houses selling her bites. She passed by the deceased's house, knocked the door which was left open without a response. She glanced inside where she saw a female body lying on the floor partly covered with a sheet surrounded with a pool of blood. She identified the face which was left open as that of Rebeka. Concerned, she called baba Kaega who also called the ten-cell leader one Mzee Maramoja (PW4) and the police who came to the scene and left with the deceased body after they had investigated the scene. After the funeral she heard that Sande John,^{2nd} accused their neighbour is one among the arrested suspects of the incident.

PW1, SP. Benard Nyambalya is a police officer, OCCID of Mbagala police station by then. He was on 24/02/2020 informed of the murder of a girl known as Rebeka Daud at Saku Chamazi ward, Mkodogwa street. He, with a team of investigators went to the scene where they found many people gathered. Assisted by the street chairperson Mr Shabani, they managed to get inside the house where they found a female body covered by a bed sheet lying on the floor who seemed to have been slaughtered at the neck.

According to PW1, the investigation at the scene revealed the missing of the deceased's mobile phone after the incident and efforts to call it

proved futile as it was not reachable. They collected the body to Muhimbili Hospital and the matter was reported to Chang'ombe police station for further investigation. He came to learn later that three suspects were arrested with the deceased mobile phone.

At Muhimbili Hospital, the deceased body was medically examined by Doctor Advera Isaac Ngaiza (PW6) on 26/2/2020. He found the deceased body with blood, a congested face with several injuries on her neck describing the enormous injury as having 6 cm by 3cm which seemed to be caused by a sharp object. An autopsy report (exhibit P1) at the end revealed the cause of death as haemorrhagic shock due to cut wounds.

PW9 is one Julius Abel Mwanjala a person who happened to be the deceased boyfriend. This witness is among the people who participated in the mourning, escorted the deceased body to Muhimbili hospital for examination and he personally participated in the funeral of the deceased on 26.2/2020. On 28/2/2020, he happened to be at his working station as a site construction operation manager at Vijibweni Kigamboni area. While there he saw the 2nd accused holding a mobile phone putting it in his bag. He suspected the said mobile phone to be that of the deceased. And he was able to identify it because he is the one who purchased it and used to see it when he was with the deceased. He consulted his boss and the police who ultimately managed to arrest the accused, searched his bag and seized therefrom two mobile phones and other clothes which were taken to police station. He said accused was arrested together with another people. This evidence was

confirmed by PW7, PF.1842 SP Stanslaus Nyigana and D/SGT Edwin (PW8) police officer from Mbagala police station, the arresting officers.

Having received the information regarding the suspects, and assisted by PW9, PW7 together with PW8 went to Vijibweni kigamboni area. They arrested the 2nd accused and searched his bag whereby they manage to find two mobile phones, a techno touch, light blue in colour with black cover mobile phone and a small techno phone silver in colour. PW7 said, on interrogation with the police, 2nd accused admitted that the mobile phone belongs to the deceased, Rebeka Daudi and he took it after killing her naming the 1st Accused as his accomplice. A certificate of seizure (exhibit P2) was prepared, and both the seized mobile phones and the two accused persons were taken to Mbagala police station.

Apart from being among the team members who visited the scene on the material date and in the arrest of the accused persons, PW8 also played a role in recording the 2nd accused's cautioned statement (exhibit P6) on 28/2/2020 at around 2.00 pm where the 2nd accused is alleged to have confessed killing the by stabbing her with the knife.

The last witness is PW10, F7309 D/Sgt Audax a police officer at Mbagala Police station. On 28/2/2020 at around 12.00 pm to 1.00pm he was assigned a duty by PW7 to take the 1st accused's cautioned statement (Exhibit P7). He took the 1st accused from CRO office for interrogation where he confessed commission of the offence with his fellow including the 2nd accused. He also divulged to him that they sodomised and raped the deceased before she was knifed to death by the 2nd

accused. 1st accused also confessed to have taken the deceased mobile phone.

In his affirmed evidence, DW1, Nassoro Ally Rajabu admitted having heard of the deceased death. He however denied commission of the offence claiming that he on the material date slept with his wife with whom they attended the burial ceremony of the deceased person. Speaking of his arrest, the 1st accused said, they were arrested at Vijibweni Kigamboni in a construction site where he was working taken to mbagala police station suspected of smoking bhangi and forced to sign a caution statement. His defence was supported by his wife Mariam Ramadhani also known as Sikuzani DW2, who told the court that on 24/2/2020 she was at home with her husband, first accused. She woke up early around 5.00am and went to fetch water that is when she heard the news of the death of the deceased and informed her husband. Later, they went to the funeral. She received the information of the arrest of her husband on 28/2/2023 and told that her husband was found with the deceased mobile phones.

DW3, is Sande John Francis (the 2nd accused). He stayed with his sister, uncles and brother-in-law and knew the deceased and her family though he was not close to the deceased. He also knew PW9 as their supervisor at Vijibweni construction site. Denying the allegations by the prosecution, DW3 said, on 24/2/2020 he was at home till around 9.00 am and that he was arrested on 28/2/2020 at his workplace together with about 5 other people. He denied being found with the deceased phone and that he was later forced to sign the seizure certificate at the

police station. He further states that the witnesses of the search are among the people whom they were arrested together. About the caution statement, he said that he was forced to sign after he was tortured by the police. He completely disowned the contents of the statement.

DW4, is Salha John, the 2nd accused's sister. She insisted that the 2nd accused was not involved in the case because on 24/2/2020 in the morning he was at home with her.

Parties' counsels were ordered to file final/ closing submissions. Unfortunately, it is the State Attorney alone who managed to comply with the courts order. He was of the strong view that the prosecution managed to establish the case beyond reasonable doubt. Attention of the court was drawn to the doctrine of recent possession and accused's cautioned statement on which all combined managed to establish the prosecution's case.

I have diligently examined the evidence on the records. On a charge of murder, the prosecution must prove the following essential ingredients:

1. That the death of a human being occurred.
2. That the death was with malice aforethought.
3. That the accused participated in the crime.

There is no doubt that the deceased is dead. Almost all prosecution witnesses saw the deceased body on the material date. PW2, the deceased mother, PW5, the deceased sister and PW9 the deceased boyfriend, testified that the deceased was buried on the 26/2/2020. PW 3, Pw4 (the ten-cell leader), PW7 and PW8 testimony are to the effect that the deceased died, and they saw the deceased body. The defence

evidence is also in support of this fact. DW1 and DW2 affirms the fact as they both confirms to have attended the scene on the material date.

Further to that, the remarks on the postmortem report that: "***A body of an adult African female with multiple body bruises on the anterior aspect of the neck, right side of the waist and back and lacerations. There were sex superficial and deep cut wounds at around the neck, largest measuring 6cm across exposing neck muscles and large vessels, couhised, haemorrhage and oedematous lugs were also noted***". doesn't only prove unnatural death but also portrays a clear intention of the culprit to kill. This is established by the types of the wounds inflicted on the deceased body who was just left asleep by her sister (PW5) on that same morning. I am thus satisfied that the Prosecution has proved beyond reasonable doubt that the deceased is dead, the death was unnatural and that the killing was with a malice aforethought.

The most crucial element is whether the accused persons brought before the court are responsible with the complained death. In this regard, the prosecution relies on the doctrine of recent possession, accused's confession, and 2nd accused's prior threats to the deceased's family.

The doctrine of recent procession is a presumption of guilt against a person found in possession of the items recently stolen from the victim of the offence. To have the doctrine established, the Court of Appeal in Joseph **Mkumbwa and Another v. The Republic**, Criminal Appeal No.94 of 2007 (unreported) held t: -

*"The position of the law on recent possession can be stated thus. Where a person is found in possession of property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction, **it must positively be proved, first that the property was found with the suspect; second that the property is positively the property of the complainant; third the property was recently stolen from the complainant; and lastly that the stolen thing in possession of the accused constitutes the subject of a charge against the accused.** It must be the one that was stolen/ obtained during the commission of the offence charged. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements..." (Emphasis added)*

See also **Juma Bundala v. Republic**, Criminal Appeal No. 151B of 2011 (unreported).

It is the prosecution case that before her death, the deceased owned a mobile phone Techno by type which went missing after the murder incident. And two weeks before her death, her mother PW2, lost her phone also techno but of a different specification. According to the prosecution witnesses, both phones (exhibit P4) were found in

possession of the 2nd accused at Vijibweni Kigamboni area four days after the murder incident that is 28/2/2020. This was supported by PW7, PW8 and PW9 together with exhibit P2 certificate of seizure which was signed by him and two other persons including PW9. The accused persons however strongly deny this evidence. The 2nd accused contends that he was forced to sign the seizure certificate at the Police station after his arrest.

I have subjected the entire evidence into scrutiny. Though appealing, this piece of evidence is wanting on merit. Not all items seized in the search, were tendered in court. According to PW7 the 2nd accused was found with two mobile phones, three pairs of jeans, three shorts and a t-shirt which were kept in the same bag. All exhibits collected were taken to the police but only two mobile phones were tendered in court as exhibit. PW7's answer on why the rest of exhibits were not tendered in court was that they were not connected with the offence. This answer left the court without any proof as to whether the fact being asserted is true or not, much so in this case where the issue of search is contentious.

Worse, no independent witness of the **search** and seizure that resulted into the recovery of the deceased mobile phone and that of her mother (PW2) was brought to court to affirm the prosecutions stance that indeed search was conducted. Explaining of the need of independent witness, the Court of Appeal In the case of **Shaban Said Kindamba vs Republic**, Criminal Appeal No. 390 of 2019(Unreported) held:

*"We are inclined to take it as logical that an independent witness to a search must be credible, or the whole exercise would be rendered suspect..." In the instant matter, **the certificate of search and seizure was signed by Rajabu Semuye, who was the complainant. I am of the considered opinion that the complainant could not be an independent witness.** Therefore, since the said certificate of seizure was not signed by an independent witness, then the trial magistrate erred in law in relying on it in convicting the appellants." (bold is mine)*

In this case, PW9 , a deceased lover, the one who saw the 2nd accused with the alleged deceased phones, he is the same person who reported the matter to the police after he was so advised by his boss named Steven but more strangely he witnessed the search resulted to the retrieval of the alleged phones and signed the seizure certificate. This is supported by PW7's evidence during cross examination. When answering the questions by Mr. Munuo advocate for the 1st accused, PW7 said he said:

"It is true that the information on the use of the deceased phone by the accused was given to us by Julius Abel Mwanjala, the deceased lover and one of the witnesses of the search and seizure".

Though the seizure certificate was signed by another person called Habibu Hashimu who was named by PW7 as an independent witness, that witness was never called before the court to testify on what he witnessed if any and no explanation was given on why he was not summoned to testify before the court.

On top of that, no description of the stolen items was give before their seizure. The description of the stolen phones including the imei numbers, colours and other specifications mentioned by PW2, PW5, PW7, PW8 and PW9 came to feature only after the arrest of the 2nd accused. According to Pw2, she after the murder incident fell unconscious to the next day. She only contacted the police two weeks after the burial ceremony, a period after the arret of the accused persons. This proves that she never gave the specification of the phones to the police before they were recovered four days after the incident. Similarly, no description of the said phone was given by PW5, and Pw9 the deceased sister and fiancés' after the murder and before the recovery of the same by the police. PW5's interaction with the police was very minimal on the material date. Testifying on this point she said:

"While on the way, I saw many people seated in different groups pointing at me. On arrival at home, I found many people gathered. ... I forced and ran inside our house. I found the deceased lying at the seating room covered with a bed sheet except the face. I looked at her. She had a big wood on her neck and there was a pool of blood on the floor.

I was taken to my neighbour. I lost conscious and regained my conscious later and found the deceased has been transferred to the Hospital. I found the investigators. They asked me few questions and left".
(Emphasis added)"

PW8, one of the arresting officers was keen enough to tell the court that the imei numbers of the identified phones came to be known after

the arrest of the 2nd accused. This evidence is also supported by PW2 and PW5 who admitted having shown the said mobile phones at the police station for identification after they were recovered from the 2nd accused.

There is no doubt that mobile phones are easily available in the market, and thus, can be owned by any person. In this case, I think, description of special mark ought to have been given to the police first before the items were shown to the identifying witnesses. The identification of these items by PW2 and PW9 in court, under the circumstances of this case cannot by any standard be accepted as trustworthy evidence. The only possibility in this case is that the features described by prosecution witnesses came to their knowledge after the recovery of the said phones by the police raising doubt to the whether they are the same phones the deceased and her mother owned before the incident more so because there was no other evidence adduced to prove ownership. I for the above reason find the evidence by PW2, PW9, PW7 and PW8 on the identity of the alleged stolen phones doubtful and highly prejudicial to the interest of the accused.

Connected to the above is a contradiction on how the loss of the PW2 mobile phone was handled. While PW2's claims to have reported the loss of her mobile phone to the police as indicated by her answer during cross examination that:

"My phone was stolen two weeks before the incident. I reported the loss of my phone to the police. I do not have a loss report".

PW5, who is PW2's daughter told the court that the loss of PW2 was neither reported to the police nor the local authorities. It should be remembered here that, the two mobile phones discussed here are the key to this matter because they are the only items brought to link the accused persons with the murder of the deceased. Prosecution was thus required to establish, not only their existence and ownership by the alleged owners but that they really moved from one end to the other, that from the deceased and her mother to the accused persons in an indescribable manner and they have totally failed to so establish.

Next is the accused cautioned statements. The prosecution has relied on two repudiated cautioned statements of the accused. It is settled that it is unsafe to convict the accused person basing on uncorroborated retracted or repudiated confession. The trial court may only act upon uncorroborated repudiated or retracted confession where it is satisfied that the retracted or repudiated confession is true. This is the position in **Bombo Tomola v. Republic** [1980] TLR 254, where the Court held:

"Generally, it is dangerous to act upon a repudiated [or retracted] confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances, is satisfied of its truth."

I have inspected the accused persons cautioned statements to find out whether they are trustworthy. Firstly, though the alleged confesses talks of the same incident, they are at variance on the manner the incident

was committed. In his statement, the 2nd accused confess to have stabbed the deceased with the knife at the neck and stealing the deceased's phone while the 1st accused says, in addition that, they gang raped and sodomized the deceased before they knifed her. Secondly, the allegation of rape and sodomy in the cautioned statements is not supported by the prosecution evidence including the Postmortem examination report where nothing was remarked in respect of the deceased genital organs. And I was wondering whether it is possible for the gangraped and sodomised genital organs by four male persons to remain unnoticed by a pathologist Doctor.

Again, as one would notice, the prosecution did not bother to have accused persons' extra judicial statement recorded to prove that indeed the accused's statement was a volunteered statement made in acknowledgement of the offence at issue especially in this case where no direct evidence was available to connect the accused with the offence of murder raising doubt on the reliability of the Cautioned Statements. The court is supported by the case of **Ndorosi Kudekei v. Republic**, Criminal Appeal No. 318 of 2016 (Unreported), where the Court of Appeal held that:

"With the absence of the extra judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant really confessed to have killed the deceased or not."

The 2nd accused's prior threat is another piece of evidence relied by the prosecution. PW2 and Pw5 's allegations are that the 2nd accused, is their close neighbour that he once asked for an iron which was later

reported missing. On following up the iron, the accused threatened to do something unforgettable to the PW2's daughter. This information is however being brought to court for the first time. It was never reported to anybody, the police or the local authority. And to complicate the matter further, PW3, the ten-cell leader has denied knowing the 2nd accused as one of his residents in his locality. In any case, suspicious however grave cannot ground conviction. See **G. Ntinda v. Republic**, Criminal Appeal No. 17/ 1991 (Unreported)

The only conclusion here is that the prosecution has failed to prove beyond reasonable doubt that the accused's culpability in this matter. I forthwith acquit the accused persons from the charge of murder and order for their immediate release from prison unless they are held therein for other lawful cause. Order accordingly.

Dated at Dar es salaam, this 16th February 2024



E. Y Mkwizu
E. Y Mkwizu

Judge
16/2/2024

COURT: Right of Appeal explained



E. Y Mkwizu
E. Y Mkwizu
Judge