

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

**IRINGA SUB REGISTRY**

**AT IRINGA**

**CRIMINAL SESSION CASE NO. 23 OF 2023**

**THE REPUBLIC**

**VERSUS**

**PROSPER S/O KIYEYEU MLOFA @ POLO**

**JUDGMENT**

**Date of Last Order: 27.02.2024**

**Date of Ruling: 18.03.2024**

**A.E. Mwipopo, J.**

Maria Kavina, the deceased, was found sitting on the ground on the pathway several meters from her residence by her granddaughter, Carolina Aidan Kiyeyeu (PW1). PW1 asked the deceased what was wrong, and she answered that Prosper Kiyeyeu Mlofa @ Polo, the accused person, had kicked her in her ribs on an allegation of bewitching him. Maria Kavina was taken to the village dispensary, and the Village Chairman was informed about the incident. Village Chairman arrested Prosper Kiyeyeu @ Polo and sent him to Ifunda Police Post for assaulting Maria Kavina. On the following day, Maria

Kavina died while undergoing treatment at Ipamba Hospital. Prosper Kiyeyeu Mlofa @ Polo, who was in police custody, was charged with a murder offence before this Court. The particulars of the offence in the information reveal that on the 25<sup>th</sup> day of September 2022, at Ilandutwa Village within Iringa District and Region, the accused person intentionally killed Maria Kavina. When the information was read to the accused person he pleaded not guilty. The prosecution called five witnesses and 1 exhibit to prove the case. The Court found that the prosecution's case was made to require the accused person to defend himself. The accused testified on oath in his defence and called two other witnesses. He did not have an exhibit.

Carolina Aidan Kiyeyeu (PW1) testified that on the 25<sup>th</sup> day of September 2022, around 11:45 hours, her grandmother, Maria Kavina (the deceased), visited their house to greet her and stayed with her until around 17:00 hours, when she left. A few minutes later, PW1 came outside the house only to see her grandmother, Maria Kavina, sitting on the ground approximately 50 meters away. As Maria Kavina was aged, PW1 went where she sat to see if everything was fine. PW1 found she was covered with dust in her head and bleeding in her mouth. PW1 asked Maria Kavina what happened, and she answered that Polo had beaten her on the allegation she

had bewitched him. PW1 said the other name of Polo is Prosper Mlofa Kiyeyeu. Maria Kavina said Prosper Mlofa Kiyeyeu kicked her in the ribs. PW1 called Filomena Kavina who is staying close to where PW1 found Maria Kavina. Filomena Kavina came to the scene and took Maria Kavina to her house before taking her to the Ilandutwa Dispensary. PW1 said Prosper Mlofa Kiyeyeu is her brother from her uncle. PW1 said Maria Kavina was the mother of her father. PW1 identified Posper Mlofa Kiyeyeu @ Polo as the accused person in the dock.

Aidan Kiyeyeu (PW3) testified that on the 25<sup>th</sup> day of September 2022, while at the local club, his child Zawadi came and told him that his mother namely, Maria Kavina, was assaulted, and she was at home. PW3 went back home to see his mother. PW3 asked Maria Kavina who attacked her, and she answered that she was beaten by Polo Kiyeyeu, who kicked her in the ribs. Polo Kiyeyeu is the son of his brother. PW3 hired a motorcycle to carry his mother to the Ilandutwa Dispensary. Later on, PW1 followed her to the Dispensary. The doctors at the Dispensary told them to take Maria Kavina to Ipamba Hospital for further treatment as she had severe pain. On the next day, the 26<sup>th</sup> day of September 2022, PW3 took his mother to the Ifunda Police Post to report the incident. Police recorded the witness statement of

Maria Kavina and issued PF3 so that she could get treatment at the hospital, and they went to Ipamba Hospital. Maria Kavina was treated at Ipamba Hospital, and they were told to return to the hospital for an operation after one month. While on the way back home from Ipamba Hospital, Maria Kavina died around Tanangozi village in the passenger bus.

PW3 went to report the death of the deceased at the Ifunda Police Post before taking the deceased body to the Mortuary at Iringa Region Referral Hospital. On the following day, the examination of the deceased body was conducted by the doctor after PW3 identified the body to be that of his mother, Maria Kavina. The deceased body was handed to relatives for burial processes.

The Chairman of Ilandutwa Village, Isack Bernard Nzamilisi (PW2), testified that on the 25<sup>th</sup> day of September 2022, around evening hours, he received a phone call from the Village Executive Officer informing him about an incident that occurred in the village and asked him to go to the village Dispensary. PW2 went to the Ilandutwa Dispensary and met with Maria Kavina. Maria Kavina told PW2 that she is having shoulder pain after she was beaten by Prosper Kiyeyeu, who is also known as Polo. PW2 called Prosper Kiyeyeu, but he refused to come. He sent local militiamen who brought

Prosper Kiyeyeu to the Ilandutwa Dispensary. PW2 asked Prosper Kiyeyeu if he had beaten Maria Kavina, and he denied it. Prosper Kiyeyeu told PW2 that he attended his relative funeral at Winome village and returned to the village later on by using Huzuni's motorcycle. PW2 called Huzuni, who came to the Ilandutwa Dispensary. Huzuni told PW2 that Prosper Kiyeyeu told him he kicked an older person when he was coming from Winome Village. PW2 believed that it was Prosper Kiyeyeu who attacked Maria Kavina. He arrested Prosper Kiyeyeu and took him to the Ifunda Police Post. Maria Kavina did not tell PW2 why Prosper Kiyeyeu attacked her. There was a previous conflict where the Kiyeyeu family accused Maria Kavina of being a witch. The conflict was solved and the matter was settled.

The prosecution's 4<sup>th</sup> witness is WP 6358 D/Cpl Eliza (PW4). PW4 is a police officer working at Ifunda Police Post in Iringa District. On the 26<sup>th</sup> day of September 2022, while at Ifunda Police Post, PW4 recorded a witness statement of Maria Kavina after she reported being injured by Prosper Kiyeyeu on the 25<sup>th</sup> day of September 2022, around 17:30 hours at Ilandutwa village. Maria Kavina told PW4 that her grandchild, namely Prosper Kiyeyeu, attacked her by kicking her in the ribs on the accusation she was a witch when they met. She said Prosper Kiyeyeu attacked her while she was

going back home after greeting her grandchildren. She sustained injuries in her ribs, hands and shoulders. PW4 opened an investigation file for the offence of assault causing actual bodily harm against the suspect, Prosper Kiyeyeu. She issued a PF3 so Maria Kavina could get treatment at the hospital. Around 19:30 hours on the same day, PW4 received information that Maria Kavina was dead. PW4 tried to tender the witness statement of the deceased under section 34B (2) of the Evidence Act, Cap. 06 R.E. 2022, but the Court ruled that the statement is not admissible for failure to meet the law requirements under section 34 B (2) (d) and (f) of the Evidence Act following the objection raised by the defence counsel.

Dr. Richard Nicodem Kipyee (PW5) examined the deceased body on the 27<sup>th</sup> day of September 2022 at the Mortuary of Iringa Region Referral Hospital. The deceased son, namely Aidan, identified the deceased body. PW5 said according to his examination, the cause of the deceased death was due to pneumothorax pulmonary embolism caused by the burst of airbags in the lungs. PW5 filled the report on post-mortem examination and tendered it as an exhibit. The report was admitted as exhibit P1. The report shows the cause of the deceased death is pneumothorax pulmonary embolism.

The prosecution called as their next witness police officer with No. F. 3928 D/Sgt Edmund. D/Sgt Edmund testified that he was the investigator of the case. However, Advocate Cleophas Mheluka, the defence counsel, observed that the statement of D / Sgt Edmund was not read during the committal. The state attorney admitted that the statement of D/ Sgt Edmund was not read during the committal proceedings. Following the observation by the defence counsel and admission by the state attorney, the Court expunged PW5's evidence from the record. After that, the prosecution closed their case.

In his defence, the accused person (DW1) testified that on the 25<sup>th</sup> day of September, 2022, he went to Winome Village to attend his uncle's Mwachusa Kadinde (elder brother of his father) burial ceremony. He said that Mwachusa Kadinde died on the 24<sup>th</sup> day of September, 2022, while undergoing treatment at Usokami Mission Hospital. He started the journey from Ilandutwa Village to Winome Village around 12:45 hours on the 25<sup>th</sup> day of September, 2022, using a motorcycle he borrowed from Huzuni Kalinga. Chunguza Kiyeyeu accompanied him. On the way to Winome Village, they picked up Mavila Kadinde, who was also on his way to attend a burial service at Winome Village. They arrived at his uncle's house around

14:00 hours. They buried his uncle and started returning to Ilandutwa Village around 18:07 hours. They arrived at Ilandutwa Village when it was already dark. DW1 did drop off Chunguza Kiyeyeu and Mavika Kadinge at Kijiweni. After that, he returned the motorcycle to Huzuni Kalinga.

DW1 denied assaulting the deceased as he was at Winome Village attending a burial ceremony at the time it was alleged he kicked her on a witchcraft accusation. He said PW1, PW2, PW3 and PW4 were not telling the truth that they heard the deceased mentioning him as the person who attacked the deceased and caused her death. He denied attacking the deceased. DW1 said the deceased is his grandmother. He alleged the deceased had an eye problem and she was not seeing well. He said his name is Prosper Mlofa Kiyeyeu and not Prosper Kiyeyeu Mlofa, as it appears in the information. DW1 tendered his voter's identity card from the National Electoral Commission (exhibit D1) to support his testimony.

Mavita Charles Kadinda (DW2) testified he is a resident of Ilandutwa Village. On the 25<sup>th</sup> day of September 2022, he started a journey by walking from Ilandutwa Village to Winome Village to attend the burial of his uncle. Around 13:00 hours, when he was close to arriving at the mourning house, the accused person and Muchunguza Kiyeyeu gave him a lift in the

motorcycle. They arrived at the mourning house around 14:00 hours. They stayed at Winome Village until around 18:30, when they started a journey back to Ilandutwa Village using the motorcycle ridden by the accused person. They arrived at Ilandutwa when it was already dark. He said several people in the village use the name Prosper. Also, several people in the town use Polo, including Polo Ndaga and Polo Kibiki.

The Court observed that DW2 was not a credible witness during cross-examination as he took a long time to answer cross-examination questions as if he was making up answers. He said in cross-examination that it was around 11:00 hours when he got a lift from the accused person and Muchunguza Kiyeyeu. The accused person is his relative. They arrived at mourning house around 13:00 hours. Before arriving at the mourning, they went somewhere to drink alcohol. His answers during cross-examination contradicted his evidence in the examination in chief.

The last defence witness is Chunguza Kiyeyeu (DW3). DW3 testified that on the 25<sup>th</sup> day of September, 2022, around 13:00 hours, he travelled from Ilandutwa Village to Winome Village with the accused person to attend the burial of Mwakyusa Kadinda, their grandfather. They arrived at the morning house around 14:00 hours. They stayed at Winome Village until

around 18:00, when they started returning to Ilandutwa Village. They used a motorcycle on their journey. They arrived at Ilandutwa Village around 19:00 hours. The accused person dropped DW3 at Kijiweni. Around 17:00 hours later, they were still at Winome Village attending the burial ceremony.

In cross-examination, DW3 said another name for Prosper Kiyeyeu is Polo. They picked DW2 close to the mourning house and went there straight without passing anywhere. This was the end of the defence case, and the defence case was closed.

From the evidence adduced by the prosecution's witnesses, there is no dispute that Maria Kavina (the deceased) is dead, and her death was not natural. The evidence of PW5 and the content of exhibit P1 (report on post-mortem examination of the deceased body) reveals that the cause of the deceased death is pneumothorax pulmonary embolism. PW5 explained that there was too much air in the deceased lungs caused by the rupture of the airbags. The death of the deceased was caused by the increased amount of air in the lungs after the rupture of airbags in the lungs, secondary to injuries she sustained. Thus, her death was not natural.

As the accused person is brought before this Court for murder offence, the questions to be determined are whether the accused person is responsible for the deceased death, and if the answer is in affirmation, whether the accused person killed the deceased with malice aforethought.

In this case, no witness saw the accused person killing the deceased. The prosecution's case relied on circumstantial evidence to prove its case. The circumstantial evidence must be intact to lead to only one irresistible conclusion pointing to the accused's guilt. The burden of proving facts that justify drawing this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused. In **Julius Justine and Others vs. Republic**, Criminal Appeal No. 155 of 2005, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:

*"... the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. Those circumstances should have a definite tendency unerringly pointing towards the guilt of the accused. Circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else."*

From the above-cited case, for circumstantial evidence to prove the case, the evidence which establishes the accused person's guilt must not be capable of existing together with his innocence. The only explanation of the evidence must be that the accused person is guilty of the offence. The circumstances taken cumulatively should form a complete chain in which, under human probabilities, there is no escape from the conclusion that the crime was committed by the accused and no one else. In the case of **Gabriel Simon Mnyele vs. Republic**, Criminal Appeal No. 437 of 2007, Court Appeal of Tanzania at Dar Es Salaam, (unreported), it was held that:-

*"It is common ground that for circumstantial evidence to found a conviction, it must be such that it irresistibly points to the guilt of the accused. From the authorities we are settled in our minds that when a case rests on circumstantial evidence such evidence must satisfy three tests:-*

*(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established,*

*(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,*

*(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else within all human*

*probability."*

In this case, the prosecution's case relies on the dying declaration from the deceased that it was the accused person who attacked him and caused her some injuries. Under section 34 (a) of the Evidence Act, Cap. 6 R.E. 2022, a written, oral or electronic statement made by a person explaining the cause of his death or the circumstances of the transaction which caused his death is admissible as evidence. The law is silent if the dying declaration requires corroboration before the Court can convict relying on it. The evidence could serve as the sole basis for a conviction without additional corroborating evidence. The evidence could be relied on if found to be genuine and reliable.

However, the Court must be satisfied that the dying declaration is accurate. Where there are doubts about the dying declaration, its reliability may be questioned. In the case of **Onael Dauson Macha vs. Republic**, Criminal Appeal No. 214 of 2007, Court of Appeal at Arusha, (unreported), it was held that:-

*"It is now settled law that where a dying declaration is admitted in evidence, it should be scrupulously scrutinized, and in order to be acted on, corroboration is highly desirable."*

As a rule of practice, the dying declaration should be corroborated before it. See. **Republic v. Rutema Nzungu** (1969) HCD no. 445, **Republic v. Marwa** (1968) HCD no. 47, and **Africa Mwambogo vs. Republic** [1984] TLR, 240. In **Republic vs. Mohamed Shedaffa and Three Others** [1983] TLR 95, it was held:-

*"It is possible for a conviction to proceed upon evidence consisting of a dying declaration only, although it is a rule of practice that a dying declaration requires corroboration before it can be acted upon, the court said that it is possible for a conviction to proceed upon evidence consisting of a dying declaration only, although it is a rule of practice that a dying declaration requires corroboration before it can be acted upon."*

The exact position was stated in **Onael Dauson Macha vs. Republic**, (supra), where it was held that:-

*"All the same, it is trite law now that apart from what are really exceptional cases where the reliability of the deceased's statement cannot be impugned or questioned, corroboration has been held by all Courts in East Africa and India, to have been necessary."*

In the present case, PW1, PW2, PW3, and PW4 evidence is that the deceased told them it was the accused person who kicked him in his ribs for witchcraft allegations. The deceased named the accused person Polo

Kiyeyeu to PW1 and PW3 and named him Prosper Kiyeyeu to PW2 and PW4. The accused said the name of Polo Kiyeyeu does not belong to him, but PW1, PW3 and DW3 testified that the accused person's other name is Polo Kiyeyeu. The evidence proves that the other name of the accused person is Polo Kiyeyeu. The evidence of PW1 and PW3 supposed the incident occurred in the evening. PW1 said she was able to see the deceased sitting on the ground from a distance of 50 meters. It presupposed there was sufficient light. PW3 said after he hired a motorcycle to take the deceased to the Ilandutwa Dispensary, he followed them to the Dispensary, arriving around 18:00 hours. This proves that the incident occurred in the daytime, and there was sufficient light.

However, there is evidence of PW3 during cross-examination that the deceased was very old and one of her eyes was not seeing well. PW3 said the deceased remaining eye was seeing well and she was able to go to church by herself. This brings in the doubt if the deceased was seeing well enough to identify the accused person during the alleged attack. PW1, PW2, PW3 and PW4 did not say if the deceased said the circumstances of the attack, and it is not known how the deceased was able to identify the accused person. The accused, in his testimony, said that the deceased had

an eye problem and was not seeing well. The same is similar to what was stated by PW3.

The accused (DW1) filed a notice of reliance on the defence of alibi before the close of the prosecution's case and raised the defence of alibi during the defence case. He said that at the time the deceased was attacked, around 17:00 hours, he was in Winome Village attending the burial service of his uncle. He started the journey from Ilandutwa Village to Winome Village around 13:00 hours on the 25<sup>th</sup> day of September 2022, by using a motorcycle and returned around 19:00 hours. He said he was with the company DW2 and DW3. DW3 testified that from 14:00 hours to 18:00 hours, they were at Winome Village attending the burial service of their relative, Mwakyusa Kadinda. The Court found DW2 was not a credible witness as his evidence was contradictory. DW2 was saying one thing one time and saying another thing that contradicted his first story the next time. He took a long time to answer the prosecution's questions during cross-examination as if he were making answers.

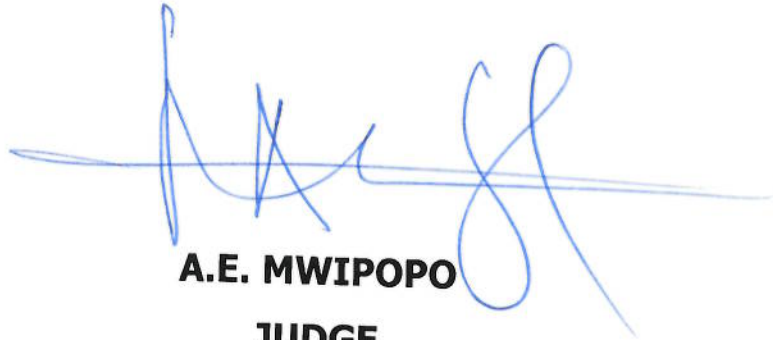
As there are some doubts about the vision ability of the deceased, the possibility of mistaken identity could not be ruled out. The deceased may have mentioned the accused person due to her poor vision. For that reason,

I find the evidence of the dying declaration requires corroboration for the Court to rely on it. Unfortunately, there is no such evidence in the record. The evidence of PW1, PW2, PW3 and PW4 is an oral deceased declaration that it is the deceased who attacked him. The same is evidence of the consistency of the deceased belief. Her repetition to PW1, PW2, PW3 and PW4 that the accused person attacked her could not guarantee her accuracy. PW1, PW2, PW3, and PW4 evidence could not corroborate each other. The same was stated in **Onael Dauson Macha vs. Republic**, (supra), where it was held that:

*"What the learned judge took to be corroborative evidence is only evidence of the consistency of Haikasia's belief, if she even told the witnesses so, but her repetitions were no guarantee of the accuracy or truthfulness of what she alleged: see **R v. MUYOYA bin MSUMA (1939) 6 EACA 128.**"*

Further, the accused person's alibi defence raises the possibility of the accused person not being present at the crime scene during the incident. I find it not safe to rely on the evidence of the deceased's dying declaration made to PW1, PW2, PW3, and PW4 to convict the accused person. There is doubt if the deceased identified the accused person during the incident.

Therefore, the prosecution evidence is not sufficient to prove the offence of murder against the accused person, namely Prosper Kiyeyeu Mlofa @ Polo, and he is acquitted accordingly. It is so ordered accordingly.

A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

**A.E. MWIPOPO**

**JUDGE**

**18/03/2024**