

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT MOROGORO
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 182 OF 2016
REPUBLIC
VERSUS
1. JOHNSON DAMIAN @ MKUDE @ WAKUSIZI
2. AMON THADEI @ GULIO
3. MOHAMED MUHANDO @ MDEVE

JUDGMENT

MUNISI,J.

The three accused persons; namely **JOHNSON DAMIAN @ MKUDE @ WAKUSIZI, AMON THADEI @ GULIO** and **MOHAMED MUHANDO @ MDEVE** stand jointly and together charged with the offence of Murder contrary to section 196 of the Penal Code [Cap 16, R.E. 2002]. The prosecution alleged that on or about 3/8/2014 at Nyandira area, Mlali Village within Mvomero District in Morogoro Region, the three accused persons murdered one Mathias Damian @ Mkude. From the contents of the Post Mortem Report - exhibit **P2** which was admitted un-objected during the Preliminary Hearing, the cause of death was due to slaughtering. The body of deceased was found without a head, only a trunk was found thrown on the road side. Undoubtedly, from such cause of death, deceased died a very violent death.

When the charges were read over to the accused persons, they all disputed them and pleaded their innocence. The prosecution thus called a total of eight witnesses to prove its case.

The 1st prosecution witness, Damian Mathias (PW1) is the biological father of the deceased and the 1st accused. His testimony was to the effect that on 4/8/2014 he learnt from Mathias' wife that her husband did not return back home since he left home the previous day. Upon inquiring further, he was told he left with the 1st accused who came and they left together. He went on that his two sons Mathias and Johnson were bodaboda drivers. After receiving the news, he looked for Blanka Michael @ Paroko his in-law and Gaspar and instructed them to report the matter to the police. In the meantime, he phoned Johnson to establish whether he was with Mathias, but the latter answered that he was away in Dar es Salaam, however, within a short while he met him in the village. He went on that together with reporting the matter to the police, Blanka and Gaspar kept on searching until 7/8/2014 when information was brought that a body had been seen at Mbalala area. He thus went to the said area where he witnessed a body which had no head and upon inspecting it he confirmed positively that it was his son Mathias. He identified him through his bent/crooked toes which were bent towards each other and also white birth mark on his left elbow. After the police procedures he looked for the village chairman and requested for a burial place and proceeded with burial. He said Johnson did not take any active role or show any cooperation during the burial of process which is contrary to the Luguru custom which expected Johnson

to bury his young brother. He said Johnson's conduct made him form the opinion that he was involved in the murder of Mathias.

Upon being cross examined by the learned counsel together with responding to questions from Lady Assessors, PW1 conceded that he never saw those who killed Mathias and his suspicion was mainly based on the conduct demonstrated by the 1st accused on the burial day of not taking an active role. He also conceded that Johnson was generally an antisocial and he did not take part in most communal activities.

PW2 was Blanka Michael Msigwa an in-law of PW1. He told the court that Johnson (1st accused) was suspected to have killed Mathias because the report sent to Damian Mathias (PW1) by Mathias' wife after he went missing was that it was Johnson who left with him the last time he left home on 3/8/2014. On 5/8/2014 his father in law instructed him and Gaspar to report the matter to the police and look around for information. He said they started looking around and sent a report to Mgeta and Mzumbe police stations. On 7/8/2014 he received an anonymous phone call which informed him that there was a body seen at Mbalala area – Mlali village. He thus went to the area mentioned and upon searching for a while, they found a body which had no head. They informed relatives and the Police who came to the scene. When the police completed their procedures, the body was handed over to them for burial. Like PW1, Blanka said Johnson did not take any active role in the burial process and he declined to pay any money for the purchase of the burial cloth (sanda). Due

to that they all suspected that he was involved in the death of his young brother.

Upon being cross examined by Mwansoho, learned counsel PW2 said he did not know who killed deceased, or when death occurred and did not know the weapon used in slaughtering deceased.

PW3 was Scholastica Cyprian, she told the court that she was the wife of the 2nd accused, Amon Thadei. She said on 3/8/2014 at around 7.00 pm her husband came back home and asked for a machete but because it was not there he took a slasher instead and left for his shop. He came back later around midnight dressed in pants (bukta) and had a wound on his finger. While wondering what had happened the husband asked for a trouser and left again. In the morning she went to look for him in his shop but he was not there. She thus phoned him and he answered that he had gone to Mgeta and will be coming back the following day. When he came back he told her that he got an accident on his way back where he injured his finger. She later heard of the murder incident while she was in her farm and the arrest of her husband.

Upon being cross examined by Mr. Mwansoho, learned counsel, she admitted that she did not know Johnson Damian. She admitted that she only heard that there was somebody slaughtered but she did not know who slaughtered him and had never seen her husband slaughter anybody.

Upon being cross examined by Mr. Mahenge, learned counsel. She confessed that she is currently married to another man and had a child aged 7 months whose father was not the 2nd accused and she had no plans to reunite with Amon, in that regard she would not wish him to go back to the village.

PW4 was A/Ins. Mwashibamba, his evidence was to the effect that; in 2014, he was stationed at Mzumbe police station. On 7/8/2014 at around 3.00pm he was assigned by his boss Insp. Abdallah to make preparations to go to the scene of crime at Mlali village where police had received information of the discovery of a body. After the necessary preparations a team of detectives led by the OCS left for the scene and on the way they passed by the Dispensary to pick up a doctor. Upon arrival, they found lots of people gathered and found a body of a male person which had no head. The body was identified by Johnson Mkude and Blanka to be of Mathias Damian Mkude. The identifiers showed peculiar marks on the hand and the toes which made them say with certainty that it was the body of Mathias. After the identification the doctor performed the postmortem report. Attempts to locate the head failed thus the body was handed over to relatives for burial.

On being cross examined by Mr. Mwansoho, learned counsel, PW4 admitted that he did not know deceased or the 1st accused before the incident. He also admitted that he did not know who killed him.

PW5 was Hussein Abdallah Isike, a retired police Sergeant. He told the court that on 9/8/2014 a team of detectives comprised of himself, Alex, Shaban and their OCS went to Changarawe area for purposes of arresting some suspects. This was after the receipt of information that at Chief Simba's residence there were two people involved in the Mlali murder who were receiving charms to protect themselves. After the arrest they took the two suspects to the station where he heard the 3rd accused tell the 1st accused "hebu waambie tu hawa askari kile tulichokifanya kwani kuna tafizo gani"- (just tell the police what we did). He said due to those utterances, they became suspicious hence the accused persons were taken by the OCD for further interrogations.

Upon being cross examined by Messrs Mwansoho, Mahenge and Giray, learned counsel, PW4 admitted that he knew that chief Simba is a witch doctor and that he heard when the 3rd accused made the utterances which were directed to 1st accused. He said the witch doctor told the police that the charms were in relation to the murder incident that the suspects had committed at Mlali. He admitted that deceased's motorcycle and his head were not found. He also conceded he could not tell who slaughtered deceased.

PW6 was D/Cpl. Joseph, he told the court that the role he played in this matter was to investigate the relationship between the 3rd accused and one Chief Simba of Changarawe. His findings were that he did not find any relationship that existed between the 3rd accused and Chief Simba.

PW7 was DC Alex, he told the court that he was among the detectives who went to Changara we to effect arrest of suspects at Chief Simba's residence. He said upon arrival they found a ritual going on over the 1st and 3rd accused persons. Contrary to what PW5 told the court, he said they found Chief Simba performing his ritual over the 1st and 3rd accused. He said he knew Chief Simba as a witch doctor but he was not acquainted to him. After the arrest, the two accused persons were taken to the station where the 3rd accused appeared to be making utterances blaming the 1st accused.

On being cross examined by the learned counsel and responding to questions by the Lady Assessors, PW7 insisted that they found Chief Simba performing the ritual over the two accused persons.

The last prosecution witness was Levina Evarist who testified as PW8. She told the court that she was the wife of the deceased Mathias Damian. On 3/8/2014 around 2:00 pm her husband returned home from his bodaboda errands. While there she overheard him talking over the phone to his brother Wakusizi who was also a bodaboda driver. The later was telling Mathias that there were two passengers who wanted to be taken to Mlali if he had time. After a while she saw Wakusizi law come with his bodaboda but he stopped by the road and called her husband. She saw the two talk briefly and Mathias picked his motorcycle and they both left. From that day Mathias never came back home again. She tried to make inquiries of his whereabouts from near relatives without success and on 5/8/2014 she reported the

matter to her father in law where she also found present; Godfrey, Blanka and her mother in law. She received no information until the 7/8/2014 when in the family meeting it was resolved that the matter be reported to the police and she was among those who went to the police, due to her condition, she was however asked to go back home. She said Wakusizi did not take part in the family meeting. Later in the evening she learnt about a body seen which was confirmed to be her husband's body. She said due to her condition she did not take part in the burial as she was unwell. She concluded her evidence by pointing a finger at the 1st accused with bitterness lamenting that he did not do a good thing to her because she has now been left a widow with 5 children alone.

Upon being cross examined by the learned counsel and responding to questions by Lady Assessors, PW8 said she strongly suspected Wakusizi because he was the last person to leave with Mathias, in addition she said Blanka told her it was Wakusizi who killed her husband.

At this juncture, Mr. Kapinga, learned counsel prayed to close the prosecution case and the same was accordingly marked closed.

The court upon reflecting on the totality of the prosecution evidence, was of the view that in view of the strong suspicion expressed by the family members against the 1st accused, Johnson Damian Mkude @ Wakusizi, it was to the interest of justice that they entered their defence. Under the provisions of section 293(2) of the Criminal Procedure Act, the accused persons were required to enter their defence.

Defence case comprised of five witnesses; two for the 1st accused, one for the 2nd accused and two for the 3rd accused. DW1 was Agapita Peter the 1st accused's wife. She told the court that in 2014, her husband - Wakusizi was accused of murdering his young brother and since then he has been in prison. She said after her husband's arrest the police came and searched her house but they found nothing thereafter she was taken in a lock up for two weeks. She said her husband and his young brother had good relationship but their relationship with his father was not good because the latter did not approve her as a right wife for Wakusizi as they claimed she was old. She said she did not know that Mathias was missing. That she learnt about the discovery of his body when her husband came home and met one Mzee Simba and the two left together. Adding that since the arrest of her husband the family had maintained a cold relationship with her family.

On being cross examined by the learned counsel and responding to questions by Lady Assessors, she said Wakusizi was a quiet person who did not like disputes. She said she knew Mathias as a relative and that at times when Wakusizi got passengers he connected them to Mathias. She said she did not receive the information that Mathias was missing. She said when the house was searched nothing was recovered nor does she know the reason for Mathias' killing.

DW2 was Johnson Damian Mkude @ Wakusizi (1st accused) he told the court that he used to be a bodaboda driver until his arrest. On

3/8/2014 while at Nyandira bus stand he found three passengers who needed transport to Lwale. As at that particular time there were no bodabodas at the stand, he tried to locate Mathias his young brother who was also a bodaboda driver. He thus went to his house around 2.00 pm to ask whether he was interested and upon telling him of the news, Mathias took up the deal and they both went to the stand. Unfortunately, upon arrival they found the passengers had already left. From there they parted ways and he went back home leaving Mathias at the stand. He said he had good relationship with his brother and he learnt the news about the missing of Mathias from Blanka on the 2nd day. He started making inquiries and looking around for him alone as his relationship with his father was bad because he did not approve the wife he married due to the fact that she had one child from another man, adding that at one time, his father had wanted to take his motorcycle from him which he declined. Regarding the news about the discovery of the body of Mathias, he said he learnt from Blanka at the stand area. He thereafter rushed home to fetch his helmet and convey the news to his wife. At home he met Mzee Simba who also had heard about the news and they left together to the scene where they found a lot of people had gathered including some bodaboda drivers. He managed to identify Mathias through the clothes he wore. The police came and performed their procedures after which they handed over the body for burial which he took part. DW2 said in his opinion the reason why his father and other people suspected him to have taken part in the murder of Mathias was because he was said to

be the last to leave with him from his house on 3/8/2014. He said he did not know who killed Mathias.

Upon being cross examined by the learned counsel and responding to questions by learned assessors DW2 insisted that he did not know the motive for his brother's murder, adding that to his knowledge his motorcycle has not been recovered to date. He admitted that he knew the 2nd accused because he used to conduct business at the area where they used to park their bodabodas and had also borrowed about 30 litres of petrol worth Shs 75,000/= from him and up to now he had not paid.

DW3 was Amon Thadei @ Gulio (2nd accused person) he told the court that on 3/8/2014 after his business errands he went to his house to collect a machete for purposes of cleaning his shop's surroundings. He failed to get a machete, and took a slasher instead and went back to his shop. On 4/8/2014 he went to Kododo to purchase beans and on his return he was involved in an accident at Omboza area and injured his finger. Upon return, he followed his wife in the farm and the latter upon seen the injury she advised him to go to the hospital, he however told her it will heal. He said he did not know Mathias the deceased he only heard people talking about a person who was found dead in the village. With regard to the 1st accused, he said he knew him because he was a bodaboda driver who used to park close to his shop and he used to buy cigarettes and other items from him and at one time he borrowed petrol valued at 75,000/= Shs. He said he knew the 3rd accused as a youth from Mlali and he used to visit his shop

and at one time he sold a generator to him. He said he was arrested in his shop on a Saturday by people he did not know and they did not tell him the reasons for the arrest. At the police station, he was told he was involved in the killing of Mathias. He was categorical that he was not involved at all in the murder of the deceased.

Responding to the cross examination by the learned counsel and questions by the Lady Assessors, DW3 disputed taking part in any meeting that planned to kill Mathias or been asked by anybody to kill deceased. He said the only time he met his co-accused was when they met after their arrest. He said Johnson borrowed petrol from him about a month before the death of Mathias and that he was arrested first and the rest followed.

DW4 was Masalim Mjuma Mhiza, her evidence was to the effect that the 3rd accused is her biological child but she has another child known as Chief Simba whom she described as "mtoto wa hiari." In her explanation it is a child that she did not give birth to but they mutually liked and accepted each other and created a mother – son relationship. She said as she has taken him to be her son, she introduced him to her biological children as their brother. She said she occasionally pays visits to him and he reciprocates but could not tell whether the 3rd accused used to pay visits to Chief Simba.

The last defence witness was Mohamed Muhando @ Mdeve who told the court that DW4 is his biological mother and after she introduced to Chief Simba to him as a brother, he used to visit him

at his Changarawe residence. He said that on the date of his arrest he had gone to visit Chief Simba as usual and that he was arrested together with three others so in total four people were arrested there on that day. With regard to Wakusizi, he said he did not know him before, he came to know him when he met him at the police station. He said he knew Amon as he had met him at Mlali in his shop where he went to sell a generator which he had been given by a certain Mpemba. He sold the same to Amon for 250,000/= Shs but he was only paid 150,000/= Shs on agreement that the balance was to be paid upon production of a receipt, adding that up to now he is claiming a balance of Shs 50,000/= from Amon. He said those arrested at Chief Simba's house did not include the 1st and 2nd accused persons and that the 1st accused was arrested on the way on a bodaboda as they were going to the police station. He said he did not know deceased and was not involved in killing him.

Responding to cross examination by the learned counsel and questions by the Lady Assessors, DW5 disputed the claim that the 2nd accused offered him a deal to go kill deceased. He also disputed the claim that when Amon paid him for the generator, the 1st accused was there.

At this juncture the defence prayed to close its case and the same was marked closed.

It is now my turn to assess the evidence presented in its totality to tell whether the three accused persons committed the offence of murder they stand charged. From the contents of P5 and the

testimonies of PW5, PW8, PW1 and PW2 that deceased Mathias Damian Mkude is dead and his death was very violent as it resulted from slaughtering where the head was completely severed from his trunk. PW1, PW2, PW4 and DW2 witnessed the dead body with no head lying on the road side at Mbalala area and the same was identified through its peculiar marks to be of Mathias. From such evidence, I have no doubt from such clear evidence whoever severed the head of Mathias Damian Mkude had only one intention; i.e. to kill him and must have used very sharp objects. In that regard by severing a person's head, whoever did so must have had malice aforethought because he had only one intention to cause the death of deceased. The Prosecution have cogently proved that; 1. Mathias Damian Mkude is dead, 2. His death was unnatural and very violent, 3. Whoever killed Mathias, did so with malice aforethought. The issue is whether it is the accused who did so.

From the totality of the evidence presented by the prosecution, there is no evidence whatsoever showing that all or any of the three accused persons planned to kill or were seen killing deceased. It seems the circumstances relied upon by the prosecution include the claim by PW8 that on 3/8/2014, Wakusizi came to her house to see Mathias and she overheard them discussing about passengers at the bus stand who wanted to be taken to Mlali area and each left on his motorcycle. According to PW8, her husband did not return home again the reason why on 5/8/2014 she decided to break the news to her father in law (PW1). Her account was supported by PW1 and PW2. DW2,

Johnson Damian Mkude admitted in court that he went to his young brother's house as explained by PW8 with good intentions of informing Mathias of the business opportunity regarding availability of passengers at the stand.

Another piece of evidence relied upon by the prosecution was the strong suspicion expressed by PW1 and PW2 who appeared to blame Johnson for not taking active role in the search and burial of deceased. The two witnesses expressed strong sentiments regarding the role that Wakusizi was supposed to assume in the burial of his young brother based on the Luguru customs which they claimed he neglected to perform hence the basis of the suspicion.

The last piece of evidence relied upon was the alleged arrest of the 1st accused at Chief Simba's residence allegedly receiving protection charms. Unfortunately, no evidence was produced by the prosecution to amplify what those charms were or for what purpose were they being offered. Both 1st and 3rd accused disputed this allegation strongly.

I have given due consideration to all the pieces of evidence relied upon by the prosecution, with respect, I think they constitute more of suspicion than concrete evidence. In his defence DW2 gave a very plausible explanation on why he went to deceased's house and how he searched his young brother although he did it alone after getting the news of his disappearance. He also explained that he participated in the deceased's burial. Considering what DW1 told the court regarding the way their family related to the

wider clan members, the way Wakusizi behaved could be understood.

Looking at the evidence connecting the 2nd accused, Amon Thadei @ Gulio, it seems the only evidence being relied upon by the prosecution is that of PW3, his wife then, to the effect that the night of 3/8/2014 he appeared suspicious to her and he came back with a wound on his finger. There is no any other piece of evidence connecting him with deceased's murder. In his defence DW3 disputed taking part in the killing of deceased, adding that he had problems with his wife that is why she testified as she did against him. I looked at PW3 when she was testifying, I do not think she impressed me as a credible witness, at any rate, her evidence was of no evidential value.

With regard to the 3rd accused Mohamed Muhando @ Mdeve, the only piece of evidence relied upon by the prosecution was the information obtained that he was at Chief Simba's residence receiving protection charms together with the 1st accused in relation to the Mlali murder as deposed by PW5 and PW7. DW5 did not dispute being arrested at Chief Simba but he gave explanation why he was there. He said Chief Simba is his brother and he was supported on this issue by his mother who testified as DW4. There was nothing else to connect DW3 with the deceased's murder. He disputed being arrested with the 1st accused at Chief Simba's residence saying that he was arrested alone there and the 1st accused was arrested on the way to the police station and was while on his bodaboda.

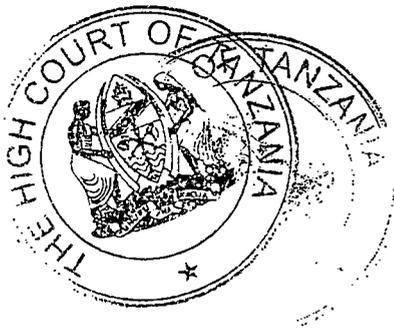
From the above analysis of evidence, what is very clear is that the evidence against all the three accused persons is based on suspicion with nothing to back up the said suspicion. From the totality of the evidence the 1st accused is suspected more by the family members on the main ground that he did not take active role in the search, family meetings and the burial. PW1 made reference to the Luguru customs which expected Johnson to bury his young brother. In my view from the circumstances of this case the blame is unjustified because the 1st accused took part at the burial only that he did not contribute money for the burial cloth as per PW2's evidence. In that regard, the blame appears to be taken out of the proportions by the relatives particularly PW1 and PW2.

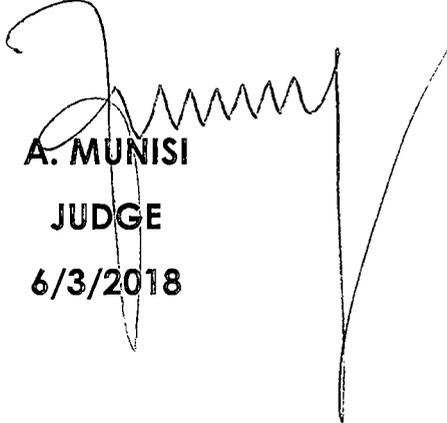
From the foregoing discussion, I have no doubt the prosecution evidence was rooted on suspicion alone and there was no concrete evidence connecting the three accused with the murder of Mathias Damian Mkude. It is trite law that suspicion alone cannot be a basis of conviction more so where accused are facing the capital offence of murder (see the cases of **MT 60330 PTE Nassoro Mohamed Ally V R Criminal Appeal No 73 of 2003** (unreported)). It is apparent that in the instant case, the suspicions against all the three appellants were so plain with nothing else to hold on.

The Lady Assessors were of the unanimous view that the three accused persons were not guilty of murder or any other offence because the whole case was based on suspicion, further that

reliance on the Luguru customs will not support the looming suspicion against the accused persons on a serious charge of murder. I joined hands with the Lady Assessors and find that the prosecution did not prove the charges of murder the accused persons stand charged.

Consequently, the accused persons, Jonhson Damian @Mkude @ Wakusizi, Amon Thadei @ Gulio and Mohamed Muhando @ Mdeve are acquitted of the charge of murder contrary to section 196 of the Penal Code which they stand charged with. Accordingly, they are to be released from prison forthwith unless otherwise held for other lawful causes.




A. MUNISI
JUDGE
6/3/2018