

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT TARIME

CRIMINAL SESSIONS CASE NO. 120 OF 2021

THE REPUBLIC

VERSUS

- 1. SABATO S/O MESHAKI**
- 2. JOEL S/O MWAI @ OSWE**
- 3. ISAYA S/O SIMBA @ OKELO**

JUDGMENT

4th & 9th August, 2022.

A. A. MBAGWA, J.:

In this case, the accused persons namely, Sabato s/o Meshaki, Joel s/o Mwai @ Oswe and Isaya s/o Simba @ Okelo who are referred to as the 1st, 2nd and 3rd accused respectively stand jointly charged with murder contrary to sections 196 and 197 of the Penal Code.

The particulars of offence alleged that Sabato s/o Meshaki, Joel s/o Mwai @ Oswe and Isaya s/o Simba @ Okelo on 26th day of April, 2019 at Kogaja village within Rorya district in Mara region murdered one Elikana s/o Johnson @ Yongo.

Upon their arraignment, all the accused pleaded not guilty thereby pressing the matter to go through a full trial.

At the hearing, Monica Hokororo, learned Senior State Attorney and Mafuru Moses, learned State Attorney represented the Republic whereas the 1st, 2nd and 3rd accused had the services of Juma David Mwita, Pili Otaigo Marwa and Onyango Otieno, learned advocates respectively.

In the endeavours to prove the allegations, the prosecution marshaled five witnesses and one documentary exhibit to wit, a post mortem examination report, exhibit P1. The witnesses who testified for prosecution are PW1 Dr. Idd Shaban Buri, a medical doctor who examined the deceased body at Bugando hospital, PW2 Hoka Elikana Yongo, the deceased's second wife who was with the deceased at home on the fateful day, PW3 H543 D/CPL Joel, a police officer who arrested the 2nd accused Joel Mwai @ Oswe, PW4 Assistant Inspector Goodluck Unambwe Palangyo, an investigator of the case who, among other things, arrested the 1st accused Sabato Meshaki and 3rd accused Isaya Simba Okelo and PW5 Edward Mbogo Ismail, the deceased's relative who arrived at the scene of crime immediately after the incident and also witnessed examination of the deceased body at Bugando hospital.

In brief, the prosecution account is to the effect that on the fateful day that is 26th April, 2019 at around 19:30hrs, the deceased one Elikana Johnson

Yongo was at his home at Kogaja village with his second wife one Hoka w/o Elikana Yongo (PW2). While Hoka was preparing dinner, the deceased got out to attend a call of nature (pee in). Hardly had the deceased got outside the house than PW2 heard the deceased shouting for help while uttering that Onyango Omolo and Isaya Simba were killing him. Hoka peeked through the window and saw people attacking the deceased by cutting him with machetes. According to PW2 the two attackers were Onyango Omolo and Isaya Simba. PW2 managed to identify the attackers by the aid of tube lights that were illuminating the whole place. Having seen what was transpiring to her husband, Hoka opened the door to get outside in order to render assistance but she was blocked by two guys namely, Sabato Meshaki, 1st accused and Joel Mwai Oswe, 2nd accused who were standing at the door. They threatened to harm her if she dared get outside. She thus returned inside, closed the door and continued raising alarm. Nonetheless, the assailants continued attacking the deceased.

As PW2 continued shouting (raising alarm), Martin Odada, the deceased's younger brother arrived at the scene of crime in response to the alarm raised. On noticing the coming of Martin Odada, the assailants took at their heels. PW2 therefore got outside to join Martin Odada and both started

offering first aid to the deceased. The deceased was grievously injured on his hands and leg and thereby excessively bleeding. As PW2 and Martin Odada were still giving first aid to the deceased, PW5 Edward Mbogo Isamail arrived at the scene. According to PW2 and PW5, the deceased was mentioning Isaya Simba and Onyango Omolo to be his assailants.

Martin Odada went and brought a car in which they boarded the deceased up to Kogaja Police Post. The deceased was accompanied by Hoka Elikana Yongo (PW2), Nina and Martin Odada. According to PW2 and PW5, the deceased was recorded the statement by a police officer called George and mentioned Onyango Omolo and Isaya Simba to be his assailants. Having recorded the statement, the deceased was issued with a PF3 and thereafter he was taken Tarime District Hospital.

Owing to the severity of injuries, the deceased was referred to Bugando hospital in Mwanza. Nonetheless, on 1st May, 2019, the deceased met his demise while receiving treatments.

PW1 Dr. Idd Shaban Buri, on 3rd May, 2019 examined the deceased body and was opined that the cause of death was excessive bleeding caused by multiple cut injuries.

It was the evidence of PW3 H543 D/CPL Joel and PW4 Assistant Inspector Goodluck Unambwe Palangyo that following the information provided by PW2 Hoka Elikana and the deceased, a hunt for the suspects was mounted. PW4 arrested the 1st and 3rd accused on 6th May, 2019 and 18th December, 2019 respectively whereas the 2nd accused Joel Mwai Oswe was arrested by PW3 on the 20th day of May, 2019. PW4 further told the court that the efforts to arrest the 4th suspect Onyango Omolo did not yield results as such, until at the time he was testifying, Onyango Omolo was still at large.

In defence, the accused called a total of six witnesses. Each accused testified under oath and called their spouses to testify in their favour. Sabato Samwel Meshaki testified as DW1 and called his spouse Ester w/o Sabato who stood as DW2. Further, the 2nd accused Joel Mwai Oswi testified as DW3 and called his wife one Yasinta w/o Joel who testified as DW4. Lastly, the 3rd accused Isaya Simba Okelo testified as DW5 and his wife Sebia w/o Isaya gave evidence as PW6.

In essence, the accused disputed the charge. They claimed that they were not at the scene of crime on the alleged date. Their defence was that they

were at their respective homes at the material time i.e., 19:30hrs to 20:00hrs on 26th April, 2019.

The first accused Sabato Meshaki stated that he spent the whole day of 26th April, 2019 in farm as he was harvesting cassava with his wife. Further, Sabato testified that after his return from the farm he did not leave his home until the following day. He stressed that he spent the whole night of 26th April, 2019 at his home. His evidence on this was supported by his wife DW2 one Ester w/o Sabato. He further said that he was arrested on 6th May, 2019 at Riagoro Primary Court when he went to receive judgment in which he was charged with trespassing into the deceased's land.

Similarly, the second accused Joel Mwai Oswe denied the allegations and raised a defence of *alibi*. He said that the whole day of 26th April, 2019 he was at his farm harvesting groundnuts and upon his return he had a shower and thereafter he went to church. He continued that on return from the church he stayed at his home the whole night. He called his spouse one Yasinta w/o Joel to corroborate his version. Joel Mwai Oswe vehemently denied to have ever left his home or fled after the incident. He

said that he was available all the time and when the police went to arrest him, they found him at his home.

The 3rd accused Isaya Simba Okelo also disputed the allegations stating that he was not at the scene of crime. He said that from the time of incident to the time he was arrested, he was present at his home as he did not go anywhere. He averred that he attended the funeral of the deceased. DW5 said that he had no any dispute with the deceased save that he was summoned by Riagoro Primary Court to give testimony under his capacity as the chairman of Ward Land Tribunal in Case No.59 of 2019. DW5 also called his wife Sebia w/o Isaya who testified as DW6 to support his evidence.

Upon close of the case for both sides, counsel made brief submissions regarding the evidence adduced.

Monica Hokororo, learned Senior State Attorney, submitted that there is no dispute that Elikana Johnson Yongo (the deceased) died unnatural death. She continued that the germane question for this court to determine is who caused the death. It was Monica's contention that the prosecution brought direct evidence (eye witness) through PW2 Hoka Elikana Yongo who told the court how she witnessed the incident and identified the accused.

Monica continued that PW2 elaborated the circumstances which enabled her to identify the culprits. The learned Senior State Attorney insisted that PW2 said that there was enough light from the tube light which illuminated the whole surroundings of the house. The Senior State Attorney added that PW2 knew the accused before the incident and the incident lasted for ten to fifteen minutes. She was thus opined that the circumstances were favourable for proper identification. Monica stressed that the identification met the conditions set in the case of **Waziri Amani vs the Republic** 1980 [TLR] 250 and **Charles Nanati vs the Republic**, Criminal Appeal No. 286 of 2017, CAT sitting at Dar Es Salaam at page 11.

Monica also pointed out to the court that PW2 Hoka Johnson Yongo mentioned the culprits at early stage. The Senior State Attorney said that this was corroborated by PW5 who testified that the deceased mentioned his culprits as Isaya Simba 3rd accused and Onyango Omolo (not in court). Monica referred to the case of **Jaribu Abdallah vs the Republic** [2006] TLR 245 in a bid to implore the court to accord weight to PW2's evidence.

Monica admitted that there were contradictions here and there in the prosecution evidence however, she hastily remarked that the alleged contradictions were so minor which did not go to the root of the case.

Monica said that the said contradictions might have been caused by lapse of time. To support her contention, the learned Senior State Attorney relied on the case of **Charles Nanati** (supra).

Besides, Monica submitted that the defence of alibi was an afterthought for during the prosecution case the defence did not cross examine the prosecution witness on this important aspect. She cited the case of **Charles Samson vs Republic** [1990] TLR 39 to fathom her position.

Further, the learned Senior State Attorney attacked the defence testimony and submitted that it was full of contradictions. She clarified that the 1st accused said they ate ugali wa muhogo whereas his wife (DW2) said that they ate ugali wa mahindi on the fateful day. Further, Monica lamented 3rd accused said that he was a leader of the Nomia Church, but his wife (DW6) testified that 3rd accused is a believer of the Nomia Sabato Gospel church.

Finally, Monica strongly submitted that the prosecution proved the case to the required standard hence she beseeched the court to find the accused guilty and convict them accordingly.

Mr. Juma David Mwita and Pili Otaigo Marwa, learned advocates made a joint submission on behalf of the 1st and 2nd accused. The counsel was of

the view that it is not disputed that Elikana Yongo died unnatural death. He however, challenged the evidence of PW5 Edward Mbogo saying that it was a complete hearsay.

Furthermore, Mr. Juma Mwita attacked the evidence of PW2 on ground that PW2 testified that she identified the 1st and 2nd accused because she saw them when she opened the door but did not tell the court as to how much time she spent facing Sabato and Joel at the door. On this, Mwita submitted that it is possible to for a witness to mistaken the identity of a person whom he knows. To support his submission, Mwita cited the case **Abdul Chande vs the Republic**, Criminal Appeal No. 529 of 2019, CAT at Dar at page 9. Mwita continued that PW2 did not explain the intensity of light as she failed to describe the watts of the tube light nor did she explain peculiar features of the accused such as attire. On this, Mr. Mwita referred this Court to the case of **Maulid Dotto Mau @ Mchina vs the Republic**, Criminal Appeal No. 493 of 2019, CAT at Dar es Salaam at page 7. Owing to the weaknesses identified, Mwita submitted that it goes without saying that the prosecution evidence leaves a lot of doubts which should benefit the 1st and 2nd accused.

Mr. Mwita also lamented that the prosecution evidence was tainted with contradictions on material aspects. He expounded that PW5 said that there are more than ten houses within the fence whereas PW2 said there are only three houses. According to Mwita, such contradiction goes to the root of the case. Mwita cited the case of **Jadili Muhumbi vs the Republic**, Criminal Appeal No. 229 of 2021, CAT at Kigoma where it was held that a witness who lies on a material point should hardly be believed.

Mwita went on to criticize the prosecution evidence. He submitted that PW4 A/Insp Goodluck did not interview the neighbours as to why they did not respond to the alarm. He further pointed out that the sketch plan was not brought in evidence to show the court the surroundings in which the incident took place. In addition, Mwita attacked the prosecution for not calling important witnesses namely, George and Martin Odada. The counsel expounded that George was a very important witness for he is the one who allegedly received the deceased at Kojaga Police Post and recorded his statement. Similarly, Martin Odada who allegedly arrived at the scene and managed to identify two accused was not called. In the premises Mwita prayed the court to draw an adverse inference. He cited the case of

Emmanuel Kabelele vs the Republic, Criminal Appeal No. 536 of 2017, CAT at Shinyanga at page 18 to back up his prayer.

Lastly, Mr. Juma David Mwita prayed the court to acquit the 1st and 2nd accused on the ground that the prosecution case was weak. He said that accused are convicted on the strength of the prosecution evidence and not the weakness of the defence. He referred the court to the case of **Mwita and Others vs the Republic** [1977] LRT 54.

Mr. Otieno Onyango, learned counsel on behalf of the 3rd accused Isaya Simba Okelo prefaced his submission by attacking the identification evidence of PW2. Onyango submitted that PW2 said that there was sunlight but later on, during cross examination, she said that the electricity lights were on. According to Otieno, this was a major contradiction which dented the witness credibility. The counsel cited the case of **Kamuli Masjamba vs the Republic**, Criminal Appeal No. 325 of 2013 CAT at Mwanza, page 6 to support his proposition. Concomitantly, Mr. Otieno wondered why the prosecution did not call any neighbour to testify. According to Otieno this also created doubt as regard to how the incident was committed. He referred to the case of **Ally Mohamed Singagae vs the Republic**, Criminal Appeal No. 105 of 2020, HC at Mtwara at page 5.

Furthermore, Mr. Otieno queried the prosecution for not calling the material witnesses such as George who drew a sketch map of the scene of crime, supervised post mortem examination and recorded the deceased statement on the fateful night. The counsel submitted that George would have told the court what the deceased told him with regard to the identification of the assailants. Also, George would have clearly explained how the scene of crime looks like.

Otieno assaulted the evidence of dying declaration testified by PW2 and PW5 saying that it was not corroborated. He cited the case of **Dotto s/o Said Ngalu and 2 others vs the Republic**, Criminal Sessions Case No. 17 of 2018, HC Sumbawanga at page 7 to augment his submission.

Lastly, Mr. Otieno invited the court to take into account the fact that the 3rd accused is a person of good behaviour in terms of section 55 of the Evidence Act hence find him not guilty. The counsel continued that 3rd accused participated in the funeral and he was at all time present in the village. He wondered why he was not arrested soon if at all he was truly mentioned by the deceased immediately after the incident.

It is common cause that, in murder cases, the prosecution is duty bound to prove four elements namely; there is the death of a person, the said death

was caused by unlawful act or omission, it is the accused who caused the death of deceased and the accused acted with malice aforethought. See the case of **Philimon Jummane Agala @ J4 v. The Republic** Criminal Appeal No. 187 of 2015, **Emmanuel Mrefu Bilinje vs Republic**, Criminal Appeal No. 271 of 2006, CAT at Dodoma and **Abdallah Rashid Namkoka vs the Republic**, Criminal Appeal No. 206 of 2016 CAT at Mtwara.

In this case, through the evidence of PW2 Hoka Johnson Yongo, PW1 Dr. Idd Shaban Buri and the Post Mortem Examination Report (exhibit P1), it was well established that the deceased Elikana Johson Yongo died unnatural death.

The nagging issues therefore for determination are whether it is the accused before the court who caused the death and whether the same was done with malice aforethought.

There is one eye witness in this case namely, Hoka Johson Yongo (PW2). This witness said to have identified four culprits at the scene of crime to wit, Isaya Simba, Onyango Omolo, Sabato Meshaki and Joel Mwai Oswe. PW2 said that she saw Isaya and Onyango attacking (cutting) the deceased with machetes while Sabato and Joel while standing at the house door and were the one who blocked her to assist her husband. PW2 told

the court that the deceased also identified the 3rd accused Isaya Simba and Onyango Omolo who is still at large. PW2 further said that the deceased mentioned the two culprits before George, a police officer who recorded the deceased's statement at Kogaja Police Post. PW2's evidence was supported by PW5 who also said that he heard the deceased mentioning Onyango Omolo and Isaya Simba. Besides, PW2 told the court that even Martin Odada identified the assailants at the scene of crime.

It should be noted however that the said Martin Odada and D/CPL George were, for some obscure reasons, not called as witnesses. Instead, the prosecution prayed and was allowed to bring additional witness one Edward Mbogo Ismail who testified as PW5.

I had an occasion to strenuously assess the evidence of PW2 who is the solo eye witness in this case and I came up with a number of reservations with regard to her credibility. While testifying, she said that she shifted to Mwanza from Kogaja village in 2020 after she continuously received threats from the 1st accused one Sabato Meshaki. However, the evidence both of prosecution and defence speaks against this fact. This is because Sabato Meshaki was arrested on 6th May, 2019. It is therefore inconceivable that a person who was in prison could still threaten her to the extent of causing

her to vacating her home. Furthermore, as rightly submitted by Onyango Otieno, learned counsel for the 3rd accused at one time PW2 said that the windows were open at the time of incident because there was still sun light but on other occasion, she said that she identified the culprits by the aid of electricity lights (tube lights). Considering that identification evidence was of utmost importance in this case, the contradictory versions in her testimony highly weaken the witness credibility.

With regard to PW5 one Edward Mbogo Ismail, it is my considered views that his evidence should be treated with great circumspection. This is because one, there were allegations from Onyango Otieno, learned defence counsel that PW5 was present in court when PW2 was testifying, two, his statement was not read at the committal though he was among the witnesses who arrived at the scene of crime immediately after the incident and his statement was allegedly recorded as early as 3rd May, 2019.

While assessing PW5's evidence, I took trouble to look the recorded statement which was attached to the notice for additional evidence. The statement is on tidy and neat papers different from other witnesses' statements that were filed in court. Further, even the font used is

apparently different from other statements. This made me believe that the statement was made in the course of hearing with the view to suit the prosecution interests. Consequently, I accorded little weight to PW5's testimony.

Further, the prosecution witnesses in particular PW3 and PW4 allege that the accused fled immediately after the incident. However, the same witnesses told the court that they arrested the 2nd and 3rd accused at their homes whereas the 1st accused Sabato Meshaki was arrested at Riagoro Primary Court on 6th May, 2019 when he went to receive judgment in a case he was facing. This fact goes against common sense that a person hiding to evade murder charges could still appear in court to receive judgment. Moreso, the 3rd accused Isaya Simba was arrested 18th December, 2019 that is six months after the incident but there was no proof either from the neighbour or village leader to the effect that Isaya Simba was not present in the village after the incident. I have pondered if the accused were truly mentioned immediately after the incident, why did it take too long to arrest them? This fact also created doubt in the prosecution evidence.

In addition, the prosecution failed to call material witnesses namely, D/CPL George and Martin Odada, the deceased younger brother. I entirely agree with the defence counsel that these two persons were very important witnesses who would have corroborated PW2's evidence. Martin Odada would have told more the court on the accused he identified at the scene of crime as contended by PW2. Also, D/CPL George is the one who allegedly attended the deceased at Kojaga Police Station and recorded his statement would have tendered the alleged statement of the deceased (dying declaration) and shed more light on the identification of the accused. Indeed, non-calling of D/CPL George and Martin Odada compels this court to draw negative inference on the prosecution evidence. In the case of **Azizi Abdalah v. Republic** (1991) TLR 71, the Court of Appeal held;

'The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution'

In view of the above authority, it is my considered opinion that this is a fit situation to draw inference negative to the prosecution for its failure to call D/CPL George and Martin Odada.

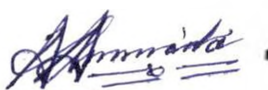
Having discredited the prosecution evidence in particular of Hoka Johnson Yongo (PW2) and Edward Mbogo Ismail (PW5) and taking into account failure by the prosecution to call the material witnesses namely, D/CPL George and Martin Odada, it is my considered findings that the prosecution evidence has not proved the case beyond reasonable doubt against the accused.

In the event, I find Sabato Meshaki, Joel Mwai Oswe and Isaya Simba Okelo not guilty of the offence they stand charged. Accordingly, I acquit them.

It is so ordered.

The right of appeal is explained.




A. A. Mbagwa
JUDGE
09/08/2022