

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

**IN THE SUB-REGISTRY OF ARUSHA**

**AT BABATI.**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSIONS CASE NO.157 OF 2023**

***(PI No. 3 of 2021 Kiteto District Court)***

**THE REPUBLIC ..... COMPLAINANT**

**VERSUS**

**SABORE MBILI @ SABORE WILLIAM ..... ACCUSED**

## **JUDGMENT**

**16<sup>th</sup> & 23<sup>rd</sup> June, 2023**

**GWAE, J.**

In criminal responsibility, there is a doctrine of "last seen" which stands as a negation or an exception to the doctrine of "presumption of innocence" as provided for under Article 13 (6) (b) of the Constitution of the United Republic of Tanzania, 1977. It is trite law that, where the victim was last seen with an accused person and has not been found after a period, the death of the lost person will be presumed. The person last seen together

with such person will also be presumed responsible for his disappearance or death as shall be demonstrated in this murder case herein.

Before the court, the accused person, Sabore William @ Sabore Mbili stands charged with the offence of murder contrary to section 196 & 197 of the Penal Code, Cap 16 Revised Edition, 2019 (Penal Code). It was alleged by the prosecution that, on 10<sup>th</sup> day of May 2021 at Sunya area within Kiteto District in Manyara Region, the accused person did murder one Fundi Magembe @ Fundi Msafiri (the deceased).

At the commencement of the trial, when the information for murder was reminded to the accused person, he patently pleaded not guilty, thus, the case proceeded to the full contested trial. During hearing, Ms. Christine Joas assisted by Ms. Rose Kayumbo, both the learned State Attorneys represented the Republic, whereas Mr. Paschal Peter, the learned advocate represented the accused person.

In its undertaking to prove the offence against the accused beyond reasonable doubt, as required by section 110 of the Law of Evidence Act, Cap 6 Revised Edition, 2022 (TEA), the prosecution summoned a total of six (6) witnesses. These are; PW1 Rosa Jacob, PW2 Msafiri Fundi Magembe,

PW3 Nuru Msafiri PW4 G. 5310 D/CPL. Musa, PW5 PF 20564 Inspector Lusekelo and PW6 G.5648 D/CPL Destery Rajab. They also tendered six (6) exhibits namely Post Mortem Report, Sketch Map dated 30<sup>th</sup> June 2021, Motorcycle with Reg. No.MC. 761 CDM, Certificate of Seizure dated 22<sup>nd</sup> June 2021, Chain of custody dated 22<sup>nd</sup> June 2021 and witness statement recorded on 22<sup>nd</sup> June 2021 which were admitted into evidence as PE1, PE2, PE3, PE4, PE5 and PE6 respectively. On the same note, the defence side had one (1) witness, the accused who fended himself and had no any exhibit to tender.

The prosecution case was anchored on the evidence that, on 10<sup>th</sup> May 2021, the accused persons intentionally murdered the deceased after he hired him to ride him from Ndirigishi village to Sunya village Kiteto District. According to PW2, deceased father and PW3 who are the deceased's father and younger brother respectively whose testimony are almost the same, the accused approached the deceased who is a motorcyclist on hire and owner of a motorcycle with registration No. MC. 751 CDM. He asked the deceased to be taken to Sunya on 10<sup>th</sup> May 2021. Thus, they took eight litres of fuel (Petrol) from one Jenipher on credit with arrangement that, she would be

paid in the evening immediately after their return from Sunya village as the accused was going to Kiteto to collect his money.

However, after the sunset, the deceased did not return. They went to the accused sister-in-law, where the accused stays when he visits Ndirigishi by the name of Lekatisha who gave them his number. When they called the accused he told them that, they reached at Sunya safely, he paid the deceased and they parted ways. Hence, he did not know the deceased's whereabouts. These witnesses also told the court that, when the accused was called to show participation in searching for the deceased he did not show cooperation. They reported the matter to the police station and on 31<sup>st</sup> May 2021, they received a call from one person who informed them that there was a dead body thrown in the forest.

Upon their arrival at the crime scene, they managed to identify the deceased lifeless body due to what he wore on the material date such as white shoes, white belt and black coat although the body was in the state of terrible decay. After medical examination of the deceased's remains through Postmortem Report (PE1), admitted during plea taking, they took the dead body for the burial. They also told the court that, sometimes in June 2021,

police notified them that, the deceased's motorcycle was recovered. They went to the police and managed to identify it.

Actuated with the suspicion of whereabouts of the deceased person, the bodaboda men (Motorcyclists) and others proceeded to the arresting of the accused's sister and brought her to police. However, she was released after one person who claimed to have known the residence of the accused person. Thereafter, the police officers arrested the accused's father as the accused escaped. The accused's father was released after the civilians had arrested the accused and took him to Kiteto Police Station. PW2 & PW3 managed to positively identify the accused person on dock. They finally told the court that they believe the accused participated in murdering the deceased because he was the last person to be seen with him and that, he did not show any cooperation in looking for the deceased until when his arrest.

Another incriminating prosecution evidence was that of PW1 Rosa w/o Jacob who told the court that on 20<sup>th</sup> May 2021, a person called Sagati Musa and another person whom she did not know brought the deceased person's motorcycle at his home place. The said Sagati requested her to leave the motorcycle on the assertion that, he was sick as he had leg injuries. She

further told the court that, the said Sagati was with another young man whom she did not know and after she and her husband allowed them to leave the motorcycle, they left with the keys. After a while, the said Sagati returned while accompanied by the police officers. That, on interview with the police, she revealed the persons who brought it. The police officers then impounded it from her residential house and that, She positively identified the motorcycle.

The prosecution side also testified through PW4 that on 14<sup>th</sup> July 2021, while at police station at Kibaya, Kiteto, he was assigned a case file from OC-CID relating to the offence of murder KIB/879/2021 against the accused. At that time the accused was detained as a suspect for the case of armed robbery. Having received the case file with certificate of seizure pertaining a motorcycle with reg. No. MC. 761 CDM make Haojue with back colour and a chain of custody, he proceeded to record the accused person's cautioned statement. However, the accused person denied to have murdered the deceased but admitted to have hired him for a ride from Ndirigishi Village to Sunya village Kiteto. He also admitted to have bought the deceased motorcycle for Tshs 900,000/= and that, he instantly paid Tshs. 650,000/=. Further that the, said motorcycle was at Kitwai village taken there by one

Sagati Musa. Having recorded his statement, they both signed after reading it over to the accused.

PW4 further told the court that, on 30<sup>th</sup> June 2021, he visited the crime scene where the deceased's body was recovered and drew a sketch, PE2. According to PW4, after completion of investigation, he was certain that, it was the accused responsible for the deceased's death since he was the last person to be seen with him. He added that, the accused's act of hiding the motorcycle and the fact that, there was no written agreement establishing that, the deceased person sold the motorcycle to the accused person without any proof even an eyewitness. He positively identified the accused person on dock.

Another piece of evidence adduced by the prosecution is that of of PW5 whose testimony is to the effect that, on 22<sup>nd</sup> day of June 2021, he was assigned a duty of tracing the motorcycle connected with this case. Accompanied with other four police officers namely; PC. Moshi, CPL. Emmanuel, PC. Nasikei and PC. Thomas proceeded to Kitwai village with the lead of one civilian, Sagati Mussa who was under restraint. According to him, the said Sagati Musa was detained when he went to the Police Station to make a follow ups his brother-in-law, the accused. While there, the accused

was talking to his father William Simanga that he did murder the deceased and Sagati knew whereabouts of the Motorcycle. Another person who was a detainee heard the conversation between the accused and his father, William and disclosed that information to the OC-CID. Knowing that Sagati Musa was knowledgeable of the incidence, they arrested him when he brought food to the accused who was by then at the police custody.

Upon arrival at Kitwai village, they looked for an independent witness one Mwita and proceeded to the residence of PW1 who showed them the motorcycle. They seized it as Sagati confirmed it to be the same motorcycle they brought on 20<sup>th</sup> June 2021 to the homestead of PW1 by the said Sagati Musa accompanied by the said Lupas.

PW5 prepared certificate of seizure (PE4) in the presence of Mr. Mwita, Sagati Musa and PW1 who signed it. He also signed, and continued with safari to Kilindi tracing motorcycle's key at the accused's residential house. However, such safari went in vain. They returned to the police station and handed over the exhibit, motorcycle through a chain of custody (PE4) to one D/C. Thomas.

The last prosecution witness, PW6 (an investigator) who told the court that, on 22<sup>nd</sup> June 2021, he was assigned a duty of recording the statement of one Sagati Musa by OC-CID, ASP Malema. He informed that, the said Sagati was a witness to the murder case of one Fundi Msafiri that occurred at Lotapes area at Sunya Village within Kiteto District. That, he recorded the statement of Sagati Musa who stated that, in May 2021 while at his village, Ngobore (Accused) he got information that his father in-law called William Simanga was arrested by police under condition that he would be released if his son Sabore William is procured. Thereafter the Kilindi District leadership organized for the arrest of the Sabore William who was luckily arrested and brought to Kiteto Police Station. Thereafter, he got information from his wife that, the accused gave directives to Lupas, his supervisor, to pick the motorcycle at his residence and keep it at Kitwai 'B' village in a homestead of Kaya Ladalai (PW1's husband).

According to him, the witness stated that one **Lupas** went to Sagati Musa's residence riding the motorcycle in question and took it to the homestead of Kaya Ladalai as directed by the accused that, the same to be kept therein until when he will be released. He also stated that, he took the keys in order to hand over to Sabore William upon his release and that, he

was the one who led to the discovery of the motorcycle from the homestead of PW1. After recording the statement (PE6), he read it over to the said Sagati Mussa and they both signed. PW's testimony marked the end of the prosecution case.

The court found the accused person a case to answer and the following is his defence evidence. Featuring as DW1, the accused person admitted to have hired the deceased person, his friend, on 10<sup>th</sup> day of May 2021 while at Ndiligishi village in order to be taken to Sunya Village. That, they agreed that, the deceased would ride him to Sunya Village to his paternal uncle known by the name **Kihange Simanga**. They started their safari at 10:00 hrs from one Jenipher who gave them eight litres of fuel on credit, as they did not have money at that particular time.

Thereafter they proceeded with safari to Sunya village where they arrived at 12:30hrs and went to the said Kihange Simanga who gave him Tshs. 35,000/= and he immediately gave the money to the deceased being fuel and riding charges. They ate at his uncle's place and parted ways around 13:00hrs.

The accused went testifying that on the following day (11/06/2021, he left Sunya village and proceeded with his safari to his residential house at Ngobole village within Kilindi District where he arrived at 16:00 hrs. On 14<sup>th</sup> May 2021, He was astonished to receive a call from the deceased's father (PW2) asking about the whereabouts of his son and that he narrated to him how they parted ways on the same day he took a ride (10/06/2021). He added that On the following day (15/6/2021), he was called by the police whom he also narrated the same story but was asked to go to the police station and participate in searching the deceased but he did not go to police as required on the basis that he had no faire.

On the following day, he took his goat and sold it for Tsh. 80,000/= in order to get a fare money. He thereafter travelled from Kilindi and surrendered himself to Kijungu Police Station and on 18<sup>th</sup> May 2021, he was sent to Kibaya Police Station where he was detained until on 24<sup>th</sup> May 2021 under allegations that, the person whom he hired was nowhere to be seen.

The accused went defending that, he was interrogated and threatened by police officers Musa, Lusekelo and two others to tell them the deceased's whereabouts but he maintained that, he did not know his whereabouts.

Following such police intimidation he signed the already written paper on the same date. He further stated that he was brought to the court for the offence of armed robbery until 15<sup>th</sup> July 2021 when he was discharged. However, he was re-arrested for the current offence. The accused person denied to have murdered the deceased neither to have known Leitiksha (a person alleged to be his blood sister), Sagati Musa, Lupas and Kaya Ladalai (the person alleged to be his brother in-law).

DW1 also contended that, the statement by the said Sagati Musa as well as that of other prosecution witnesses is false since he had no money to purchase the said motorcycle. He prayed that this court be pleased to thoroughly analyze the evidence and acquit him, as he took no participation in the killing of deceased who was his friend. That marked end of his defence case.

The parties through their learned counsel did not prefer to have final submission after the close of their case. Having thoroughly considered the evidence as outlined hereinabove, the following are the issues for the court's determination;

1. Whether the deceased Fundi Magembe @ Fundi Msafiri was murdered.
2. If the first issue is answered in affirmative, whether the accused person murdered the deceased.
3. Whether the prosecution has proved the accused person' guilt to the required standard.

Starting with the **1<sup>st</sup> issue**, it is undisputed from the evidence adduced that, the deceased Fundi Magembe @Fundu Msafiri is dead and his life was cut short unnaturally as evidenced by the postmortem report Exhibit P1. As per the post mortem report (PE1) the cause of his death was irreversible hypovolaemic shock secondary to visceral injury secondary to penetrating wound. This piece of evidence (documentary evidence) was sufficiently supported by the testimony of the deceased person's father who appeared for testimonial purpose as PW2. PW's evidence in this regard is to the effect that he visited the scene of crime on 31<sup>st</sup> June 2021 where the deceased person's dead body was found and he properly identified it be the dead body of his son. This affirmatively answers the 1<sup>st</sup> issue that the deceased untimely death was not naturally but he was murdered.

Coming to the **second issue**. It is trite law that, all judicial evidence is either direct or circumstantial one. By direct evidence, it is meant when the principal fact is attested directly by witnesses, things or documents. To all other forms, the term circumstantial evidence is applied. The fundamental principle of universal application in cases is dependent on circumstantial evidence, is that in order to justify the inference of guilt of an accused person. In a situation where the evidence is circumstantial, the incriminating fact must be incompatible with the innocence of the accused person or the guilt of any other person. In that premises, the trial court or an appellate court must carefully analyse the evidence in its totality. In **Sikujua Idd vs. the Republic**, Criminal Appeal No. 484 of 2019 (unreported-CAT) with approval of its decision in **the case of Saidi Bakari vs. Republic**, Criminal Appeal No. 422 of 2013 (unreported-CAT) it was stated:

*"It is established law that a charge of murder can be fully proved by circumstantial evidence. In determining a case centered on circumstantial evidence, the proper approach by a trial court and an appellate court is to critically consider and weigh all the circumstances established by the evidence in their totality, and not to dissect and consider it in piece meal or in cubicles of evidence or circumstances."*

The same position of the law was judiciously emphasized in the case of **Abel Mathias @ Gunza @ Bahati Mayani vs. The Republic**, Criminal Case No. 267 of 2020 CAT at Mbeya (unreported), the Court of Appeal had this to say;

*"It is true that for a conviction on circumstantial evidence to stand, it should not be capable of an interpretation other than the accused's guilt. However, the specie of circumstantial evidence we are dealing with here, is that of the last person to be seen with the deceased, which as we stated in **Miraji Idd Waziri @ Simana & Another v. Republic** Criminal Appeal No. 14 of 2018 (unreported)."*

In our instant murder case, it is undisputed fact that, no one who testified during trial that, he or she saw the accused murdering the deceased. Hence, the evidence before this court is purely circumstantial mainly based on the ground that, the accused was the last one to be seen with the deceased. It was the deceased's father and his young brother (PW2 & PW3) who saw him (deceased) with the accused on the 10<sup>th</sup> day of June 2021 from there onwards no person who said to have the deceased till on 31<sup>st</sup> June 2021 when PW1 went to the scene of crime.

Applying the above judicial principles to the instant case, it is clear that strong evidence available against the accused connecting him to the offence charged is that of PW2, PW3, PW5 and PW6 who tendered exhibit P6, Sagati Musa's statement (PE6). From their testimonies and in my considered the following were established;

**One,** PW2 and PW3 saw the accused leaving with the deceased on the day he disappeared (10<sup>th</sup> May 2021) only to be found dead twenty one days later (31<sup>st</sup> May 2021). Hence, he was the last person to be seen with him as no other person saw the deceased after they left together until when his dead body was found at area at Sunya Village.

**Two,** the subsequent conducts of the accused are indicative of his participation the deceased's death. I am holding to that effect for an obvious reason that, it is the evidence of the prosecution that, the accused did not show cooperation in searching for the deceased 21 days despite being aware or notified of the missing. The accused is found to have not bothered of the deceased person's whereabouts when the deceased's family, motorcyclist union and the police officer were searching for the deceased person while worried of what might have happened to him. More so, the accused's

demeanour changed when the deceased's father, PW2 and deceased young brother PW3, testified in court while in pain, he looked worried as the court's observation during trial.

**Three**, when PW5 testified about Sagati Musa telling him that, the accused person sent him to take the motorcycle at PW1's homestead and keep the keys until when he is released and even after tendering the Sagati's statement, the accused person did not cross-examine, PW5 and PW6 on such vital information. According to the case of **Nyerere Nyague vs. The Republic**, Criminal Appeal No. 67 of 2010 (unreported), Court of Appeal of Tanzania held *inter alia* that;

*"A party who fails to cross examine the witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the court to disbelieve what the witness has said."*

Subscribing to the above, since the counsel for the accused did not bother to either object or cross-examine on exhibit P6, Sagati's Musa's statement positively impliedly that, he accepted facts testified by and PW5 PW6 together with the statement tendered.

**Four,** the accused person's defence evidence did not raise doubt to the prosecution case in respect of how he parted ways with the deceased. The assertion that after they had lunch together with his paternal uncle, Kihange Simanga. It is my considered opinion that, the said uncle would have been a key witness to his defence taking into account that the accused as last person seen with the accused had a duty to give plausible explanation as to his whereabouts.

**Five,** the accused's conducts, it took civilians including Rev. William and Police efforts to take the accused person to the police station. Although he claimed that, he surrendered himself to the police, his testimony is bit wanting as there is ample evidence adduced by the prosecution witnesses (PW5 and PW6) and documentary evidence especially PE6. I find his narration that he told the police that he would report is wanting because I do not think the Tanzania Police Force could be so weak and pamper a suspect of murder like that.

**Six,** the recovered motorcycle by police at the residence of PW1 and the testimony given by PW1 as well as statement of the said Sagati Musa, PE6 are sufficiently indicative that, it was the accused person who directed

the hiding of the motorcycle and that one Lupas and Sagati worked under his instruction. Hence, discovery of motorcycle (PE3) was under the lead of the accused person. For clarity, parts of pieces of evidence adduced and recorded by the court are herein under reproduced;

#### W1's evidence

*"On 20<sup>th</sup> May 2021 one person called Sagati brought a motorcycle. The said Sagati requested her to leave the motorcycle on the assertion that, he was sick as he had leg injuries. I accepted his request. The said **Sagati** came with one Youngman whose name was not known to me. The said Sagati and his colleague left the motorcycle. However, they took the motorcycle's key."*

#### **PE6**

*"...Akamwambia fomen huyo pikipiki hiyo aipeleke huko KITWAY B (W) SIMANAJIRO. Akaihifadhi...SABORE s/o WILAM alimpigia simu fomen wake LUPASI s/o? na kumwelekeza pikipiki alweke.... Taarifa hizo nilikuwa nazipata kutoka kwa mke wangu NABULUU w/o SAGATI ambaye huyu SABORE s/o WILIAM na huyu mke wangu ni mtu na kaka yake tumbo moja. ... Mimi mwenyewe niliondka na huyu LUPASI s/o ? formen wa SABORE s/o WILIAM tukaipeleka hiyo pikipiki ya SABORE.....huko KIWAY B Wiaya ya Simanjiro....Tarehe 22/06/2021 mimi ndio*

*niliongozana na polisi wa Kiteto NIKAWAPELEKA HADI  
Kitway B kuwaonyesha pikipiki hiyo....”*

According to the above quoted parts of evidence incriminatory to the accused, it is clearly established that, it was the accused who instructed one Lupas, Sagati and Sagati's wife (the accused's sister) to pick the motorcycle and send to the homestead of one Kaya Ladalai (PW1's residence or where the accused's sister is married). I have therefore evaluated point one to six intimated above and come with a conclusion that the circumstantial evidence against the accused lead to irresistible finding that, the accused's guilt has been proved to the required standard. The accused is therefore an actual offender who personally murdered the deceased or the one who planned the fatal incidence of untimely death of the deceased. The 2<sup>nd</sup> issue is answered in affirmative.

As to the last issue, it is a trite principle that, conviction may only be entered basing on the strength of the prosecution case and not on the weakness of the defence case. In the case at hand, it is the court's findings that, the case against the accused person was proved to the required standard that is beyond reasonable doubt as the prosecution evidence

sufficiently excludes all hypothesis of innocence on the part of the accused person.

In light of the above I find the accused person guilty of the offence of murder contrary to section 196 & 197 of the Penal Code, Cap 16 R.E. 2019 and I proceed to convict him forthwith.


It is so ordered.

**DATED at BABATI** this 23<sup>rd</sup> June 2023

  
**M.R. GWAE**  
**JUDGE**  
**23/06/2023**

**Court:** As the punishment for the offence of murder is only one as per section 197 of the Penal Code (supra) that is death by hanging. Therefore, I hereby sentence the accused, person, **SABORE S/O MBILI @SABORE WILLIAM** to death by hanging. It is so ordered

Right of Appeal Explained

  
**M.R. GWAE**  
**JUDGE**  
**23/06/2023**

**Court:** Motorcycle with Reg. No.MC. 761 CDM (PE3), be handed over to the deceased's father one Msafiri Fundi Magembe since the defence has not claimed its ownership



**M.R. GWAE**  
**JUDGE**  
**23/06/2023**