

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

**DAR ES SALAAM SUB REGISTRY**

**AT DAR ES SALAAM**

**CRIMINAL SESSION NO 37 OF 2022**

**REPUBLIC**

**VERSUS**

**ELIUD ROGERS MSANGI.....ACCUSED**

**JUDGEMENT:**

**23rd Feb & 18th March, 2024**

**KIREKIANO, J:**

The accused herein is charged with one count of manslaughter contrary to sections 195 and 198 of the Penal Code Cap 16 [ RE 2019]. According to the information filed in this court, it is alleged that on 31st July 2021 at Magole area, within Ilala District in Dar es Salaam, the accused unlawfully caused death of one Justine James.

The accused protested his innocence; he pleaded not guilty to the charge. The prosecution side was not convinced, they paraded three witnesses in a bid to prove the information. These are; PW1 F 8132 Cpl Gasper. PW2 Masoud Nesangya and PW3 Paulo Matiku.

In this trial the prosecution side was led by Miss Foibe Magili and Miss Mwanahamisi learned state attorneys while the accused had the service of Mr Yohana Kibindu, learned advocate.

In substance, the background leading to the accused trial is that the deceased was a boy aged 15 years who resided at his parents' house at Magole. The accused person owned an unoccupied house at Magole. It is common ground that on 31st July 2021, there was theft in the accused house and several properties particularly electric wires used for wiring were stolen. The deceased was implicated in theft, he was beaten on several parts of his body, taken to the police at Kitunda and he was later taken to hospital at Ilala where he met his death. Medical investigation on the cause of death revealed that the cause of death was severe traumatic head injury associated with assault.

The prosecution and defence side's point of departure is who attacked the deceased hence causing his death. The prosecution case is that the deceased death was caused by the accused person in the dock.

PW1 F 8132 D Cpl Gasper was a police officer who investigated the offence, his version was that the police had received information that there was housebreaking and stealing which culminated in the killing of Justine James (deceased) a person suspected of theft. On 5/08/2021 he

went to the scene at Magole in the company of Inspector Paulo to find out what happened. According to him, while at the scene, he learnt that the deceased was beaten near a house owned by the accused, he also gathered evidence from people he explained as bystanders and sketched a map of the scene led by one Michael Chacha.

According to this witness, the evidence gathered at the scene there was two versions; **first**, there was evidence from Paulo Matiku (PW3) the deceased young brother who saw the accused assaulting the deceased by using a piece of wood (gongo). **Second**, according to information from people around the scene, the deceased was assaulted by people who took the law into their hands.

He then sketched a map of the scene led by Michael Chacha. This sketch map was not tendered as evidence. More investigation on the cause of death was done at Muhimbili National Hospital where the post-mortem examination report (Exhibit P 1) revealed that the cause of death was severe traumatic head injury.

In PW1 testimony when prompted by prosecution on names of the people who saw the deceased being attacked, he did not name any and said they did not cooperate to make a statement to the police!

PW2 Masoud Nesangiya was a police officer at Kitunda police station. This witness received the deceased from his mother Ghati, the said Ghati (the deceased mother took the deceased to police seeking police to issue papers which would assist the deceased to get medical attention. According to PW2 Masoud, the said James was a suspect of theft at the station, he allowed his mother to bail him out for medical attention. He later learnt that the deceased passed away.

The deceased young brother testified as PW3 Paulo James Matiko. In his version, on the fateful day of 31/07/2021, while on his way to the bus stand from home, he passed around a house owned by the accused, when he heard people screaming and crying, he approached the house and saw his brother (deceased) being assaulted by the accused by using a piece of wood (gongo)

According to this witness, he was alone at this scene by then, other people arrived including one Bernard. He said, Bernard begged the accused not to beat the said Justine but the accused finally left the deceased free, PW3 took the deceased brother home which was just a third house from the scene.

In his defence the accused disassociated himself with the cause of death, his version was that on the fateful day on 31/07/2021, he went to his

house at Magole. He learnt that there was theft in his house in which electric wires were stolen from this house. He then reported at Kitunda Police station; this was around 16:30hrs and went back to college until 08. 08,2021. He later learned from police at Kitunda that the suspect was arrested and that he would be taken to court upon investigation. According to him, he was not at the scene by then

DW2 Magai Amos was a people militia in the area. According to him, he worked as a people's militia (MG 125477) tasked with cooperating with police as *Police Jamii*. On the fateful date, he was informed that there was a person assaulted by people who accused him of theft, he rushed to the scene at Magole and saw several people assaulting the deceased he knew as Justine. He calmed them and the deceased managed to run.

According to him, he informed the local authorities and he learned that the deceased was taken to the police by his mother.

It is worth noting here that the accused also relied on the statement of PW1 and PW2 Exhibit D1 and D2 making a point that there was inconsistency in the prosecution case.

As rightly submitted by Mr Kibindu the onus of proving the lies on the prosecution side (***Jonas Nkize V Republic 1992 TLR 213*** considered.

To find conviction against the accused person herein all elements of the offence of manslaughter under section 195 of the Penal Code must be proved beyond reasonable doubt. That is to say; **one**, the said Justine is dead. **two**, proof that the deceased died as a result of an unlawful act or omission of the accused person and **three**, the unlawful act or omission which caused the death of the deceased was unintentional and without knowledge that death or grievous bodily harm was a probable consequence. **Lusungu Duwe vs Republic (Criminal Appeal 76 of 2014) [2014] TZCA 162 (16 June 2014)** considered.

The first aspect is less contentious, there is evidence in the Postmortem Examination Report prepared by Dr Gloria (Exhibit P1) this report revealed that the said Justine's body was examined and the cause of death was severe traumatic head injury. There was no evidence from the defence disputing this fact. I thus find as a fact that the said Justine is dead.

The **second** aspect is who caused the death of the deceased. According to the postmortem examination report (Exhibit P1), the cause of death was severe traumatic head injury. The prosecution case heavily relied on the testimony of the deceased young brother, PW3 Paulo Matiko that, he saw the accused assaulting the deceased with a piece of wood. This

witness told the court that when he witnessed the accused, he was alone, however, other people arrived later including one Bernard who asked the accused to let the deceased go.

This evidence was relied on by PW1 an officer who investigated the offence. However, a thorough scrutiny of the evidence of PW1 as indicated above pose another version of the story. In his testimony according to what he gathered from people around the scene, the deceased was assaulted by unnamed people who took the law into their hands.

PW1 was the officer who said he sketched a map at the scene led by one Michael Chacha. It is noted here that; **one**, the said sketch map was not tendered by PW1 as Exhibit, **two** the statement of this witness (exhibit D1) was relied on by the defence suggesting a contradiction in his evidence. Part of exhibit D1 was to the effect that PW1, sketched a map led by one Michael Chacha who indicated the house in which theft was committed and the area in which the deceased ran and was assaulted by a mob of people.

While it is apparent that the deceased injuries were caused by attacks, the question is who assaulted the deceased. Tracing back the last few hours before his demise on 31.07.2021, there is a piece of

evidence from PW2 Masoud who received the deceased and issued PF3 to facilitate his medical attention.

According to him, the deceased was taken to police by his mother Ghati Charles and there was a complaint by the accused at the station suspecting the deceased of theft.

This statement (Exhibit D2) was also relied on by the defence, part of it is to the effect that the said Ghati Charles informed PW2 that the deceased was assaulted by a mob of people. This version contradicts PW3 testimony.

From the above the prosecution evidence suggests two scenarios. The deceased was attacked by the accused and the other one was attacked by an unnamed mob of people. The accused defence as indicated was that he was not at the scene. DW2 Magai Amos told this court that he arrived at the scene and rescued the deceased from a mob of people who were attacking him.

The said Ghat Charles is the deceased mother, the person who knew or could have heard from the deceased what happened. It was unexplained why she was not paraded to explain what happened to the deceased.



I am alive on the rule that, a fact may be proved by strength of evidence and that there is no specific number of witnesses required to prove a particular fact. As such in a bid to prove the charge the prosecution side reserves the right to parade witnesses whom they think will prove the facts of the case. This was a position fortified in **Abdallah Kondo Vs. Republic, Criminal Appeal No.322 of 2015** (unreported), that;

*"It is the prosecution which has the right to choose which witnesses to call to give evidence in support of the charge. Such witnesses must be those who can establish the responsibility of the appellant in the commission of the offence"*

While I have this position in mind, considering that PW2 Matiko said he was the first person to respond to the deceased calling for help and he mentioned one Bernad as a person who asked the alleged assailant to let the deceased go, and that the deceased was then taken to police and later to hospital by his mother Ghati Charles, omission of prosecution to parade these witness left a lot to be desired. There was no explanation given on any predicament to trace them. It is on this basis it is doubtful what exactly happened thus weakening the prosecution case. In **Aziz Abdallah V. R. [1991] T. L. R. 71** it was held that:

*"The general and well-known rules are that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, can 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"*

Having considered the evidence by the prosecution side together with the defence evidence, the prosecution case is dented with contradictions on who caused of death of the deceased. This contradiction on who attacked the deceased touches the root of the important element of the causation of death. **Mohamed Said Matula V Republic; 1995 TLR 3** considered.

It is in this state of affairs I find a leaf from the decision by Satish Chandra Sharma. J. from Supreme Court of India in **Malappa & Ors Vs State of Karnataka Criminal appeal no 1162 OF 2011** on appreciation of evidence thus;

*Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive and inclusive of all evidence, oral or documentary,*

*Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge,*

***If the Court, after appreciation of the evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed. (Emphasis supplied)***

All said, on the foregoing analysis I conclude that; the prosecution has not proved the information against the accused in the required standard. The accused person Eliud Rodgers Msangi is found not guilty of the offence charged which is manslaughter contrary to sections 195 and 198 of the Penal Code Cap 16 [ RE 2019]. He is accordingly acquitted.

**A. J. KIREKIANO**

**JUDGE:**

**18.03.2024**



**COURT:**

Judgement delivered in presence of Mr Say Gugah state attorney for Republic and in presence of the accused and Mr Yohana Kibindu for the accused.

**Signed**

**A. J. KIREKIANO**

**JUDGE:**

**18.03.2024**