

IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT TARIME
CRIMINAL SESSIONS CASE NO. 190 OF 2022

REPUBLIC

VERSUS

JACOBO S/O OLAMBO MUNA @ JACK

JUDGMENT

17th & 20th October, 2023

M. L. KOMBA, J.:

There was a new building under construction at Majengo village in Rorya District within Mara Region. The owner of the new building was Otieno Awilo. At construction site on 29/01/2022 there were casual labourers who were filling *moram* in the rooms to allow other stages of the construction to proceed. On that particular day (29/01/2022) there were some labourers women and men. According to prosecution, it was around 12:45 hours one of the labourer **JACOBO S/O OLAMBO MUNA @ JACK** who was in one of the unfinished room went outside of the building in a hurry while holding the hoe which was used in that job, met Mzee SILVANUS ALEKO OLWAR (Mzee Aleko) outside the building, pushed him on the wall and hit him on

his head by using a hoe. He collected his belongings, which was hoe and bucket and disappeared. There was a person watching all that, PW1 (Sharifa Lucas Andrea) who informed this court that following that incident, she (PW1) make an alarm (yowe) while Mzee Aleko was bleeding from the injury he sustained at the left side of the head.

She further informed this court when cross examined that she know the person who attack Mzee Aleko by one name of Jacobo or Jack whom they were doing the work together. Elaborating how they were doing their job at site she explained that they used spade to put moram in buckets and then transfer it inside building. Sometimes they used hoe to soften moram before they use spade putting moram in buckets. The place where Jacobo and Mzee Aleko were found was a path to where moram was taken, and she did not know who was the first to hold another but what she witnessed was two people were holding each other and the Jacobo pushed Mzee Aleko on the wall before he hit him on his head.

According to PW2 (Perter Sylvanus Aleko), Mzee Aleko was taken to his home after the injury then to Utegi health centre where he was given first aid and PW2 was advised to take Mzee Aleko to Kowak Hospital for further treatment. Following that advice, he took Mzee Aleko to Kowak Hospital

where they were referred to Musoma referral Hospital (Musoma Hospital). They managed to arrive at Musoma Hospital around 17:00 hours and the Mzee Aleko was treated but he died while under treatment around 20:00 hours of 29/01/2022.

Basing on these facts, prosecution arraign **JACOBO S/O OLAMBO MUNA @ JACK** before this court charging him with the serious offence of murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E 2022. It is serious because it involves a death sentence penalty to the convict, unless the trial court decides otherwise as per section 26(2) of the Penal Code, or where the same is not proved on the standard required by the law.

In proving the offence, prosecution had five witnesses. The testimony of PW1 was reproduced in a foregoing paragraph that she saw accused hit Mzee Aleko outside the site. Mzee Aleko was injured and was taken to hospital where he died in the same day while under treatment.

It was PW2 who testified that in the following day, that is 30/01/2022 relatives were given the body of Mzee Aleko and they passed to Utegi police with the body of deceased on their way home and then they decided to take the body to Utegi Health Center mortuary. Prior to their departure

from Utegi Health Centre to Kowak Hospital as advised by medical practitioner, PW2 went to Utegi police post to report the matter and asked for PF3 which was not given. Then he went to the scene where he found many people. Upon asking what happened to Mzee Aleko, he was informed that Mzee Aleko was beaten by Jacobo Olambo and Jacobo run away without being informed of the weapon used. Jacobo was familiar to this witness as he was his village mate.

It was PW2 who directed the investigator, PW3 in drawing sketch map of the scene (exh P1) on 30/01/2022 and few days later on 02/02/2022 according to PW2 the body of deceased was examined by the doctor Nkwama (PW5) who informed them that the cause of death of deceased was wound at the head which was 7cm deep which cause internal bleeding that's why before his death mzee Aleko was bleeding from nose and ears and the skull was damaged.

During cross examination this witness informed this court that while at the scene he was told by Sharifa (PW1) that Mzee Aleko was beaten by Jacobo and clarified that the body of Mzee Aleko was not examined while at Musoma Hospital and they were not accompanied by any doctor from Musoma to their village.

G. 6024 D/CPL Sila of Utegi Police Post appeared as PW3 who informed this court that he was at his office before he was informed by his supervisor that there was crime incident at Soa hotel area within Majengo. Before taking any action, Peter Aleko (PW2) appeared in their office who informed policemen that his father was injured and was in the hospital. He said following that information from PW2, police were divided, some of them went to hospital and others went at the scene of crime. This witness went at the scene of crime where he found some people working as labourers. While at the scene he was told that Jacob cut Mzee Aleko who was passing and he said he managed to see blood stains at the corner of the fence. He draws the sketch map and returned back to his office.

In the morning of 30/01/2022 this witness was given information by his supervisor that Mzee Aleko was dead and he was assigned to investigate the matter. After being given that responsibility he called (PW2) who was complainant and he was informed by that PW2 that he was on his way to Utegi from Musoma hospital. Around 10:00 hours together with PW2 they went at the scene for the second time and draw sketch map of the scene (exh P1). This time, PW3 was directed by PW2 and other people (Iddi and Lucas, he just mentioned them by one names). This witness further

informed this court that the body of deceased was examined by Dr. Nkwama just as she was mentioned by PW2, this witness testified further that Doctor informed police and relatives who were at the health center mortuary that cause of death was wound which was found at the head. He testified to see blood stains at the nose and ears of the deceased.

In searching for the accused, investigator testified that he was given information that the suspect was in Geita and he was arrested by the Police at Geita and was handled to him at Utegi police post. From his investigation he informed this court that it was Jacobo Olambo who cut Mzee Aleko.

During cross examination he confessed he was not at the scene when the crime occurred but he knows there is only one eye witness who is Sharifa Lucas Andrea.

The arresting police was paraded as PW4, G. 3404 DC Alfred from Geita Police Station who informed this court that he arrested the accused at Geita new bus stand after he was given description of the said Jacobo and physical appearance. When he saw a person resemble the appearance he was informed, he called the name and the accused responded that's why

he know he was the right person. He managed to arrest accused and interrogate him and surrendered him at Geita police post. During interrogation with accused, this witness informed the court that accused admitted to kill Mzee Sylvanus Aleko while at Majengo area in Rorya District though he did not tender caution statement of the accused. DC Alfred confessed that before interviewing the accused he was not aware of the name of the person who was killed in Rorya.

As indicated earlier, the body was examined by Dr. Mercy Laison Nkwama who testified in court as PW5 while connected from Mloganzila, a branch of Muhimbili National Hospital by teleconference, a service which is offered by judiciary of Tanzania as among the means of simplifying hearing of cases. Dr. Mercy informed this court that in February, 2022 she was a doctor incharge of Utegi Health Centre. While at Utegi on 02/02/2022 she examined a body of Sylvanus Aleko (Mzee Aleko) which was introduced to her by policeman called Sila.

Through physical examination, witness testified that the body had a wound on left side of the head which was stitched. The wound was 7 cm long. Further she observed that there was clotted blood on ears and nose. Upon further examination of the stitched area, she found the skull was broken.

She informed relatives who was around and police about her findings then filled post mortem report which was admitted in court as exhibit P2. PW5 informed this court that cause of death was broken skull which was caused by severe head injury.

During cross examination by the defence counsel she acknowledges she did not know where the death occurred, she was just introduced the body of deceased by Sila, police. On cross examination by accused person she failed to answer a question on the size of the wound versus the size of the hoe including the function of the hoe if is to cut or to bend things but this witness insisted that she reported the wound was caused by sharp object while denying to mention a hoe in Exh P2.

Being no further witnesses, prosecution closed their case. After the above evidence was closed the court was satisfied the evidence was sufficient to establish primacies case against accused who gave his testimony under oath.

JACOBO S/O OLAMBO MUNA @ JACK testified as DW1. In his defence he denied to kill Mzee Aleko though he confirmed on 29/01/2022 he was casual labourer at Otieno site near Sao Hotel. He had a task of filling

moram in under construction building. He informed this court that he finished his task and went home at noon hours. Up to the time he left the site nothing happened, he did not witness any crime and nobody died.

Accused further informed this court that he was with PW1 at the site and that they used hoe, spade and buckets in their duty. He left to Geita in the following day, that was 30/01/2022 and he was arrested while in Geita.

As indicated above, the accused persons herein are facing a serious charge of Murder c/s 196 and 197 of the Penal Code. It is serious because it involves a sentence of death penalty to the convict unless the same is not proved on the standard required by the law. Therefore, at the outset, I wish to point out that in order to win conviction, the prosecution must prove its case beyond any reasonable doubts as required of it under section 110 of the Evidence Act, CAP 6 R.E. 2022, short of that the accused person will be entitled to the benefits of doubts left behind by the prosecution side.

Proof beyond reasonable doubts refers to the cardinal principle which entails that in any criminal trial, the accused person must not be convicted because he has/put forward a weak defence, but rather the evidence led

by the prosecution incriminates him to the extent that there is no other hypothesis than the fact that the accused person committed the offence which he stands charged. (See **Anthony Kinanila and Another vs. The Republic**, Criminal Appeal No. 83 of 2021 (unreported)).

Coming to the case at hand, prosecution had an eye witness, a person who saw what happened at the scene. This is called oral evidence as per section 62 of the Evidence Act, Cap 6 R.E 2022. Reading careful testimony of PW1, she informed this court she saw accused in a hurry going out of the building while holding a hoe and when she followed, she saw accused holding Mzee Aleko, pushed him on the wall and hit him at the head by a hoe and run away. This was so direct and it was day time, the sun was shining. After that scenario Mzee Aleko was injured and taken for treatment. He died while under treatment and the rest of witnesses heard the story from PW1.

According to PW2, Mzee Aleko died on 29/01/2022 while under treatment at Musoma Hospital and his body was examined on 02/02/2023 at Utegi Health Center. The examining doctor said the wound at the head was seven (7) cm long and it was stitched. The cause of death according to this expert as per Exh P2 was severe head injury. There is no doubt that

according to prosecution, Mzee Aleko was attacked on his head by accused and he run away. He was treated at Musoma. Following the testimony of PW2, after the death occurred on 29/01/2022 the body remained at Musoma hospital till the following day when it was handled to them (relatives) whom they took the body to Utegi. The body was examined at Utegi after four days and it was transported by relatives without any medical practitioner. How the body was handled from Musoma hospital where accused was treated to Utegi and to the time when it was not examined?. This reminds me of the philosophy of chain of possession. And I shall borrow some words from the famous case of **Paulo Maduka and 3 others vs. Republic**, Criminal Appeal No. 110 of 2007.

In that case of Paulo Maduka the Court of Appeal insisted the importance of making sure that chain of custody of evidence is intact in order to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having planted fraudulently to make someone appear guilty. Of course, am aware that there are development to this principle which was introduced by the same Court eight years later when cerebrating the case of **Joseph Leonard Manyota vs. Republic**, Criminal Appeal No. 485 of 2015 (unreported). In this later case the

principle was relaxed to the extent that where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way **tampered with**. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken.

In the case at hand, the prosecution allege that cause of death was the wound at the head of Mzee Aleko. Mzee Aleko died while under treatment at Musoma hospital. Prosecution did not register any reason why the body was not examined at the hospital where death occurred. They never explained why the body was examined four days later and the examining expert confessed she did not know where the body was from. The issue here is the wound which caused the death. Was the wound found in the head of Mzee Aleko at the scene and while under treatment was the same which was examined four days later? How the body of Mzee Aleko was handled from the day of his death till he was examined. Was there a risk of it be tempered? Is it a right case to apply the principles in chain of custody?. Let's us see.

There is no doubt that Mzee Aleko was injured and later on died as even the accused informed this court that there was no murder incident at the

cite but he heard somebody died when accused was in Geita and after his arrest. Prosecution expert explained in court that cause of death was wound on the head. It was not explained how the wound was (the size) during treatment as there was none among the witnesses attended the deceased at Musoma Hospital. PW2 informed this court he went to the scene while his father was at the hospital and while at the scene he was told Mzee Aleko was beaten by Jacobo, he did not ask he was beaten by which weapon. He went back to hospital and transport his father to Musoma Hospital for further treatment. After the death, the body was handed to PW2 for it to be taken to their home without any supervision. They pass with the body to Utegi police post so that the police officers can see the body before the burial and then they decided to keep it in the Utegi mortuary. As said, there is no explanation why the body was passed to police post and why it was kept for four days before it was examined.

When prosecution find the right time to examine the body of Mzee Aleko, it was the policeman, PW3 who faced PW5 (doctor) and request for the examination of the body. At this juncture, I find likelihood of the body of Mzee Aleko to be tampered with, specifically on the size of the wound so that to simplify investigation. In the circumstance of this case the wound

is the sole evidence to prove the crime, which is the cause of death. I find the body within which the wound was found was not handled properly as directed in the **case of Paulo Maduka**. That evidence (the wound in the head) was not among the evidence where the principle of chain of custody may be relaxed as it was easy to be tempered and it was the cause of death. I find the gap which was not cleared by prosecution over the size of wound which cause the death.

At the first place Mzee Aleko was injured, he was taken from the scene while he was an injured person, a victim, as confirmed by all prosecution witnesses including the investigator. In his defence, the accused person testified that by the time he left the site there was no murder incident. It was said that even accused is entitled to credence as it is well settled that every witness is entitled to credence unless there are reasons for not according it. See **Allan Duller vs. Republic, Criminal Appeal No.367 of 2019 (unreported)**. In the case at hand, accused confirmed to be at site working with PW1 and he admitted to own a hoe while at the site. Basing from the PW1 testimony, accused hit Mzee Aleko with a hoe. This court too find it was accused who hit Mzee Aleko as the accused did not shade any doubt in his defence over the injury of Mzee Aleko, rather he

created doubt over the size of the wound found in the head of Mzee Aleko when he cross examined PW5. See the case of **Abas Matatala vs Republic**, Criminal Appeal No. 331 of 2008 CAT

For the reasons best known to prosecution they decide not to tender the said hoe in court as an exhibit for this court to make assessment of its effect when hit a human being as there is big hoes and small hoes. A reasonable person may ask was the wound caused by the accused while at the scene was big enough to be seven (7) cm long? The answer is no as the body of Mzee Aleko was mishandled from his death to the time the wound was examine. See the case of **Paulo Maduka** on chain of custody and **Moses Mwakasindile vs. Republic, Criminal Appeal No. 15 of 2017**. The doubt is on the size of the wound which cause the death. It is clear to this court that the interlude between the morning of 30/01/2022 when the body was handled to PW2 and 13:30 hours of 02/02/2022 when the body was examined by PW5 at Utegi mortuary, PW2 and PW3 had exclusive custody of the body of Mzee Aleko. The possibility or potential danger of the said body of Mzee Aleko to be, in any way tampered before the same was examined, cannot be completely excluded. It must benefit the accused. See **Aidan Mwalulenga vs. Republic**, Criminal Appeal No.

207 of 2006 and **Ally Miraji Mkumbi vs. Republic**, Criminal Appeal No. 311 of 2018 (June, 2021)

In a different note, it was prosecution assertion that accused used hoe to hit Mzee Aleko. A hoe has three sides, sharp side, the place to fix a handle and a handle. Both sides are capable to be used depending on the circumstances and intention of the user. Reading testimony of PW1 careful she did not inform this court which part of the hoe was used to hit Mzee Aleko. Was it a hoe of 5 cm sharp edge, or 10 cm edge or the maximum size of 30 cm. I find the size of the hoe and the part used to hit determine the extent of injury but prosecution did not bother to clear out this. I find a gap in prosecution case.

Another shortfall of prosecution is found on the way exhibit P1 was prepared. I have no issue on how it was tendered as the foundation was properly laid by PW3 before he tendered it just as was in the case of **Christina Ughechi vs The Republic**, Criminal Appeal No. 274 of 2019, CAT at Dar es salaam. Reading it carefully, it was prepared on 30/01/2022 by PW3 its title reads;

*'RAMANI YA ENEO LA TUKIO LA MAUAJI YA SILVANUS S/O ALEKO
OLWAR YALIYOTOKEA ENEO LA KAZI YA JENGO LA OTIENO (SITE*

CAMP) KIJJI CHA MAJENGO WILAYA YA RORYA. RAMANI IMECHORWA NA G 6024 D/CPL SILA AKISAIDIWA/ KUONGOZWA NA PETER S/O ALEKO. TUKIO LA MAUAJI TAREHE 29.1.2022.'

From the excerpt above as per D/CPL Sila (PW3) who was the author of the exhibit and also investigator, Mzee Aleko died on the area which was indicated in the sketch map. He was directed by Peter Aleko who in the case appeared as PW2. In his testimony while in court PW2 confirmed he was not at the scene while the incident occurred. Am thinking loud how was he capable to direct or assist investigator in drawing the said map while he was not at the scene.

PW3 testified during cross examination that there was only one person who witnessed the crime, PW1. And prosecution record show republic knew whereabouts of an eye witness as they managed to parade her in court. It is best known to themselves why they decide not consult her when the sketch map is drawn and decide to base on the person who was informed of the incident. Because none of them were present during the incident that means contents in the Exhibit P1 was guesswork and therefore, its my finding that prosecution compromised on the authenticity of Exhibit P1 and therefore it is not safe to rely on it.

In the case at hand, the only piece of evidence which prosecution manage to prove is injury to Mzee Aleko without the extent of it and or the size of the wound from the scene.

As indicated earlier, the accused is charged with the offence of murder which among the ingredient is death of a person. Usually in order to prove occurrence of death as an ingredient of an offence of murder, there must be direct evidence to show that a certain person is actually dead, and his death was unnatural. That requires also the evidence of a medical expert who conducted a post-mortem examination of the deceased body at the scene of crime. Exhibit P2 is the expert report which prove Mzee Aleko died and his death was unnatural. It was caused by the wound inflicted in his head prior to his death. This expert finding was provided four days after the death and the body was examined in a different location apart from the location where death occurred. It is not in all cases direct evidence may prove existence of a certain fact. The above court's position is fortified in the principle that each case has be decided per its own circumstances. See. The **Republic vs Hussen s/o Malulu @ Elias & 3 Others**, HC at Shinyanga (unreported).

Basing on cited case and above analysis, I am of the firm finding that accused injured Mzee Aleko on the heard but he did not intend to kill him as the size of wound was not established before the body was handled to PW2 at Musoma Hospital to be transported to Utegi police post and later on to Utegi mortuary.

That being the case, then accused injured Mzee Aleko, wound then cause the death. It is the finding of this court therefore, accused killed Mzee Aleko without intention and I find the accused person guilt of a lesser offence of manslaughter. That being so I hereby convict **JACOBO S/O OLAMBO MUNA @ JACK** to the offence of manslaughter contrary to section 195 of the Penal Code.

SENTENCE

In considering the factors as registered by prosecution and defence counsel, the party which injury was inflicted, other gaps as pointed in judgment, time spent under custody the accused person Jacobo S/O Olambo Muna @ Jack is hereby sentenced to serve nine (9) years in prison.



Nk
M. L. Komba

Judge

20th October, 2023

Right to appeal has been explained.

NK

M. L. Komba

Judge

20th October, 2023

