

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA SUB-REGISTRY
(SITTING AT TABORA)**

CRIMINAL SESSIONS CASE NO. 27 OF 2023

THE REPUBLIC

VERSUS

SENI S/O NHUYUGU @ KAYEYI@ SENI NHUYUGU @ LUTEMA ... 1ST ACCUSED
JILALA S/O TOSOGORO@ JILALA S/O TOBOGORO SOSOMA 2ND ACCUSED
JUMA S/O RAMADHANI @ MIHAMBO @ JUMA MASUNGA @ MSINDI
MASUNGA 3RD ACCUSED
KATARINA D/O LUKASI @ KATARINA D/O LUCAS 4TH ACCUSED
DANIEL S/O FREDRICK 5TH ACCUSED

JUDGMENT

Date of last order: 22/03/2024

Date of Judgment: 22/04/2024

KADILU, J.

The accused persons in this case are charged with murder contrary to Sections 196 and 197 of the Penal Code, [Cap. 16, R.E. 2022]. The particulars of the offence were that on 07/10/2022, at Makibo Village within Sikonge District in Tabora Region, the accused murdered a 60-year-old man named Bundala Kayeji. They allegedly invaded the deceased and assaulted him on different parts of the body thereby causing his death. When the charge was read over to the accused persons, each pleaded not guilty. The prosecution paraded nine witnesses and tendered two exhibits to prove the charge against the accused.

The prosecution's evidence linking the accused persons with the commission of the offence was as follows. The 3rd accused married the deceased's daughter, Elizabeth Bundala. She was suffering from demon spirits for about thirteen years. In addition, the prosecution's testimonial

account was that the deceased was married to the 4th accused but he had divorced her and married other women. The 3rd accused contacted a witch doctor, Manyenye Nhuyugu who discovered that his wife was bewitched by her father, Bundala Kayeji. Manyenye advised the 3rd accused to ensure Bundala was killed. The witch doctor demanded the payment of TZS. 1,050,000/= for hiring the killers. The 3rd accused convened a family meeting between himself, his mother-in-law (4th accused), and his wife, Elizabeth to raise money for the killing of Bundala Kayeji.

They decided to sell four cattle to get TZS. 1,050,000/=. The witch doctor assisted the 3rd and 4th accused in hiring the 1st and 2nd accused to kill the deceased. The 1st accused is the witch doctor's young brother. The 5th accused took the 1st and 2nd accused to the deceased's house where they smashed him to death using a machete. Thereafter, they escaped to Ulyankulu where they were arrested while in Manyeye's house and were transferred to Sikonge Police Station.

Dr. Jenoveva Kaishe (PW1) went to the scene where she found the deceased's body lying outside the house. According to her, the body had wounds on the stomach and the head, the largest one being on the head. PW1 conducted an autopsy of the deceased's body. After the examination, she found that the cause of death was excessive bleeding due to the large wounds that were caused by a sharp object. A postmortem examination report of the deceased's body was admitted during the trial as Exhibit P1.

Elizabeth, the 3rd and 4th accused directed the 5th accused to show the 1st and 2nd accused where the deceased lived.

Msobi Bundala Joseph (PW2) was living with the deceased before he met a violent death. He told the court that the deceased was his father and the 3rd accused was his brother-in-law. PW2 recounted that on a tragic day, he went to the 3rd accused's home to take maize he had purchased earlier. He stated that he did not find the 3rd accused and his wife at home as they went to a witch doctor at Ulyankulu because Elizabeth was suffering from demon spirits. At the 3rd accused's home, PW2 found the 3rd accused's sons, Masunga Juma and Machia Juma together with the 1st and 2nd accused.

PW2 took the maize intending to grind them that day but there was no electricity. He decided to go to his grandfather, Lugeji Gonzela. In the evening, PW2 was called by his friend named, Tano who informed him that their father was invaded and killed with a machete. He went back home and found his father already dead. PW2's wife, Lucia Charles informed him that she saw the 1st accused cutting the deceased with a machete after having told them, "*Wote mko chini ya ulinzi*," meaning, you are all under arrest. PW2 said that his father was killed by the 1st and 2nd accused who did not quarrel with him but were hired to do it as they were experienced killers.

PW2 added that before his father was killed brutally, there was a long-time misunderstanding between the deceased and the 3rd accused concerning the dowry of Elizabeth Bundala.

Lucia Charles (PW8) testified that she is PW2's wife so the deceased was her father-in-law. During the incident, she was living in the deceased's house. She told the court that on 10/10/2022 evening, she was with Khadija (PW2's young wife) cooking in the outdoor kitchen when two

people arrived. According to her, there was moonlight so she saw them moving to where the deceased was sitting. She described the two persons as old as the deceased himself. She stated that the visitors requested to sleep in the deceased's house because they were going to the bush but the night befell. Lucia explained that the visitors did not talk about anything. One of them lit a torch towards the deceased which made her and Khadija wonder, looking at the torch.

She saw the 1st accused hitting the deceased with a stick. Khadija and her ran away and after a while, she turned back to pick up her child. She said when she went back, she saw the 1st accused cutting the deceased with a machete. She explained that she was able to identify the 1st accused because they lived together in Makazi, Ulyankulu for two years. PW8 elaborated that the incident took about a minute and she saw the 1st accused using a torch light. According to her, the torch was held by the 2nd accused. Thereafter, PW8, Khadija, and the young children who were present ran away and went back an hour later when they found Bundala Kayeji already dead.

Joseph Bundala (PW3), is the deceased's son who testified that his brother (PW2), called him saying that their father was killed at Makibo Village. He went to the deceased's home where he found neighbours with the 3rd accused's sons, Machia Juma and Masunga Juma. They told him that two people visited the deceased and left with him. They added that the 3rd accused, Elizabeth and the 4th accused went to Ulyankulu. PW3 stated in addition that the 5th accused took Seni and Jilala to the deceased's home. As

it was their first time, they got lost and went back two times. The second time, they met the deceased and killed him.

After the killing, they went back carrying a machete stained with blood. PW3 told the court that Hongoro heard Seni and Jilala talking on a phone call that they had already killed Bundala. According to PW3, many villagers responded to an alarm (*Mwano*) but the 3rd accused's family did not as they were at Ulyankulu to the witch doctor. The 2nd accused informed PW3 that they killed the deceased after having been promised to be paid TZS. 1,200,000/= and they were given advanced payment of TZS. 200,000/=. PW3 elaborated that he witnessed the deceased's body and it had several wounds on the head and stomach.

The body was transported to his home at Urambo for burial. While on the way to Urambo, they were called and informed that one of the killers was arrested. PW3 explained that two days after the burial, they were also informed that another killer was arrested hiding in the bush but he did not know the killers' names.

F.6629 - DC Sgt. Erick (PW4) stated that on 07/10/2022, he was at Ulyankulu police station when he got information from his secret informer that the people who murdered Bundala Kayeji at Sikonge were in Ulyankulu. He went to Toba Village with other police officers and took Yunge Bundala, 3rd, and 4th accused to Ulyankulu police station. He found them already arrested by the Militia. He stated further that on 10/10/2022, he got additional information from another secret informer that the 1st accused was arrested in Jiwe Village.

He went there and took the 1st accused to Ulyankulu police station. Finally, PW4 got information from his other informer that the 2nd accused was at Mwadui Hamlet. He then went there, arrested him, and took him to the Ulyankulu police station. At the police station, PW4 left other police officers to interrogate the suspects. PW4 testified that the accused persons were arrested in connection to the murder of Bundala Kayeji.

G.4186 – DCPL, Yuda (PW6) informed the court that he was the investigator of this case. He went to the crime scene on 09/10/2022 and saw the deceased's body having wounds on the head. After PW1 had conducted a postmortem examination, the body was handed to the family for burial. PW6 added that the suspects escaped to Ulyankulu so, he went there. He found the 1st accused was arrested on 10/10/2022 therefore, he recorded his cautioned statement. As stated by PW6, the 1st accused admitted that he participated in killing Bundala Kayeji after having been informed by the 2nd accused that they would be paid TZS. 1,200,000/=.

PW6 narrated that in the interview with the 1st accused, he revealed that the 3rd accused gave them advanced payment of TZS. 200,000/= for them to kill Bundala Kayeji. By that time, the 3rd accused had already directed the 5th accused about where the deceased was. Then, the 3rd accused boarded a motorcycle and went to Ulyankulu accompanied by his wife and the 4th accused. Further, the 1st accused told PW6 during the interview that the 5th accused took the 1st and 2nd accused to the deceased's home for the first time on 07/10/2020, and on 08/10/2022, they went back and killed him using a machete.

PW6 elaborated that the 1st accused was the one who killed the deceased while the 2nd accused was lighting him with a torch. Two persons who were with the deceased ran away after seeing a torch leaving the deceased alone. Finally, PW6 stated that although the TZS. 200,000/= advanced payment to the killers was made via mobile transaction, he did not discover anything about the phone that was used to receive the money. He testified in addition that the accused persons told him that they threw away the machete after using it to kill the deceased. The 1st accused person's cautioned statement was not admitted in evidence after having found that it was recorded beyond the basic statutory hours.

PW7, WP 8033 DC-CPL Judith recorded a cautioned statement of the 2nd accused. She testified that the 2nd accused admitted that on 07/10/2022 during the night, he went to the deceased's home accompanied by Seni and Daniel. Like PW6, DC-CPL Judith stated that she got from the interview with the 2nd accused that Seni smashed the deceased with a machete while the 2nd accused was lighting him with a torch. PW2 disclosed in the interview that they were with their other friend whose name he could not recall, but was standing beside him during the killing.

He said he was paid TZS. 250,000/= by a witch doctor, Manyenye for the killing. PW7 was informed by PW2 that the reason for killing Bundala was that he was bewitching the 3rd accused's wife. As said by PW7, the 2nd accused said he was an experienced killer as he once killed a person he named as Mwanamachiya. PW7 prayed to tender cautioned statement of the 2nd accused. The prayer was not granted after trial within trial established

that the statement was recorded in contravention of the mandatory provisions of Section 50 (1) (a) of the Criminal Procedure Act.

PW9, G.7950 – DC CPL Mwalimu, recorded a cautioned statement of the 3rd accused in which he allegedly admitted that he was the one who planned for the killing of Bundala Kayeji. He convened a family meeting between himself, the 4th accused, and Elizabeth Bundala. They agreed that Bundala Kayeji had to be killed because he was bewitching his daughter, Elizabeth. The meeting deliberated that as they had no money to pay the killers, they had to sell four cattle to raise TZS. 1,050,000/= for the work. They sent the money to Manyenye Bulugu (witch doctor) who knew the killers. Manyenye contracted his young brother, the 1st accused to execute the deal.

Thereafter, the 3rd accused left with Elizabeth, and the 4th accused to Makazi village to a witch doctor. After some days, the 3rd accused said he received a phone call from Makibo Village and was informed that Bundala was already killed. They stayed at Makibo up to 08/10/2022 when they were arrested by *Susngusungu* and taken to Ulyankulu police station. When PW9 prayed to tender cautioned statement of the 3rd accused in his testimony, the defence side objected for the reason that the time in which the 3rd accused was arrested was unknown. It was, therefore, argued that where the time of arrest is uncertain, it cannot be said that the cautioned statement of the accused was recorded within the basic four hours stipulated under Section 50 (1) (a) of the CPA.

WP 12639 – DC Cecilia (PW5), gave a more or less similar testimony as PW9. She informed the court that she recorded a cautioned

statement of the 4th accused in which she stated that she was informed by the 3rd accused that her daughter, Elizabeth was being bewitched by her father, Bundala Kaeji. So, they planned on how to kill Bundala. They agreed to hire people and killed him. He mentioned those people including Seni and another person whom she did not know. She explained more that the whole plan was organized by the 3rd accused. PW5 tendered the cautioned statement of the 4th accused which was admitted as Exhibit P2.

After the prosecution side closed their case, this court found all the accused persons to have a case to answer. They were accordingly called to enter upon their defence. Each dissociated himself from the killing of the deceased. In his defence, **DW1 (Seni Nhuyugu)** narrated that he was arrested by PW4 on 10/10/2022 at Msegi Village in Ulyankulu. He said PW4 was accompanied by other policemen whose names he did not know. DW1 stated that he was arrested at 4:00 hrs when he woke up for a short call. He was suddenly hit hard by using a clog when he was opening the door. He turned back to the room but PW4 pursued him and hit him on the head until he fell. He was handcuffed and taken to a police vehicle which was outside his house. He was taken to Ulyankulu police station.

On 11/10/22, PW4 took DW1 to the investigation room where he found other three policemen, including PW6. They asked about his particulars which they recorded on a piece of paper. After a while, PW4 instructed DW1 to sign on a paper containing some information. DW inquired about the document he was instructed to sign. The policemen insulted him saying he should not teach them how to work. They tortured him severely while alternating, one after another. They asked him again if he would sign, which

he did. DW1 informed the court that he stayed at Ulyankulu police station from 10/10/2023 to 16/11/2022 when he was arraigned in court. DW1 met the alleged co-accused for the first time in court and was informed that they were accused of having killed Bundala Kayeji. He told the court that he had never been to Makibo where the incident is alleged to have occurred.

Jilala Tosogoro testified as **DW2** and explained that he was arrested by PW4 and PW9 on 10/10/2022 at Ulyankulu. He was also taken to Ulyankulu police station where he was tortured and forced to sign on a sheet containing some information. He elaborated that at first, he refused to sign but he was beaten until he fainted. He was returned to the lock-up, and on 11/10/2022, he was taken to the investigation room again. He still refused to sign but a policewoman came who took his thumb and placed it on a paper with some information. He also said that he did not know the co-accused until 16/10/2022 when they met in court. DW2 urged the court to disregard the prosecution evidence as it was all falsehood.

Juma Ramadhani Mihambo (DW3), stated that he was arrested by two policemen on 08/10/2022 early in the morning while at his mother's home. He explained that he was constructing his house and his mother and wife went to fetch roofing grasses for him. The policemen handcuffed him and took him on the motorcycle saying he would know the reason for the arrest later. He testified that in the police vehicle, he met other five policemen and two men with local beer (*gongo*) in the gallons and they were all taken to the Ulyankulu police station. At the police station, DW1 was interviewed by PW9 and two other policemen he met in the interrogation

room. DW1 added that the two policemen were writing something on a piece of paper.

After finishing writing, they instructed DW1 to sign but he requested them to read for him the contents before signing. He said they started torturing him bitterly. According to DW1, he was told by PW9 that if he continued to resist signing, he would be beaten to death. He then signed but he told the court that he did not know what he had signed. At that time, his legs were swollen to the extent that he failed to move. He requested drinking water which was denied after PW6 warned his colleagues that DW1 would die if they gave him water immediately.

DW4 was **Katarina Lukasi** who testified that she was arrested by the police officers on 08/10/2022 at Ulyankulu while at home. She added that she was taken to Ulyankulu police station where she was informed that she killed Bundala Kayeji. DW4 explained that her cautioned statement was recorded by PW5 on 11/10/2022 after having been beaten by her and forced to sign a statement. She elaborated that she was taken to court on 16/11/2022 where she met other people (co-accused) whom she did not know at that time. She admitted that Bundala Kayeji was her husband but before he died, they were separated and they did not quarrel. She denied the allegation that she participated in killing Bundala and prayed the court to acquit her.

Daniel Fredrick (DW5) stated that he was a resident of Makibo and on 08/10/2022, he heard that Bundala was killed on 07/10/2022. DW5 explained that he went to Bundala's home with other villagers. According to him, the villagers said he knew people who murdered Bundala because, on

06/10/2022, he got the visitors at his home. The villagers arrested him and called the police who did not arrive immediately so, he was taken to the village office by the Militia (*Mgambo*). When police officers arrived, he was taken to Sikonge police station where a certain police officer took some papers to him instructing him to sign. He asked the police officer to read for him what was recorded, but the police refused then he also refused to sign. He said after having refused to sign, he was beaten by the police but he resisted to sign to the end. Like other accused, DW5 testified that he was not familiar with any co-accused before they met in court on 16/10/2022.

After having appraised the facts and evidence presented by both sides, the issue is whether the accused persons are guilty of murdering Bundala Kayeji. For the accused to be convicted of murder, the prosecution must prove that the deceased died an unnatural death, the death was caused by the accused, and that the accused killed the deceased with malice aforethought. These ingredients have to be proved beyond reasonable doubt as per Section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2022]. Thus, the accused person is entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

I have carefully considered the evidence presented before this court. There is no doubt that Bundala Kayeji died a violent death as shown by PW1 and the postmortem examination report (Exhibit P1). The prosecution has presented evidence to the effect that the accused conspired and executed the murder of Bundala Kayeji, a 60-year-old man. PW8 was the only

prosecution witness who testified that she saw the 1st and 2nd accused killing the deceased. PW2 and PW3 got information about the deceased's death from PW8. She stated that she recognized the 1st accused by using light from a torch held by the person who was with the 1st accused. She added that she did not see properly the other person who was with the 1st accused. From this piece of evidence, it is doubtful if PW8 identified the 2nd accused in the scene.

On cross-examination, PW8 explained that she saw the attackers by using moonlight, but she continued to elaborate that the killers used a torch as they could not see the deceased accurately due to darkness. She further told the court that during the incident, she was with Khadija Masanja who was her co-wife, and the young children. However, Khadija was not called to testify to corroborate what was stated by PW8. PW8 stated in addition that after seeing the 1st accused cutting the deceased, they ran away to call neighbours and went back after an hour where they found Bundala already dead. In other places, PW8 said she saw the 1st accused hitting the deceased with a stick, and in others, she narrated that when she him cutting *mzee* Bundala. PW8 did not state whether or not the neighbours she went to call attended the crime scene with her.

It was also the testimony of the prosecution witnesses that on the fateful night, the deceased was with two old men, (the visitors) who requested shelter in his house. PW8 elaborated that the old men did not leave, they stayed up to the next day. Sadly, none of these visitors was interrogated in respect of the deceased's death. Moreover, a substantial part of the prosecution's evidence revealed that Bundala's death was actuated by

superstition beliefs whereas Manyenye Bulugu Nhuyugu, a witch doctor informed the 3rd accused that his wife was being bewitched by the deceased. He went further and assisted the 3rd and 4th accused in hiring the 1st and 2nd accused to kill the deceased.

Unexpectedly, the said witch doctor was neither arrested nor interrogated in connection to the death of Bundala Kayeji. I am conscious of Section 143 of the Evidence Act which is to the effect that the prosecution is not bound to call any particular number of witnesses to prove their case, but in the circumstances, it was prudent to tell the court something regarding Manyenye Bulugu. PW6 stated was the investigator of this case and he stated that the TZS. 200,000/= advanced payment to the accused was sent through the mobile money transaction. However, he did not follow up to trace the alleged transaction or the mobile phone used to receive the money.

There was also a contradiction among the prosecution witnesses concerning the alleged advanced payment made to the murderers. Others stated that the 1st and 2nd accused were paid TZS. 200,000/= while others said the 2nd accused received TZS. 250,000/= as advanced payment. In ***Vuyo Jack v Director of Public Prosecutions***, Criminal Appeal No. 334 of 2016, the Court of Appeal of Tanzania at Mbeya held that:

"Not every discrepancy in the prosecution case will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory that the prosecution case will be dismantled."

In the instant case, I do not think the inconsistencies were minor ones. PW6 testified in addition that the accused persons told him that they used a machete to wound the deceased and that they threw it away after the killing.

PW6 did not, however, compel the accused to lead him to where they had thrown the machete.

The accused persons argued generally that they were not at Makibo where the incident occurred and that they did not know each other before they met in court. I find no need to venture a lot on their evasive defence because the law is clear that the accused is never convicted because his evidence was weak, but rather because the prosecution evidence against him was strong. *See* for example the case of ***Christian Kale & Another v R.***, [1992] TLR 302. PW8 was the only eyewitness of the incident but her entire testimony was full of inconsistencies and unreliable as already shown. PW2 and PW3 testified what they were told by PW8. For that reason, their testimonies were hear-say evidence that the court could not as well rely on. It is a general rule that hearsay evidence is not admissible except where it falls within the exceptions provided for under Section 62 of the Evidence Act. The prosecution relied on witness testimonies and attempted to establish that the accused were involved in the murder of the deceased. Witnesses testified about the circumstances surrounding the death of Bundala Kayeji, including how he was killed and the alleged involvement of the accused.

Nevertheless, the defence raised several objections and challenges to the prosecution's case. The defence contested the validity of the witness testimonies and raised issues regarding the identification of the accused, the reliability of the evidence presented, and procedural irregularities in the handling of the case by the investigation officials. In ***Goodluck Kyando v Republic***, [2006] TLR 363, the Court held that every witness is entitled to credence and must be believed and his testimony accepted unless there are

good and cogent reasons not believing a witness. Notwithstanding, where there is an excellent and compelling reason, the court may disbelieve the testimony and credibility of the witness.

One cause of discrediting the witness is when the evidence is fundamentally contradictory or irreconcilably contradicted by another witness. The position was stated in *Mathias Bundala v Republic*, Criminal Appeal No. 62 of 2004, Court of Appeal of Tanzania at Mwanza. Upon review of the evidence presented, the court finds that there are significant discrepancies and inconsistencies in the prosecution's case. Witness testimonies varied on crucial details such as the cause of death, the involvement of the accused, and the circumstances surrounding the incident.

Additionally, procedural irregularities, including the failure to conduct an identification parade and discrepancies in the prosecution evidence, raise doubts about the reliability of the evidence presented by the prosecution. Furthermore, the defence raised legitimate concerns regarding the admissibility of cautioned statements and the failure of the prosecution to call certain key witnesses. The defence also challenged the credibility of the witness testimonies and highlighted inconsistencies in their accounts. Considering the principle of proof beyond a reasonable doubt, the court finds that the prosecution has failed to establish the guilt of the accused beyond reasonable doubt.

The evidence presented by the prosecution is insufficient and unreliable to warrant a conviction of the accused persons.

In light of the foregoing, the court hereby acquits **Seni Nhuyugu, Jilala Tosogoro, Juma Ramadhani @Mihambo, Katarina Lukasi,** and

Daniel Fredrick of the charges of murder. The accused are to be released from custody forthwith unless they are being held for any other lawful reason. This judgment is based on the principles of justice, fairness, and the rule of law. The right of appeal is open to any aggrieved party.



Kadilu
KADILU, M.J.,
JUDGE
22/04/2024

Judgement delivered in open court on the 22nd Day of April 2024 in the presence of Ms. Upendo Florian and Aziza Mfinanga, State Attorneys, and Mr. Akram Magoti, Advocate holding brief for all Counsels for the accused persons who are also present under custody.



Kadilu
KADILU, M. J.
JUDGE
22/04/2024