

TANZANIA / JUDGMENT

Criminal Sessions Case 72 of 2022 Judgment MrishaJ

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IN THE HIGH COURT OF TANZANIA (SUMBAWANGA DISTRICT REGISTRY) SITTING AT MPANDA
CRIMINAL SESSIONS CASE NO. 72 OF 2022 REPUBLIC VERSUS THALATHINI LUBINZA
@MASENGEKA.....1st ACCUSED JILUNGA JIKARANGA
@LUKOMBA..... 2nd ACCUSED JISENA JIKARANGA
@MAPEMBE..... 3rd ACCUSED MWANADAWA NILAGILA
@MAMAHAMISA..... 4th ACCUSED

JUDGMENT

31s October & 14th November, 2024 MRISHA, J. This case is resulted from what is commonly known as a mob justice. It is the practice whereby a mob, usually of several dozens or several hundred persons take the law into their hands in order to injure or kill a person accused of wrong doing. The mode of the killings is mostly burning. Since, the mob serves as prosecutor, judge, jury and executioner, it thus, constitutes a gross violation of human rights, particularly a right to life, 1 liberty and security of the person, as protected under the United Republic of Tanzania Constitution, 1977 as amended from time to time, and International Human Rights Instruments to which Tanzania is a party. In the present case, the deceased Shinje Bore @Jongela was killed following attacks which were inflicted towards him by a crowd of people on the suspicion that he had stolen some maize belonging to the 1st and 4th accused persons. It was alleged by the prosecution Republic that on 23rd day of January, 2022 the deceased's son Petro Shinje (PW1) heard an alarm "mwano" then he followed it and saw persons beating his father, Shinje Bore Jongela. He also said that those persons beat, stab and cut his father on various parts of his body by using sticks, machete and spears, then they carried some wood sticks and others went to collect some fire and burnt him to death. On 24th January, 2022 the incident was reported to Tanganyika Police Station by the Village Chairman Abdallah Juma Kitalya (PW2), at around 10:00 hours the police officers from Tanganyika arrived at the crime scene accompanied by the Medical Doctor and instructed persons to remove the 2 wood sticks from the deceased body in order to conduct a post mortem examination. The investigation commenced whereby on 30st January, 2022 the 2nd and 3rd accused persons were arrested and matched off to Tanganyika Police Station while the 1st and 4th accused persons were arrested on 8th February, 2022 and matched off to Tanganyika Police Station for further interrogation. The abovementioned accused persons were

arraigned and charged before this court with the offence of Murder contrary to sections 196 and 197 of the Penal Code [Cap 16 R.E. 2019] (now R.E. 2022). It was then alleged that on 23rd day of January, 2022 at Mpembe village within Tanganyika District in Katavi Region, the accused persons did murder the deceased one Shinje Bore @Jongela. The accused persons pleaded not guilty to the charged offence as result, the prosecution paraded five witnesses and tendered documentary evidence to wit: the cautioned statements of 2nd and 3rd accused which were admitted as Exhibits P1 and P2 respectively and, the Post mortem examination report, as Exhibit P3, with a view of discharging their legal duty which is to prove the allegations against the said accused persons beyond any reasonable doubt. 3 In defence, the accused persons called a total of five witnesses whereby the 1st, 2nd and 3rd accused persons testified as DW1, DW2 and DW3 but they did not call any witness to support their oral testimonies, while the 4th accused person who testified as DW4, called one witness namely Khadija Hussein who stood as DW5 in order to testify in her favour. It was the testimony of Petro Shinje (PW1) that on 23rd January, 2022 about 18:00 hours, he and his young brother namely Leonard Shinje heard an alarm "mwano" when they were farming. They followed the said alarm and saw persons beating their father by using sticks, machete and spears. He testified that he knows the persons who beat his father are Thalasinini, 1st accused, the wife of the first accused, 4th accused, Julunga who is the 2nd accused and his son, 3rd accused and their fellow namely Bundi and Jilala. That after arriving at the scene of crime, the 3rd accused chased them. PW1 further testified that, he saw some persons carrying wood sticks and others went to collect some fire, and he heard from the 1st accused and his fellows saying that they will stab the deceased with spears and cut him with machete. 4 After being chased by 3rd accused, PW1 and his brother went to the house of Mr. Makingi and slept there. On the next day, in the morning he went to the scene of crime and saw his father being burnt; besides his body he found some maize poured. The said maize was alleged be stolen from 1st accused. He therefore identified all accused persons in the dock. Abdallah Juma Kitalya, PW2 testified that on 24th January, 2022 in the morning, he received a call from Mathias Bore who informed him about the incident of murder which happened at Mwalu. He went to the scene of crime and found the deceased body being half burnt and he didn't manage to identify the body. He also found some maize besides the dead body which had been poured down. PW2 informed the police about that incident, then at around 1000 hours the Police officers from Tanganyika arrived at the scene of crime and instructed people to remove wood sticks from the deceased body, then the PW5, a medical doctor conducted a post mortem examination of the deceased body. Besides, in his testimony, Mathias Bore Jongera (PW3) supported the narration by PW2 and added that he visited the scene of crime where he found many foot prints which showed that there were many people at the 5 scene of crime. He found the deceased body which had been burnt from the waist to the upper part of it and beside the said body, there were some maize scattered. He further added that, he identified the deceased body was of Shinje Bore, thereafter the autopsy was conducted by PW5 and the deceased's relatives were allowed to take the body for funeral process. A/Insp Abel Balele (PW4) testified that he was involved in the investigation of the incident of murder. That, on 24th January, 2022 about 1600 hours he was given a case file about murder case. At the time he was given the case file, the accused persons were not arrested. On 30th January, 2022 he went to Mpembe village in Lupa area, with a team of detectives and OC-CID

Tanganyika, and after arriving there, they visited the house of the 2nd accused where they found the 2nd accused and his son Jisena, 3rd accused and arrested them. They headed to Kibo Police Station, Tanganyika where they arrived at around 2350 hours. PW4 went on to state that on 0037 hours he was instructed to interrogate and record the statements of the accused persons and he recorded their statements. He started interrogating the 2nd accused, he informed him he wants to interrogate on the offence of murder, they were two in the room, which had enough air, chairs, windows and table. He introduced himself to the 2nd accused as A/Insp of Police Abel Balele, and he also informed him that he was charged with the offence of murder. Again, he informed the said accused that he has a right to make or not make any statement before him and that if he chooses to make it; the same will be recorded and be used in a court of law as evidence against him. He further testified that the 2nd accused was willing to make his statement, by signing the document, that showed he was willing and understood his rights which he had explained to him. After all those preliminaries were completed, PW4 began to record the 2nd accused cautioned statement at 00:37 hours and finished at 01:58 hours, then he read the said statement to the accused person who confirmed to him that the same was correct. Therefore, he gave the statement to the accused to sign and he also signed it. PW4 identified the 2nd accused in the dock together with the statement he recorded from the said accused and urged the court to admit it as an exhibit. Such prayer was objected by Mr. Gadiel Sindamenya and Mr. Thadeo Marco, learned advocates for the 2nd and 4th accused persons. The trial within a trial was conducted, whereafter the court ruled out the 7 objection and the cautioned statement of 2nd accused was admitted and marked as Exhibit P1. Apart from that PW4 told the court that, he also interrogated and recorded the cautioned statement of 3rd accused. He recorded his statement at the investigation room of Tanganyika Police Station. PW4 explained all rights to the 3rd accused as he did to the 2nd accused, and the 3rd accused was willing to make his statement alone without calling anyone. He began recording his statement at 0206 hours and finished at 0258 hours, then he read the said statement to the accused person who confirmed to him that the same was correct. Thereafter, he gave the statement to the accused to sign and he also signed it. PW4 identified the 3rd accused in the dock together with the statement he recorded from the said accused and urged the court to admit it as an exhibit. Such prayer was objected by Ms. Monica Marco Lugonda, learned counsel, but the court ruled out the objection and admitted the cautioned statement of 3rd accused as Exhibit P2. Again, PW4 testified that both accused persons confessed to have participated in the commission of murder of Shinje Bore. 8 An Autopsy on the deceased's body was conducted by Dr. Mussa Angelo, PW5 who concluded that the cause of death was due to inhalational burn injury and circulatory shock secondary to excessive bleeding. A post mortem report to that effect was admitted in evidence as Exhibit P3 without any objection from the adversary party. That marked the end of the prosecution evidence upon which the court considered and found it to have established a prima facie case against the accused persons as far as the allegations of murder contrary to section 196 and 197 of the Penal Code leveled against them, are concerned. In their respective defence, the accused persons denied any of their involvement in the alleged offence by disputing each and every detail of the prosecution testimonies. Specifically, the 2nd and 3rd accused persons who testified as DW2 and DW3 respectively stated that they were arrested by the police officers on 30th January, 2022 at Kalumbi centre at Lupa village on 0000 hours when they

were sleeping at their respective homes and taken to Kibo Police Station without being told the reason of their arrest. They arrived at Kibo police about 0100 hours. They were locked up, and on following day the police officer came and asked their names and residence and left. DW2 and DW3 stated further that, at the police custody they were forced to sign the documents which they did sign. DW2 and DW3 added that they did not know the 1st and 4th accused persons prior to the incident. DW3 also added that he was 17 years old at the time he was arrested and they stayed in the lock up for about one month and two weeks before being arraigned in Court. The 1st accused who testified as DW1 testified that, he used to reside at Mkupi, Mpembe village, he has three wives residing at Mkupi, the 4th accused is not his wife, she just used to rent his farm. DW1 denied beating deceased and cause his death. He also disputed the evidence of the prosecution Republic arguing that their evidence was false. He further narrated that, he was transported on 15th January, 2022 to Uruwila in Nsimbo, where he stayed for 22 days and returned to the village on 08th February, 2022. Mwanadawa Nilagila, 4th accused testified as DW4 to the effect that she was born at Kobi, married with Mashaka Bilal Kapeta and has five children; her last born is Abdallah Mashaka. She was arrested when her son had eight months. She knows the 1st accused person who rented her the farm 10 located at Mkupi in Mpembe village. The 1st accused has three wives who reside at Mkupi, but she is not among of his wives. On 23rd January, 2022 around 1400 hours she was in her camp/farm with her mother harvesting beans, then two young men came and told them about the call for alarm "mwnno" at Katumbi. They went to the area from which alarm was called, they were four, they reached at the said area and found a crowd surrounding a person who was lying on the floor, they were about one hundred. She further narrated that she could not be able to identify such person on the floor. They were only two females on the gathering, one man came and introduced himself as a vigilant chairman, and he asked DW4 about "mwnno" and a thief who steal maize. DW4 replied by telling him she did not hear the alarm of "mwnno" and then he told her to leave the area because she did not have evidence to prove. She left and went to Kibo at Mkupi. The last defence witness was Khadija Hussein (DW5) who was called by DW4 as her sole witness. In her evidence, she testified that she is the mother of Mwanadawa Nilagila, DW4, whom she had been living together with DW4 at Kibo where she rented a farm from 1st accused. She 11 confirmed that DW4 was married by man called Mashaka Bilal and they have three issues. She further narrated that on 23rd January, 2022 she saw two young men calling her daughter, 4th accused and left with her, but after that she never see her again. She did not know what was happening thereafter. It is a cardinal principle of criminal law in our jurisdiction that, in criminal cases, it is the prosecution which has a burden of proving its case beyond reasonable doubt and accused person need not prove his innocence. (See: *Woolmington v Director of Public Prosecutions* [1935] AC 462 and *Mohamed Haruna @ Mtupeni and Another v Republic*, Criminal Appeal No. 25 of 2007 (unreported) in which the Court of Appeal stated that: "Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence." Again, in *Mwita and others v Republic* [1977] TLR 54, the Court of Appeal held inter alia that: 12 "The appellants' duty was not to prove that their defence was true. They were simply required to raise a reasonable doubt in the mind of the magistrate

and no more.” Similarly, in the present case, the accused persons are not required to prove that their defence was true. They are just required to raise reasonable doubts on the prosecution case. I had enough time to go through the evidence of both sides in this case and observed that there is evidence of visual identification, although the accused persons denied any of their involvement in the alleged offence of murder. It is a trite law that for the evidence of visual identification to be acted upon by the court to ground a conviction, the same must be watertight to the extent of eliminating all possibilities of mistaken identity. This position was stated in the land mark case of *Waziri Amani v Republic* [1980] TLR 250 at page 251 to 252 that: “...videncece of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken 13 identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.” The court is warned to convict accused person on visual identification evidence which is not watertight; the court should be acted very cautiously, and this was stated in *Philimon Jumanne Agala @J4 V Republic*, Criminal Appeal No. 187 of 2015 thus: “ddmittedly, identification in cases of this nature, where it is categorically disputed, is a very tricky issue. There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgment, whenever the case against an accused depends wholly or substantially on the correctness of one or more identfications of the accused which the defence alleges to be mistaken, the court should warn themselves of the special need for caution before convicting the accused in reliance on the correctness. This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one. Even a number of such witnesses can all be mistaken...” The main issues for determination on the offence of murder are whether the one Shinje Bore @Jongela is dead, whether he died a violent death, 14 whether the death of that person was caused by the accused persons and lastly, whether the accused persons caused the deceased death maliciously. To start with first and second issues, it is not in dispute that the deceased Shinje Bore died unnatural death. This is exhibited by the evidence of PW1, PW2, PW3, PW4 and PW5 who testified in detail about how he examined the deceased body and went further by tendering the postmortem examination report in Court which was admitted as Exhibit P3 without any objection. According to Exhibit P3 it is clearly stated therein that the cause of death was due to inhalational burn injury and circulatory shock secondary to excessive bleeding. It is clear therefore, that the deceased was beaten and finally burnt to death. Thus, on the strength of the foregoing evidence it goes without saying that the prosecution has managed to prove not only that Shinje Bore died, but also his death was unnatural. Coming to the third issue, it is in evidence of PW1 that he saw the accused persons involved in beating his father (deceased) by using sticks, machete and spears. He knows that those who beat his father are the 1st, 2nd 3rd, 4th 15 persons in corroboration with their fellows namely Bundi and Jilala who are not in this case. He further testified that, he saw some persons carrying wood sticks and others went to collect some fire, and he heard from 1st accused and his fellows saying that they will stab his deceased father with spears and cut him with machete. Before deceased was burnt, he was chased away by the 3rd accused. On the following day, he saw his father already being burnt and beside his body, he found some maize poured down. However, on cross examination PW1

responded that he did not see a person who sat fire and killed his father, he just saw accused persons beating deceased. He saw a crowd in the scene of crime of about 100 people. This is supported by PW3 who visited the scene of crime and found many foot prints which shows that there were many people at the scene. The evidence which was confirmed by DW4 when she testified that, she reached at the scene of crime and found a crowd of people surrounding a person who lied on the floor, they were about one hundred. The above piece of evidence reveals that PW1 was there at the scene of crime seeing accused persons beating the deceased person, but he never saw a person who sat fire and the killed deceased. Again, he has testified 16 that he was chased away by DW3 and went to their neighbors' premises and slept there, then on the next day, he saw the deceased body being burnt. The prosecution evidence reveals that the said incident occurred in the day light, which suggests that the factors for a positive identification. Despite the fact that PW1 was familiar to the accused persons prior to the incident as he has indicated, I would have expected him to provide any description of the said accused persons in terms of their complexion, size, height or any peculiar features. In my view, to mention the names of the accused persons was too general to enable the police mount investigation and arrest them. There is no evidence on record which depicts that the accused persons' arrest was a result of their description made by PW1 to the police. He did not describe them in his evidence in chief. At best, what PW1 did was to adduce evidence of dock identification which has been held to be worthless in the absence of an identification parade. In *Frank Simbeya and 4 Others v Republic*, Criminal Appeal No. 320 of 2021 the Court of Appeal held that: "The incident happened the day but, PW3 and PW4 who claimed to be at the scene and identified the appellants, they completely failed 17 to describe their attire, physique and any special marks or symbols to rule out the possibility of mistaken identity." Again, at page 16 of the said Court of Appeal decision, the Court dealt with an issue of identification parade and held that: "The prosecution case is further weakened by the absence of identification parade. It is our considered view that, had the identification parade been conducted, it would have served as corroboration of PW3 and PW4S dock identification of the appellants without any corroboration by identification parade evidence was worthless. " Back to the instant case, the evidence of PW1 is beset by a number of shortcomings; first, looking at his evidence and the one adduced by PW3, DW4, it shows there was a crowd at the scene of crime of about one hundred people, but PW1 did not tell on how he managed to identify those four accused persons among the other persons who formed the throng; secondly, PW1 did not describe how he identified the accused persons except by their face, I would have expected him to make description of the four accused persons properly, because he alleged to be familiar with them, he is their neighbor, but he failed to do so. 18 Even DW3 whom he alleged to have chased him and his young brother from the scene of crime; PW1 failed to make his description properly. Thirdly, no identification parade was conducted by the police to corroborate the evidence of PW1. This inflation puts the evidence of PW1 to the status of being insufficient and not watertight in proving that the 1st, 2nd, 3rd, and 4th accused persons were properly identified at the scene of crime. The second piece of evidence is the cautioned statement of the 2nd and 3rd accused persons respectively, which have the effect of corroborating the evidence of PW1 incase his evidence is found to be credible and watertight. However, since, the evidence of that prosecution witness has already been found not to be watertight, the cannot

corroborate or be corroborated by any other piece of evidence, including the said cautioned statements. The similar position was stated in the case of Muganyizi Peter Michael and 3 others v Republic, Criminal Appeal No. 144 of 2020, in whereby the Court of Appeal provided that: "Since PW1's evidence was found weak, unreliable and not watertight, the same could not have the evidential value to corroborate or be corroborated by any other piece of evidence." 19 In this case, the prosecution Republic called five witnesses to prove the offence of murder beyond any reasonable doubt. The four witnesses, PW2, PW3, PW4 and PW5 are not eye witness, they testified based on their participation in the investigations, for instance, PW2 and PW3 visited the scene of crime, saw deceased body and reported the incident to the police, whereas PW4 conducted an autopsy and filled the post mortem examination report and, PW5 is police officer who recorded the said cautioned statements. Thus, if the court disregards the evidence of PW1, will the remaining evidence corroborate the two cautioned statements? The answer to that question is obviously, in the negative. I am of the settled view that the evidence of PW1, the only prosecution evidence of visual identification of accused person is not watertight. In the circumstances, I find and hold that the prosecution Republic has failed to prove the case of murder against the 1st, 2nd, 3rd and 4th accused persons beyond any reasonable doubts. In the totality of what I have stated above, I find the first, second, third and fourth accused not guilty of the offence of murder contrary to section 196 and 197 of the Penal Code. Hence, I hereby acquit all of them for that offence and order that they 20 have to be set free forthwith, unless there is any other lawful cause which necessitates their continued incarceration. It is so ordered. A.A. MRISHA JUDGE 14.11.2024 Judgement delivered in the chamber of the High Court, Sumbawanga District Registry through video conference on this 14th day of November, 2024 in the presence of both parties and their advocates who are seated in the Open Court of the Resident Magistrate's Court of Katavi. A.A. MRISHA JUDGE 14.11.2024 Right of Appeal is fully explained. JUDGE 14.11.2024 21

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