

TANZANIA / JUDGMENT

republic vs ibrahim so abubakary and three others 2021 tzhc 9178 22 december 2021

COURT
TZHCDECIDED
22 December 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI DISTRICT REGISTRY AT
MOSHI CRIMINAL SESSION CASE NO.57 OF 2019 REPUBLIC VERSUS

1. IBRAHIM S/O ABUBAKARY
2. HADIJA D/O THADEUS SHIO @ THERESIA
3. ABDULRAZACK S/O BILALI MIROMO
4. SALMA D/O ABUBAKARI @ SIAN G'A

JUDGMENT

15/12/2021 & 22/12/2021 The four accused persons namely, Ibrahim Abubakary, Hadija Thadeus Shio @ Theresia, Abdulrazack Bilalli Miromo and Salma Abubakari @ Siang'a are jointly charged before this Court with the offence of Murder contrary to section 196 of the Penal Code, Cap 16 R.E 2002 (now R.E 2019). They are alleged to have murdered one Titus s/o Sebastian Kimaro on 28/4/2019 at Kibosho Kirima Ngirini village, within Moshi District in Kilimanjaro Region. All accused persons pleaded not guilty to the charge. It was not disputed that one Titus Sebastian Kimaro is dead and that his death was unnatural. The same was also proved by PW3 (Esther Titus) and PW4 (Francis Ferdinand Mwacha) who are eye witnesses who witnessed the tragedy. PW7 (Emmanuel Pius Mallya) was one of the two persons who identified the dead body of the deceased to PW1 (Dr. Patrick Amsi), who examined the body of the deceased and prepared a Post Mortem Examination Report (Exhibit PI). The Post mortem report was not objected by the learned defence counsels during the hearing. According to PW1 and Exhibit PI, the cause of death was multiple cut wounds and haemorrhagic shock. Thus, on the basis of evidence of PW1, PW3, PW4, PW7 and Exhibit PI, I am of settled opinion that the fact that Titus Sebastian Kimaro died unnatural death has been proved beyond reasonable doubts. The issue is whether the accused persons killed the deceased and whether they did so with malice aforethought Evidence adduced by the prosecution is to the effect that Titus Sebastian Kimaro, the deceased was a neighbour of the accused persons and a ten-cell leader of their hamlet. It was alleged by PW8 A/

Inspector Shaban the investigator of the case, that the accused persons had a land dispute with a person called Joseph. That the deceased being a ten-cell leader used to mediate them. The reason for assaulting Titus was alleged to be that the accused persons believed that the deceased used to favour the said Joseph. On the fateful date on 28/4/2019 at about 15:00hrs, the deceased heard violence from the homestead of the accused persons. He went there for the sake of curbing down the said violence. Upon reaching at the homestead of the accused persons, all of the sudden, the deceased was attacked by accused persons who jointly and together did assault the deceased with a panga on his shoulders, on his hip, amputated the palm of his hand, stabbed him with an arrow and spear. The incidence was witnessed by PW2 (Regina Titus the wife of the deceased), who rushed to her neighbour Theresia (2nd accused) in response to the noises she heard from the said neighbour. PW3 (Esther the daughter of the deceased) also rushed to the scene upon hearing her mother saying stop cutting him where she found many villagers had gathered. PW4 Francis Ferdinand Mvyacha also alleged to have witnessed the accused persons assaulting the deceased. It was also alleged by the prosecution that the incidence was reported to the police station whereby police officers responded including PW5 E. 4932 Sgt Multo from Okoani Police Post and Inspector Kapusi from Moshi Central Police Station. PW5 found the deceased at the scene laying down with his body full of blood. The deceased who had multiple cut wounds was taken to KCMC Hospital for treatment. He was reported died few hours later on the same day. The prosecution evidence is further to the effect that, the accused persons were found to have locked themselves inside their house. They were subsequently arrested and the weapons, thus Exhibit P3 (two pangas, one machete, one spear, one bow and 19 arrows) which were found scattered in the same house were seized by police officers who were led by Inspector Kapusi and witnessed by PW7 and the 1st accused. A certificate of seizure (Exhibit P2) was tendered to that effect. The weapons (Exhibit P3) were tendered by PW6 the exhibit keeper to cement the matter. Eventually the matter was investigated by PW8 who after investigation compiled a case file which was referred to the OCCID. In their defence the accused persons denied to have committed the offence. The accused persons did not dispute the fact that the deceased Titus was their neighbour. The 1st accused (DW1) alleged among other things that on the material date in the afternoon while on his way home, from a distance he saw a crowd of people who had surrounded their house. That, the said people had traditional weapons and were shouting "Waondoke! Wahame! DW1 also saw his mother who was carrying a bunch of bananas (mkungu wa ndizi). He managed to identify from the crowd one person called Joseph who pointed at DW1, then the crowd started throwing stones at the 1st and 2nd accused persons. They ran into their banana farm. DW1 called the police officer one Multo who arrived at the scene half an hour later. While waiting for the police to arrive, they saw smoke of their burning house. DW2's evidence corroborated that of DW1. The third and fourth accused persons had the same version of testimonies which were to the effect that, on the fateful date in the afternoon they were from the shops where they had gone to buy school items when they saw many people surrounding their homestead. When they went nearer, they saw their brother Ibrahim in the company of two police officers. They were called and ordered to board a police vehicle for their safety. Then, all the accused persons were taken to Moshi Central Police Station. At the end of the defence case, both parties' representatives were given an opportunity to make their final submissions. The prosecution side was of considered

view that their case was sufficiently established beyond reasonable doubts by 3 eye witnesses, thus PW2, PW3 and PW4. The said eye witnesses stated before the Court how they witnessed the accused persons assaulting the deceased by using various weapons; swords, a spear, arrows, a machete and a stick. Evidence of the said eye witnesses was corroborated by evidence of PW1 a medical practitioner who conducted an autopsy and documentary exhibits (Exhibit PI and P2) as well as exhibit P3 (weapons) alleged to have been used by the accused persons to commit the offence charged. The prosecution was of the opinion that their evidence had proved beyond doubts that the deceased Titus Sebastian Kimaro was killed by the accused persons herein. Further, that malice aforethought a key ingredient of the offence of Murder was also established against the accused persons as factors establishing malice aforethought were said to have been established by the prosecution. In support of their argument, the prosecution outlined factors establishing malice aforethought in this case. The type of weapons and how the same were used is one of the factors. They said in this case weapons used were arrows, a Spear, swords and a machete. The second factor establishing malice aforethought was said to be amount of force used, whereas in this case it was alleged that the deceased had big wounds which implied that more force was used in inflicting the said wounds. Utterances of the accused persons during commission of offence is another factor which establish malice aforethought. In this case prosecution witnesses stated that the 4th accused was heard telling the 1st accused that the deceased was still breathing, thus he should finish him. The last factor was a number of blows, whereas in this case the deceased had multiple wounds which meant that there was more than one blow which caused the death of the deceased. The prosecution urged this Court to disregard minor discrepancies which were pointed out on their part. Regarding the defence of the accused persons, the prosecution alleged that the same was full of lies and that the same should be used in support of prosecution case. Concerning the defence of alibi raised by the 1st, 3rd and 4th accused persons, the prosecution was of the view that the same was not proved for failure to call any witness to support it. They prayed that the same should not be considered. In their closing submissions, the defence counsels faulted all the prosecution witnesses as well as prosecution exhibits and submitted that, no prosecution evidence nor exhibit which implicated the accused persons. Prosecution evidence was challenged to have been contradictory and full of discrepancies, The learned Defence Counsels were of the view that, since the crowd which surrounded the homestead of the accused persons had traditional weapons, possibly they are the ones who killed the deceased Titus. That, the prosecution did not cross examine on that issue, therefore an adverse inference should be drawn against the prosecution. Having considered evidence of both sides herein, this Court is of the view that the following facts were not disputed by both parties during the trial of this case:

1. That the deceased person died unnatural death on 28/4/2019
2. That the deceased and the accused persons were neighbours.
3. That the house of the accused persons was burnt.

4. That the accused persons were arrested on the same date immediately after the incidence and taken to the police station. 6 As a cardinal principle of criminal law, the onus of proof lies on the prosecution side. The standard of proof is beyond reasonable doubts. Also, as a general rule the stories of the accused persons do not have to be believed by the Court, but only raise reasonable doubts on part of the prosecution. Thus, issues for determination in this case are:
 1. Whether the four accused persons are the ones who killed the deceased or not.
 2. If the first issue is answered in the affirmative, whether the accused persons killed the deceased intentionally and
 3. Whether the offence has been proved beyond reasonable doubts. Starting with the first issue, whether the four accused persons are the ones who killed the deceased; the prosecution based its case on 3 eye witnesses, PW2, PW3 and PW4. However, due to the fact that PW2 fainted while being cross examined, I expunge her evidence from the record as she was not cross examined by all the defence counsels. Thus, the question is whether the two remaining eye witnesses (PW3 and PW4) were credible and reliable. Both witnesses stated how they witnessed the four accused persons assaulting the deceased mercilessly. PW3, the daughter of the deceased helped her mother by taking her father from the scene and how the accused persons continued to assault the deceased even after the deceased was taken aside at the farm. During cross examination, both witnesses firmly and coherently stated what transpired at the scene of crime. PW5 a police officer from Okoani Police Post, stated that he found the deceased at the scene laying down with multiple cut wounds. 7 The Gentleman and Lady assessors who sat with me were of considered opinions that out of 8 prosecution witnesses almost 4 witnesses gave direct evidence and not circumstantial evidence. The said witnesses were at the scene of crime, they saw what transpired. Both assessors concluded that the deceased Titus Sebastian was murdered by the four accused persons herein. Concerning malice aforethought, Gentleman and Lady Assessor found that some of the accused persons revealed their evil intention by denying to have known the deceased who was their neighbour and ten cell leader. That, the accused persons also denied to have seen the body of the deceased. If they were innocent, they could have cooperated by stating that they saw a person who was injured and if possible, mention those who had injured the deceased. It was also opined that, accused persons failed to call any local government leader who could have proved before this Court that the offence of which they stand charged has been fabricated against them. Thus, they dismissed the defences of the accused persons and believed prosecution evidence that it was the accused persons who killed Titus Sebastian intentionally. I am in agreement with the Gentleman and Lady Assessor that three prosecution witnesses (PW3, PW4 and PW5) who were present at the scene of crime proved the case against the accused persons beyond all shadows of doubts. The incidence occurred during the broad light of the day, thus there was no possibility of mistaken identification. In the case of Charles Kalungu and Charles Kalinga vs Republic, Criminal Appeal No. 96 of 2015, the Court of Appeal of Tanzania while discussing the issue of

identification held that: "We say so because the offence was committed at day time. It was a time where there was sufficient light for the eye witnesses to the Commission of the offence to see the appellants and what they did to deceased Gasper Mwanisenga." Emphasis added. Likewise in this case, as already pointed out herein above, it is not disputed that the offence was committed during the day. Both PW3 and PW4 explained how the 1st accused shot an arrow at the deceased while on the roof and how he jumped down and proceeded to cut the deceased with a panga on both of his shoulders. Both witnesses stated that the 2nd accused held the deceased while the 1st accused was cutting the deceased, the 2nd accused also did cut the deceased on his hip then the 3rd accused stabbed the deceased with a spear. He ie 4th accused told the 1st accused that the deceased was still breathing, he should finish him. The 4th accused also hit the deceased with a banana palm. The 1st accused amputated the palm of the hand of the deceased across the road at the farm where the deceased was laying down. Evidence of PW5 who saw the deceased laying down with cut wounds, corroborated evidence of PW3 and PW4. Evidence of PW1 and exhibit PI cemented what was stated by PW3, PW4 and PW5. Apart from that, there is no doubt that the accused persons were arrested instantly right on the spot (at the scene of crime) together with the weapons. In such circumstances even without the DNA test and finger print evidence, there is no doubt that the accused persons jointly committed the offence charged. Also, the fact that the house of the accused persons was burnt soon after the incidence is another incriminating and corroborating factor against the accused persons. If the alarm people had any grudge with the deceased, they could have burnt the house of the deceased. I therefore find the first issue to have been answered affirmatively. On the second issue whether the accused persons killed the deceased intentionally, it is a considered opinion of this Court that evidence which was adduced by the prosecution proved all the factors establishing malice aforethought of the accused persons. The accused persons assaulted the deceased persistently. Their conduct throughout the incidence manifested nothing except malice aforethought in their mind. The deceased sustained multiple wounds which no doubt occasioned his death few hours later on the same day. The manner in which the accused persons inflicted those wounds, the weapons used and the utterances of the 4th accused person establishes malice aforethought. I therefore find the prosecution to have proved that the accused persons had an intention to kill the deceased Titus. Lastly, on the issue Whether the offence has been proved beyond reasonable doubts; on the strength of the reasoning herein above and the reasoning of the learned State Attorney in his final submissions, it is beyond reasonable doubts that a case against the accused persons has been proved. The discrepancies which were pointed out by the defence counsels especially in respect of the prosecution witnesses who were impeached (PW4 and PW5), do not extend to the root of the case. As correctly stated by the State Attorney in his final submissions, exhibit D1 and D2 show variations and not contradictions. The same are not fatal, as this Court is of considered view that, the said witnesses were truthful witnesses. The Court did not note any unreliability in them. Variation of their testimonies from the statements which they recorded at the Police Station were in respect of additional information, to be precise the same were very minor. There were no contradicting statements. In the case of Dickson Elia

Nsamba Shapwata and another vs Republic, Criminal Appeal No. 92 of 2007, Court of Appeal of Tanzania at Mbeya, cited by the learned State Attorney, it was held that: "In all trials normal contradictions and discrepancies are bound to occur in the testimonies of witnesses due to normal errors of observation, in errors in memory due to lapse of time in due to mental disposition such as shock and horror at the time of occurrence." Concerning the defence of the accused persons which tried to suggest that they were not present at the scene of crime and that they did not know what happened to the deceased Titus. Without prejudice to the fact that the accused persons did not give notice that they would rely on the defence of alibi pursuant to section 194 (4) of the Criminal Procedure Act, Cap 20 R.E 2019; I am of settled view that the same is just a mere denial of the offence charged and does not raise any doubt on part of the prosecution. In their final submissions the learned Defence counsels also pointed out that it is doubtful why the prosecution opted to call the daughter of the deceased and a cousin of the deceased, with due respect PW4 11 who is said to be the cousin of the deceased stated that he was a cousin of the 2nd accused as well. Apart from that, the law does not bar relatives from testifying in cases involving relatives, with exception of spouse witnesses who are competent but not compellable witnesses against their spouses. Section 130 (1) and

- (2) (a) of the Law of evidence Act, Cap 6 R.E 2019 is relevant. In the case of Charles Kalungu and another vs Republic (supra) it was held that: "What matters is the competence and credibility of the witness. So long as the relative witness testifies on relevant matters to the case and tells nothing but the truth there is no reason for the court to doubt the evidence of such a witness." In this case, PW3 and PW4 as already stated herein above, were competent, credible and truthful witnesses. That's why I had no reason to doubt their testimonies. I therefore find that the offence of Murder against the four accused persons has been proved beyond reasonable doubts as required by the law. In the event, I hereby find the four accused persons guilty and I convict them of the offence of Murder contrary to section 196 of the Penal Code, Cap 16 R.E 2019 as charged. S. H. MMFUKWE JUDGE 22/ 12/2021
- SENTENCE There is only one sentence for Murder. Thus, except for the 3rd accused person (Abdulrazack Bilali Miromo) who was below 12 eighteen years old when he committed the offence, the 1st accused person (Ibrahim Abubakary), 2nd accused person (Hadija D/O Thadeus Shio @ Theresia) and 4th accused person (Salma D/O Abubakary @ Siang'a); pursuant to section 197 of the Penal Code, Cap 16 R.E 2019 read together with section 322 (2) of the CPA, are hereby sentenced to suffer death by hanging. In compliance to section 119 (1) of the Law of the Child Act, No. 21 of 2009; and pursuant to section 38 (1) of the Penal Code, Cap 16, R.E 2019, the 3rd accused is discharged on condition that he commits no offence within twelve months from the date of this order. It is so ordered. S. H. SIMFUKWE JUDGE 22/ 12/2021
- Right of Appeal explained. S. H. SIMFUKWE JUDGE 22/ 12/2021 13

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