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

**(BUKOBA DISTRICT REGISTRY)**

**AT BUKOBA**

**(ORIGINAL JURISDICTION)**

**CRIMINAL SESSION CASE NO 6 OF 2017**

**THE REPUBLIC**

**VERSUS**

**MUHANGWA SIMONI .....ACCUSED**

**JUDGEMENT**

24.9.2019 & 25.9.2019

**I.C. MUGETA, J**

The facts of this case are brief and straight forward. However, issues involved for determination are complex legal matters because the prosecution case depends wholly on the extra judicial statement of the accused person. The accused is charged of murdering Shoma w/o Masiligiti c/s 196 of the Penal Code. The incident took place on 7/5/2015 at about 20:00 hours at Chakitalagu area, Chankende village, Nemba Ward, Biharamulo District, Kagera Region. The accused was charged together with Muhoja Zacharia who died in custody before the trial commenced. His case was marked abated under section 284A of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA).

The accused was arrested eight months later, in January, 2016 because according to E. 9533 CPL Masele, who testified as PW3, he escaped after the murder. At this time, CPL Masele worked at Nemba Police Post at Nemba village which is accused's village of domicile. The evidence of the prosecution is very clear that no one saw the accused person committing the offence. However, informers told PW3 that the accused person was involved and on 10/1/2016, they phoned him to inform that the accused person was back to Nemba. PW3 and other Policemen went straight away to arrest the accused person. He testified that he was familiar with the accused person even before the incident and the accused was known for his habit of being hired to kill people.

It is unknown when the accused was transferred to Biharamulo Police Station from Nemba Police Post. According to him it was a day after his arrest. It is, however, clear from evidence that on 14/1/2016, he was taken to the Primary Court of Biharamulo District at Biharamulo where he recorded the extra judicial statement before Edward Samara, Primary Court Magistrate and justice of peace who testified as PW2. In that statement the accused person is recorded stating that he was requested by Muhoja to join him to commit the murder on payment of Tshs. 200,000/= which was, indeed, paid after accomplishing the mission. That at the scene of crime, Muhoja attacked the victim by cutting her on the head and the neck. Death was confirmed by Mtaganda Malugalila who was by then the ten-cell leader of the area and he testified as PW1. He said in his evidence that he heard a yell and he followed; on arrival he found the deceased dead with a cut wound on the neck. The postmortem examination report which was

tendered by Dr. Joel Niku Maduhu who testified as PW4 states the same thing. That the deceased had **"cutting with sharp objection at different parts of the body – NECK, EAR(R)..."** and the cause of death was hemorrhagic shock which in layman's language means excessive bleeding. The report on postmortem examination was tendered as exhibit P2 while the extra judicial statement was tendered as exhibit P1.

The foregoing are the brief material facts of the prosecution's case.

In defence, the accused person denied to have been involved. He testified that he was arrested on allegation of possession of government trophies, taken to Nemba Police Post and transferred to Biharamulo Police Station on the next day. That it was at Biharamulo Police Station where he was informed about the murder of Shoma. That he was beaten up to confess murdering her, consequently, he sustained injuries. That the torture which was administered by one Sudi included cutting a piece on his left ear upper part and a stab at his left foot. On account of this torment, he surrendered to signing documents which Policemen recorded in course of the torture. He showed in court both scars and he denied to have recorded any statement before the justice of the peace.

The foregoing is the material evidence on record. Neither the defence counsel nor the Republic made final submissions. However, both parties had made submissions on considering whether the accused person has a case to answer. Issues raised therein are pertinent and I shall address them accordingly. Among them are weight to attach on a repudiated confession, credibility of witnesses and the doctrine of common intention.

In summing up to accessors, I recounted to them the evidence as above stated and addressed them on legal issues. On facts, I informed them that there is no dispute that the victim was murdered because she died of bleeding due to cut wounds which is not a natural death. The disputed issue is whether the accused was involved to inflict the fatal blows. I told them that the only evidence implicating the accused person is the extra judicial statement and further that since the accused has denied to have made it, legally it is called a repudiated confession. For that matter for the court to act on it, it must pass three important tests: Firstly, it must be corroborated by another independent evidence. Secondly, it must be established that the maker made it out of his free will and thirdly, its central theme is believed to be nothing but the truth. I also sought their opinion on the credibility of PW2 and the accused person regarding the making of the statement. I required the gentleman and ladies accessors to opine on the credibility of PW2 and the accused person (DW1) because they are the only witnesses who testified on the confession, one alleging it was made the other one disputing. In such circumstance it is the credible witness who has to be believed. On the doctrine of common intention, since the statement does not say that the accused also cut the deceased, I told them that it must be proved that the accused was not just present but he was actively involved in the murder.

On seeking their opinion all accessors entered a guilty verdict. They answered the legal issue posed as follows:-

Firstly, that the confession was voluntary and truthful because the extra judicial statement has enough corroboration from the evidence of PW1 and

PW4. That the statement says Muhoja cut the victim on the head and neck which was also stated by the ten cell leader and the doctor who examined the body. On voluntariness of the statement they opined that it was voluntary because there is no evidence of torture.

I agree with the gentlemen and ladies accessors. In the confession the accused stated about his involvement in committing the alleged crime. That he accompanied Muhoja to the scene of crime where Muhoja cut the deceased on the head and at the neck. That thereafter, he was paid Tshs. 200,000/= for his participation. Despite denial to have made the caution statement, a trial within a trial was held in absence of the accessors and the finding was that the accused made the statement voluntarily. This finding led to its admission as exhibit P1. Like the gentleman and ladies accessors, I am also of the view that the allegation in the confession on which part the deceased was cut is corroborated by PW1 and PW4. The two prosecution witnesses testified about seeing the body of the deceased with cut wounds at the neck and on the right ear part. The mentioned parts match the head and the neck stated in the confession. The ears section is part of the head. I am of the view that this is not a coincidence. They are evidence of a proof that the confession is true. In the same vein, since it is corroborated, it is safe to act upon it.

The accessors held that the confession was voluntary. I agree and I wish to add that the statement itself shows that before it was recorded the accused was asked several questions which includes:-

*"**swali** – je kuna mtu yeyote kakutishia au kukupa ahadi yeyote (sic) amekushawishi uje kutoa maelezoyako?*

***Jibu**– Hakuna mtu yeyote aliyenishawishi ili nije nitoe, maelezo haya nayatoa kwa hiari yangu"*

No better evidence could be found in this case as far as voluntariness of the statement is concerned.

Secondly, on credibility the gentleman and ladies accessors are of the view that PW2 is more credible than the accused person because firstly, his statement that the accused cannot read or write has been confirmed by the accused himself. Secondly, the accused has admitted to be unfamiliar with the justice of the peace. For this reason, for PW2 to be able to record the history of the accused person as it reads in the confession, he must have heard it from the accused person or another person familiar with him. The statement is such that it must have been said by no other person than the accused himself. Thirdly, PW2 had no reason to lie against the accused person to the extent of fabricating the confession statement. Fourthly, PW2 is credible in evidence said the accused signed by thumb print because he (accused) said can neither read nor write which he also confirmed when he testified in court. Indeed, the accused person testified that he can neither read nor write.

I completely agree with the view of the gentleman and ladies accessors. There is no evidence that the justice of peace got this history from another source than the accused person himself. For the other reasons given by the accessors, I find and hold that PW2 is a credible witness. On this account

his evidence that he inspected the accused person before recording the statement and found him without injuries is true. Then, where did the accused person get the scars he showed herein court from?

Accessor number 1 opined that he had the scars before his arrest. I agree with this opinion in light of the finding that the justice of the peace is a credible witness. I accept is testimony that before recording that confession, he examined the accused person by requesting him to undress his shirt and raise up his trouser to find any fresh mark of injuries but he saw none.

Thirdly, on common intention, the accessors opined that he was involved because at the end he received Tshs. 200,000/= as payment. I agree with the Gentleman and ladies accessors on this aspect. I would rather add that at the scene of crime, even if he was not actively involved in the cutting, his presence gave the doer moral support and courage to act. This makes him liable for the act under section 23 of the Penal Code.

The defence of the accused person is that he was arrested on account of possessing government trophies and the case was referred to Biharamulo District Court where it was concluded. I have no reason to doubt this statement except that it has not been proved. In line with what I intend to state, one of the accessors opined that the accused person ought to have proved this statement by tendering a copy of the proceedings thereof. I agree.

It is my considered view that, if proved, the accused defence can raise a reasonable doubt in the prosecution's case. But is it proved? While I

understand that it is not upon the accused person to prove his innocent, I am certain in my mind that when it comes to proof of specific facts, the party alleging existence of that fact must prove it. This does not amount to shifting the burden of proof. There is a clear distinction between burden of proof generally and burden of proof of a particular act under sections 110 and 112 of the Evidence Act [Cap. 6 R.E. 2002] (the Evidence Act) respectivdly. Section 110 of the Evidence Act read together with section 3(2)(a) of the same Act means the prosecution can get conviction only when they prove all the ingredients of the offence charged beyond reasonable doubts. This is called the standard of proof; the key words are **"reasonable doubts"** because not all doubts are reasonable. From this generality, the law moves to particularity under section 112. This section is clear that the burden of proof of any particular fact lies on that person who wishes the court to believe in its existence. In this case it is the accused person who wishes the court to believe that he was arrest on allegations other than murder. The law imposes upon him the burden to prove this fact if he is to be believed. In criminal law, therefore, while the general burden and standard of proof beyond reasonable doubts are static, they lie on the prosecution, the burden of proof of particular facts can shift.

I understand it is the law of the land that the defence need not be believed to raise a reasonable doubt in the prosecution's case, but this is when defence is looked at generally as distinct from when the need for proof of a particular fact arises. Now therefore, has the accused person proved that he was ever charged in court of law for possessing government trophies? I

am of the view that the answer is in the negative. This is because such fact cannot be proved by oral evidence.

According to the accused person the proceedings of his case were taken at a subordinate court, the Biharamulo District Court. The law under section 210 of the CPA requires that witnesses' evidence must be reduced in writing and by extension this is true with all court proceedings. According to section 100 of the evidence Act [Cap 6 RE 200] all things reduced in writing as a legal requirement cannot be proved by oral evidence. It reads:-

> *"100 – (1) when the term of a contact, grant or any other disposition of property, have been reduced to the form of a document,* ***and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof*** *of the term of such contract, grant or other disposition or* ***of such a matter except the document itself,*** *or secondary evidence of its contents in case which second any evidence is admissible under the provision of this act"* (Emphasis supplied)

It follows, therefore, that an allegation of existence of any court proceedings cannot be proved by oral evidence but the record itself. Failure to produce such document renders the defence of the accused that he was arrested for an offence other than murder incredible. Since no proof of the allegation that the accused person was arrested and charged with possession of government trophies, I reject this defence and proceed to

hold that the argument does not raise any reasonable doubts in the prosecution's case.

Before I wind up, let me allude to some noticeable variances between the charge sheet and the evidence. According to the charge sheet, the incident took place at Nemba village. However, the evidence of PW1 and PW3 is that the incident took place at Chakitalagu area (kitongoji), Chankende village. Nemba is a village where the ward covering Chankende village is headquartered. According to section 132 of the CPA, a charge sheet shall contain particulars as may be necessary for giving reasonable information as to the nature of the offence charged. The section uses the word "shall" which is always interpreted to impose a mandatory function. In our case the subject which needed to be properly described is the incident place. The mode of describing a place in the charge sheet is prescribed under section 135(f) of the CPA which reads: -

> ***"Subject to any other provision of this section it shall be sufficient to describe any place, time, thing, matter, act or omission of any kind to which it is necessary to refer in any charge or information in ordinary language in such manners as to indicate with reasonable clarity the place..."***

I am of the view that the incident place was not described with reasonable clarity to properly inform the accused person for preparation of his defence. The issue that arise, therefore, is whether the accused was prejudiced by the omission. As I have already stated, both sections 132 and 135(f) of the CPA uses the word shall which means a mandatory

obligation is imposed. However, in the case of **Bahati Makeja vs Republic**, Criminal Appeal No. 118/2006, Court of Appeal, Dar es salaam (Unreported) it was held that the word shall whenever used in the CPA does not impose a mandatory obligation because it is subject to the provision of section 388 of the same Act.

It was further held: -

> **"There are a number of innocuous omissions in trials so if the word "shall" is every time taken to be imperative, then many proceedings and decisions will be nullified and reversed. We have no flicker of doubt in our minds that the criminal justice system would be utterly crippled without the protective provision of section 388"**

I am of the view that the accused person was not prejudiced because being a resident of Nemba he never complained that there had never occurred thereat death of a person called Shoma. I am satisfied that being in the same ward, Nemba and Chankende villages are neighboring and from his confession, which I have found to be true, he understood the intended place.

Further, the confession which I have found to be true also has some variance with the charge sheet and the evidence regarding the incident date. In the confession the accused stated that the incident took place on 8/5/2015. This is not true. It happened on 7/5/2015. Does this affect the weight to be attached to it? I am of the view that the confession itself has no contradicting statements save for the variance on date of the incident

with evidence as a whole and the charge sheet. In **Mukami Wankyo V. Republic** [1990] TLR 46 it was held that where contradictions are severed from the central story of the confession and the central story remains nothing but the truth, it can safely be relied upon to convict. It is my view that the central story of exhibit P1 is how the deceased was murdered. If we take away the incident date, therein wrongly recorded, the central story remains intact. I consider the error on dates to be memory issue which is a common human error.

To summaries, I have held that the confession of the accused person was true and voluntary. That despite the fact that the confession has been repudiated, it has been corroborated by independent evidence, therefore it can safely be acted upon. I have also held that the justice of the peace who recorded the caution statement is a credible witness than the accused person. I have rejected defence of the accused person as being untrue for failure to prove a material fact. All these put together, I hold that the prosecution has proved the case beyond reasonable doubts. I accordingly find the accused guilty as charged of murder c/s 196 of the Penal. I convict him as charged.

**I. C. Mugeta**

**Judge**

**25/09/2019**

## MITIGATION

**Accused:** I have nothing to tell the court.

## SENTENCE

There is one sentence for murder which is death by hanging. The accused person is hereby sentenced to suffer death by hanging.

**Sgd: I. C. MUGETA**

**JUDGE**

**25/09/2019**