THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL SESSIONS CASE NO. 54 OF 2016

REPUBLIC
VERSUS
JOEL MSUKWA.....ACCUSED PERSON

JUDGMENT

Date of last order: *27/07/2020*
Date of Judgment: *31/08/2020*

NDUNGURU, J.

The accused person Joel s/o Msukwa is facing a trial on Murder contrary to Sections 196 and 197 of the Penal Code (Cap 16 Revised Edition 2002).

It is the prosecution assertion that on 12th day of April, 2015 at Majenje – Igurusi Village within Mbarali District Mbeya Region, the accused person did murder one Besta d/o Julius.

Brief facts as presented by the prosecution are that on 12/04/2015 the deceased with her sister one Gladness went to the church, after the church service was over on the way back, the deceased and her sister went their separate way home. However, the deceased was seen by one Petro Patrick Mbilinyi trying to cross the road as she was young, he offered

to help her cross the road. In the process the accused showed up with the bicycle. He offered to take the deceased to her home on his bicycle claiming to know her and her home. After the deceased had left with the accused person she was not seen again. The relatives of the deceased and some villagers began to look for the deceased, till on 16th day of April, 2015 when the deceased body was found in the bush without one eye and private part removed and her back was burnt. The accused person while known to be the last person seen with the deceased was arrested before the body of the deceased found. He was arraigned for murder.

When the information of murder was read to the accused person during plea taking and Preliminary hearing and before commencement of hearing the accused pleaded not guilty to the information.

When the case came for trial before me, the Republic enjoyed the service of Ms. Rhoda Ngolle assisted by Michael Shindai learned State Attorneys while Mr. Essau Sengo was a defence counsel.

In discharging the duty of proving the case to the standard required by the law, the prosecution was armed with five witnesses and tendered two documentary exhibits. The Cautioned Statement (Exhibit P1 and Post mortem Examination Report (Exhibit P2). While the defence side had only one witness, the accused himself. There was no any exhibit tendered by the defence side.

Following the closure of the defence case, the counsel of both sides made oral final submissions.

I must admit the address was professional, it reflected professionalism inculcated to the counsel. Their submissions shall be considered at length in the course of my reasoning. Summing up to assessors was done shortly after the final submissions and the assessors were given their right to opine on the verdict.

In this case, I find there are four issues or points of determination. These are:

(i) Whether the person one Besta d/o Julius alleged to have died is actually dead, if yes.

(ii) Whether her death was of unnatural cause, if in affirmative.

(iii) Whether the accused one Joel s/o Msukwa, subject of this trial who is responsible for the death of the deceased Best d/o Julius, if in affirmative.

(iv) Whether his action was actuated with malice aforethought.

I will try the best to resolve the issues raised above visa vis the evidence on record and the final address made sequentially in order to reach to a final determination of the case at hand.

On the first issue as to whether the person one Besta d/o Julius alleged to have died is actually dead. The evidence of PW1 is to the effect

that on 12/04/2015 in the morning she went to the church. As it was a rainy day, she stopped the deceased and her sister one Gladness to go to the church. It is further that having left the home, the deceased and her sister disobeyed the prohibition and they decided to go to the church too. PW1 told the court that when she returned from the church, she found the deceased missing and when she asked Gladness on the whereabout of the deceased, she was told that the deceased went to the church. Owing to the fact that the deceased was only four years old and the church was very far, she started tracing her but she never found her. PW1 told the court that she informed the relatives and village/Mtaa leadership, and then the search started. That the deceased body was found on 16/04/2015 at Mount Mambi. That the body was taken by Police for further investigation.

As for the evidence of PW3, one Julius Mwambasi; the biological father of the deceased, he told the court that having got the information on the missing of the deceased from PW1 who was the aunt of the deceased, he joined in the exercise of looking for the deceased. It was his version that the body of the deceased was found on 16/04/2015 at Mount Mambi in the bush, with one eye and private part missing. He further testified that it appeared she (deceased) was also raped and strangulated. PW3 further said that the body had a burn wound on the back. He told the court that the body of the deceased was taken by Police to Chilama

Mission Hospital for further investigation. That after medical investigation the body was handed to him for burial activities.

PW5 one Peter Seif Kigombola is a Medical Officer working at Chimala Mission Hospital who conducted Postmortem Examination and tendered the Postmortem Examination Report (Exhibit P2). His evidence was that; on 17/04/2015 in the morning hours while on duty he was assigned to conduct postmortem examination to the dead body which was at the mortuary. That the Policemen and the relatives of the deceased particularly one Julius Mwambasi identified the dead body to him. He said the deceased was a young girl about 4 – 5 years, called Besta d/o Julius. PW5 told the court that from physical observation, the body had a wound on left side of the face, the left eye and the private part (saying the upper part of the vagina) were uprooted. PW5 further testified that the neck was strangled and the jaw was bent. Further, PW5 said the tongue had bluewish colour which meant that the deceased died of physical asphyxia due to the lack of oxygen. It was the evidence of PW5 that having recorded the finding in the Postmortem report form, he handed it to the Police for their further action; and the body was handed to the relatives for burial process.

Associated with the first raised issue on whether one Besta Julius alleged to have died is actually dead, is the 2nd issue raised. On whether

the death of the deceased was of unnatural cause. The evidence on record, starting with that of PW3 is that the deceased was found with one eye (left eye) removed, the private part removed and was strangulated and had a burnt wound on the back. PW5 told the court that the body was found with the wound on the left side of the face, the left eye was removed likewise the private part (upper part of the vagina removed and the neck was strangled. Indeed, the Postmortem Examination Report (Exhibit P2) indicates that the cause of death of the deceased asphyxia.

The findings in Exhibit P2 are consistent with the testimony of PW3 and PW5 that the deceased was strangled thus died of asphyxia. From the evidence of PW3 and PW5 and exhibit P2 I am of the firm view that the deceased did not die due to any other malaise except strangulation.

I am therefore of the firm view that the two issues (1st and 2nd) are settled. No one is at variance with another. That is, that Besta d/o Julius is actually dead. Further that her death was not natural. The deceased one Besta d/o Julius encountered violent death.

The above being the position, the pertinent issue is whether it was the accused, one Joel Msukwa who is subject of this trial responsible for the death of Best d/o Julius. In tandem with this issue is the last issue. If it is held that it was the accused person who killed the deceased, whether his act was actuated with malice aforethought.

I will try my best to resolve these two issues based on the evidence on record. At the outset I wish to make it clear that, from the evidence on record no witness has testified to have seen the accused person killing the deceased. In the absence of such evidence, the evidence at hand is circumstantial and direct evidence. The rules in circumstantial evidence were articulated by the Court of Appeal of Tanzania in the case of **Sadick Ally Mkindi vs. The DPP**, Criminal Appeal No. 207 of 2009. The Court of Appeal of Tanzania at Arusha set out 8 rules on circumstantial evidence.

It was held:

> *"We would therefore set out the general rules regarding circumstantial evidence in criminal cases as elucidated in **SARKAR ON EVIDENCE**, Fifteenth Edition, Reprint 2004 at pages 66 to 68. These are:*
>
> 1. *That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.*
> 2. *That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.*
> 3. *That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.*

4. *Where circumstances are susceptible of two equally possible inferences the inference favoring the accused rather than the prosecution should be accepted.*
5. *There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.*
6. *Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.*
7. *Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.*
8. *If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive."*

The prosecution case is pivoted on two piece of evidence. The first is the evidence of PW2 one Petro Patrick Mbilinyi. His evidence is to the effect that on 12/04/2015 while heading to his work place at Mapunga, he saw the child (deceased) who was trying to cross the main road of Mbeya – Makambako. As the child was staggering, he offered the assistance for her to cross the road. That having assisted, the deceased, the accused showed up with his bicycle saying he knew the child and her place of

abode. Thus PW2 told the court that he handed the child (deceased) to the accused so that he could ferry her to her home.

It is the evidence of PW2 that the following day, he got information on the missing of the deceased. It is him who gave information that the child was handed over to the accused after he was told the appearance and the clothes the child had on the previous day before she got disappeared. From the evidence on record, the accused was arrested upon information given/released by PW2.

It is the evidence of PW2 which establishes the doctrine/principle of the last person seen with the deceased. The stance of the principle is that; where an accused person is alleged to have been the last person to be seen with the deceased, in the absence of plausible explanation on the circumstances leading to the death, he is presumed to be the killer of that deceased. See; **Mathayo Mwalimu and Another vs. The Republic**, Criminal Appeal No. 147 of 2008 (Court of Appeal of Tanzania, Unreported), **Richard Matangule and Another vs. Republic [1992] T.L.R 5** and **Makungire Mtani vs. Republic [1983] T.L.R 179.**

From the dictate of the above cited authorities, my understanding is that two conditions are pre-requisite. One, there must be cogent evidence that the accused person is the last person seen with the deceased, and

two, there must be cogent evidence that the deceased is the very person who was with the accused shortly before encountering death.

It is crystal clear from the evidence on record that the deceased was a stranger at Majenje Vilalge as she was living at Uyole in Mbeya City. This was the evidence of PW1 one Zena Mwambasi, the aunt of the deceased. In her evidence PW1 told the court that the deceased and her mother were living at Mbeya and they visited her on 11/04/2015 a day before the event. The same was the version of PW3 the father of the deceased, that the deceased was living at Uyole Mbeya City with her mother. Likewise it is the evidence of PW2 that the child was not known to him, that is why he asked where the child came from and where she was going and the child just pointed the direction.

The evidence of PW2 is nagging of the above stated pre-requisites. The fact that PW2 did not know the deceased before as she was a stranger cannot lead to a conclusion or to say with certainty that the child he handed to the accused, taking it to be true, is the one who is the subject of this trial. But worse still after the dead body was discovered, PW2 never went to ascertain if the deceased is the very child he handed over to the accused person to send her to her home on 12/04/2015.

In my view, it was very crucial for PW2 to identify the dead body so as to ascertain if it was the body of the child he handed over to the

accused so as to establish a linkage between the accused and death of the deceased. In the absence of such crucial evidence, it cannot be said with certainty that the deceased one Besta d/o Julius is the one who was with the accused person shortly before she encountered her death. This gap, in my firm view goes to the root of the prosecution case.

The other pitfall of PW2'S evidence is that it is not certain as to who gave him explanation on the way the deceased's appearance that she was on right blue dress and was black plastic shoes famous called yebo yebo. In his evidence PW2 did not mention precisely who told him to that effect but rather said the relatives. The evidence of PW1 is silent. PW1 never testified to have given the deceased description to any whom she met in the process of looking the deceased neither when she reported to the Police nor to the cell leader to make an alarm to inform the villagers on the unknown whereabout of the deceased.

I am certain that PW1 could not be in a position of explaining on the dressing appearance of the deceased on the material date. This is on the ground that as testified, PW2 on the fateful day having warned the deceased with her sister one Gladness not to go to the church as it was raining, she went to the market area to fetch for the day needs leaving the two at home. When came back she never found them, she thought they were playing at the neighbour house. PW1 said she washed herself and

went to the church. This means she did not see them immediately before she left for church. That she noticed the absence of the deceased when she came back from the church. It is Gladness who told her that the deceased had gone to the church.

From the above version it was Gladness only who was in the best position to tell the dressing appearance of the deceased when she left home. Unfortunately the said Gladness was not among the prosecution witnesses who were summoned to testify. Even if Gladness could have testified on the dressing appearance of the deceased when she left at home, and though could be compatible with the evidence of PW2 to that effect, the fact that PW2 did not go to the scene where the dead body was found to ascertain that it was the one whom he handed to the accused being assisted with the dressing appearance which was told, the evidence of Gladness also could have not served any purpose.

The evidence of PW2 when cross examined was to the effect that the deceased was discovered at Mambi mountain which is very far from the place he had left the deceased in the hands the accused the previous day. There is a probability that the deceased was not in a company of the accused when she reached at Mambi area. See **Hamis Said Mchana vs. Republic [1984] T. L.R 319**.

In his defence the accused made a total denial to have met PW2 with the child and that the child/deceased was handed over to him so as he may sent her to the home where she was living. From the above premises I find the evidence of PW2 not worth of credity.

After I have discredited the evidence of PW2 which as stated earlier that is the one established the principle of the person last person to be seen with the deceased, the only evidence left is on the confession statement (Exhibit P1) tendered by PW5 in the course of his testimony.

PW4 is the Police Officer who recorded the caution statement of the accused person. His evidence was of the effect that firstly the file which was opened for investigation was on the stealing or loss of the child and he had interrogated the accused person on that allegation which he denied. Further that after the alleged lost child was found dead, the file was changed to murder. Thus on 17/04/2015 he interrogated the accused person on the murder allegation. PW4 said the accused person confessed to have killed the deceased and the motive being that he met the witch doctor who was in need of the private part and the eye of the female child. Thus he killed the deceased and uprooted those parts and sold them to the witch doctor.

That the accused vehemently repudiated the cautioned statement. Upon trial within trial being conducted the cautioned statement was found

worth of being admitted. The court admitted it and marked it as Exhibit "P1". It is this evidence the prosecution exerted and concentrated much effort even in the final submission address.

At the outset I wish to point out that admissibility of evidence during trial and weight to be attached are two things different. There is a difference between admissibility and the evidential value of an exhibit. This position was articulated in the case of **Steven s/o Jason and two others vs. Republic**, Criminal Appeal No. 79 of 1999 where the Court of Appeal of Tanzania had this to say:

> *"However, it is common ground that **admissibility of evidence** during trial is one thing and **weight to be attached** to it is a different matter."*

Again in **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010 Court of Appeal of Tanzania (unreported) the court had this to say:

> *"Confession statement even if is found to be voluntary and admitted, the trial court is still suddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case."*

Then point I am trying to make is that even if the caution statement was admitted during trial it must be subjected to judicial scrutiny to see if it has probative value.

It was the evidence of PW4 that on 14/04/2015 he interrogated the accused person on the disappearance (lost) of the deceased. That the

accused admitted to had taken the child to her home but on the way the child told him that she knew her home and he thus left the child to go to home on her own.

It was further the evidence of PW4 that on 17/04/2015 he interrogated the accused person on the murder of the deceased. This was following the discovery of dead body. PW4 told the court that the accused admitted to have taken the deceased to Mambi forest, having raped her and strangled her and later uprooted her left eye and private part. In his defence the accused denied to have offered the said statement (Exhibit P1) rather he was forced to sign the statement which was already written.

From the evidence of PW4 there are two versions; first is that the said witness when interrogated the accused on the disappearance of the deceased, the accused admitted to have taken the child from Petro Patrick Mbilinyi while sending her to her home, but then it came to her sense of their home and she told the accused that she knows the home. The accused left her going home. This version when offered was taken to be true and remained unchallenged, till when the body was discovered. Then the accused was re-interrogated.

The prosecution is trying to persuade the court believe that the statement was freely and willingly offered by the accused person, on the ground that the historical background found in the statement could not be

known to PW4 unless being told by the accused himself. That is a fact, I have no dispute on that, but from PW4's evidence, he is the one who previously interrogated the accused on the loss of the child. The fact which is not disputed by the accused, and that the accused told him on how he parted with the child. On that version the accused never complained to had been forced to give the statement which means willfully and freely offered it. It is therefore that PW4 had a detailed historical background of the accused person. But more seriously the cautioned statement was recorded after the deceased body was discovered and PW4's evidence was to the effect that on 17/04/2015 he went to Chimala Mission Hospital to see the dead body and when he went back to the Police Station at 07.30 hours he then recorded cautioned statement of the accused. This implies that apart from prior historical background he had, but he also was aware of the way the dead body was.

A close look at the said statement shows/states that the accused was arrested on 16/04/2015 and sent to the Police Station where he with Petro Mbilinyi were interrogated on the theft of the child. The evidence of PW4 is to the effect that he interrogated the accused on the theft of the child/deceased on 14/04/2015, the fact which PW4 was aware of. This raises doubt as to the credibility of the said cautioned statement. Not only that according to Section 58 (3) of the Criminal Procedure Act, (Cap 20

Revised Edition 2002) the certification of the Police Officer who recorded the statement is at the end of the statement. To the contrary, in the instant case the certification of the Police Officer is immediately after the end of the statement before the certification of the accused. This is an irregularity which in my opinion is fatal as it gives implication that the same was not read to the accused because it was certified by the Police Officer to be true. This denied the accused person right to correct, make alteration or additions before certification as provided under **Section 58 (3) (a), (b), (c) and (d) of the Criminal Procedure Act (Cap 20 Revised Edition 2002)**.

The above being the position, I find the cautioned statement to have very serious shortcomings. It follows therefore that as far as this case is concerned, the cautioned statement has no probative evidential value to warrant conviction in such a grave offence which if proved attracts an alarming sentence.

As rightly pointed out earlier, this case is based on circumstantial evidence. It is an established practice in our courts that when circumstantial evidence is to be relied upon, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See **Ecksevia Silas and Another vs. The**

Republic, Criminal Appeal No. 93 of 2011 (Court of Appeal of Tanzania) unreported.

Again PW3 who was among those who went to the scene told the court that the deceased was found to have been raped, removed the left eye and private part and that she had a burnt wound on her back. From the finding and evidence of PW5, the Medical Officer, he had neither testified on the rape and burnt wound as testified by PW3. Further Exhibit "P2" does not reveal be it on the summary of the report part no schedule of observation. For example item 20 of the schedule of observation, requires to be filed what/was observed is left incompetent.

Again as testified by PW3 that the deceased had burnt wounds on the back but there is no evidence as to whether at the scene there were signs of extinguished fire or not. This could establish the fact that the deceased encountered murder at that scene or somewhere else but having been killed was dumped there.

The above stated shortcomings further weaken prosecution case.

Having so gone, I am of the firm view that the third issue is proved negative, thus render the last issue nugatory.

I therefore am at one with the 3rd Assessor one Eliza Kilindu who opined that though there is evidence that the alleged deceased is dead,

but the prosecution has not proved that it is the accused who murdered the deceased.

That being said and done, I find that the prosecution has failed to discharge its duty to prove that it is the accused one Joel Msukwa who murdered the deceased one Besta d/o Julius. I hereby acquit the accused person one Joel s/o Msukwa from the charge of Murder contrary to Section 196 and 197 he was facing.

Order accordingly.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
31/08/2020

Date: 31/08/2020

Coram: D. B. Ndunguru, J

For the Republic: Ms. Prosista Paul – State Attorney

Defence Counsel: Mr. Peter Kilanga holding brief of Mr. Esau

Accused: Present

B/C M. Mihayo

Assessors: 1. Veronica Kapigna
2. Hidaya Mussa } Present
3. Eliza Kilindu

Ms. Prosista Paul – State Attorney:

The case is for judgment, we are ready.

Mr. Kilanga – Defence counsel:

We are ready.

Court: Judgment is delivered today in the presence of Ms. Prosista Paul State Attorney, Mr. Peter Kilanga, defence counsel holding brief of Mr. Essau Sengo and the accused.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
31/08/2020

Right of Appeal explained.