IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT BUKOBA

ORIGIONAL JURISDICTION

(BUKOBA DISTRICT REGISTRY)

CRIMINAL SESSIONS CASE NO. 116 OF 2016

THE REPUBLIC

VERSUS

ELIAS SINGISILA AND ANOTHER

JUDGMENT

27/02/2020 & 03/03/2020

Mtulya, J.:

In this case, two blood relatives, Elias Singisila (the first accused) and Alipius Singisila (the second accused) were arrested and prosecuted before this court for the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002] (the Code).

The facts giving rise to the present case are short and clear. The accused persons are allegedly to have murdered Bruno Nestory (the deceased) during night hours of 6th February 2016 at Nyakagoma area within Kasharara Village in Muleba District, Kagera. The offence was committed at around 00:30hrs when the deceased was returning to

his home residence after some drinks in one of the pombe shops in the center of Kasharara and along the way to his residence, he was suddenly attacked by an arrow (the arrow) at his back and yelled out for help and some people responded to his alarm.

The deceased died a bit later outside his residence where he managed to reach after the attack and the death was caused by pains inflicted by the arrow which resulted into internal hemorrhage. During the lament of severe pains of the arrow and before his expiry, the deceased suspected and mentioned the first accused to be his killer due to the long standing misunderstanding emanated from land dispute at Byantazi.

The lament was heard by deceased's wife Ms. Ester Bruno and deceased's neighbor Mr. Clemence Kathesigwa who were present when the deceased was crying for pains from the arrow. The dual suspected and mentioned the first accused during interrogation by the police officers on 6th February 2016. The first accused was placed in the list of potential suspects in the killing of the deceased.

It is from the statement of the deceased before his expiry and mention of the first accused in the list of potential killers, the first

accused was arrested by police officers at Kasharara on the same day that is 6th February 2016 and wrote cautioned statement before the police and denied involvement in the killing of the accused.

The second accused was arrested following existed rumors and suspicion that he was making arrows few days before the launch of the attack against the deceased. He was arrested on 12th February 2016 at Kalambi area by Mr. Aleto Nestory, the deceased's young brother, and two militia men, when he was in his way from his home residence to bushes for fire-wood cutting.

After the arrest, the second accused was tied by ropes and was taken to Ward Executive Offices where two police officers came and took him to Muleba police station for questioning and interrogation. During the interrogation, the second accused wrote cautioned statement (the cautioned statement) and admitted killing of the deceased. He also admitted of the killing of the deceased in extra judicial statement (the statement) recorded by the justice of peace, Ward Executive Officer of Kyebitembe Ward in Muleba District on the same day. In the statements, the second accused mentioned the first accused to be part of the killing of the deceased.

When the case was scheduled for preliminary hearing on 3rd May 2017 and trial hearing on 24th February 2020, and when the information was read over and explained to the accused persons, they both pleaded not guilty of the charge of murder. However, on the 3rd of March 2017, the Sketch Map of the Scene of the Crime (the map) and Postmortem Examination Report (the report) were tendered and admitted in this case as exhibit P.1 and P.2 respectively. The sketch map displays the scene of the crime whereas the report shows that the death occurred due to arrow shot resulting in internal hemorrhage and the arrow busted lower left back near 9th and 11th intercostal mbs and was removed deep in the abdomen.

The medical doctor who attended the deceased body and wrote the professional report was not summoned during the hearing of this case to explain lower left back near 9th and 11th intercostal mbs and deep in the abdomen. However, during the hearing of this case, Mr. Kathesigwa stated that the arrow was in buttocks and Detective Corporal Augustine testified that it was found at the back in the waist. In the statement which was admitted as exhibit P.4, the second accused stated to have attacked the deceased at the back whereas in

the cautioned statement admitted as exhibit P.3, he stated to have launched the arrow at the back near waist.

When the case was listed for session hearing on Monday, Monday, 24th February 2020, the Republic marshalled its learned State Attorneys, Mr. Nehemia John and Joseph Mwakasege who summoned and marshalled a total of three (3) witnesses to establish the case against the accused.

Mr. Clemence Kathesigwa, a resident of Kasharara Village in Muleba and neighbor to the deceased was summoned as the first prosecution witness (PW1) for the Republic to testify before this court. In his testimony, PW1 stated that on 6th February 2016 he was asleep at his residence and heard laments from the deceased and decided to leave his home for the deceased's residence and upon arrival, he found the deceased with an arrow penetrated at his back next to buttocks. According to PW1 before his expiry, the deceased mentioned the suspect of the attack being the first accused as they have land dispute registered in land court Bukoba and it was awaiting for execution. PW1 testified that following that suspicion, the first accused was arrested by the police and charged with murder. With regard to

the second accused, PW1 stated that he was arrested from existed rumors that he was making arrows few days before the attack against the deceased.

A police officer, Detective Corporal Augustine, with force number E. 4534, who recorded the cautioned statement was summoned and marshalled as prosecution witness number two (PW2) by the Republic to appear in this case and testify the arrest of the accused persons and to tender the cautioned statement allegedly made by the first accused in his office on 12th February 2016. With regard to the first accused, PW2 stated to have been arrested by police officers at Kasharara and wrote statement for him, in which he denied involvement of the attack.

PW2 testified further that on 12th February 2016, the second accused was arrested at Kalambi area by militia men and was taken to Ward Executive Offices at Kalambi. PW2 stated that he was called by his boss through cell-phone and informed that the second accused was arrested at Kalambi in connection of the killing of the deceased occurred on the 6th February 2016 and was detained at Kalambi Ward Executive Offices.

PW2 testified that he rushed to the Ward Executive Offices with another police officer and secured the second accused at about 1300hrs to Muleba Police Station and he started to interrogate the second accused from 14:05hrs and completed at 15:49hrs. Before the interrogation, PW2 stated to have complied with all necessary procedures governing interrogation, including informing the second accused of his basic rights, including absence of any other person during interrogation, save for those he wished, using separate room, reading the statement before him after recording, signing of the statement by use of right thumb-print and written signature.

Finally, PW2 prayed to tender the cautioned statement before this court, which was protested by the second accused supported by the defense counsel, Ms. Aneth Lwiza. As per requirement of law and directive of our superior court of the land, the Court of Appeal (the Court), the trial court must conduct a trial within trial in the circumstances of that nature. This court had no option than to conduct a trial within trial (see: **Massanja Mazambi v. Republic (1991) TLR 200, Jackson@ Mabeyo Francis v. Republic, Criminal Appeal No. 55 of 1994** and **Makumbi Ramadhani Makumbi and**

Four Others v. The Republic, Criminal Appeal No. 199 of 2010).

After the trial within trial, this court overruled the objection raised by the second accused supported by his learned defense counsel and admitted the cautioned statement as an exhibit P.3. In the statement, the second accused admitted to have killed the accused with an arrow and gave smallest details of the circumstances leading to the killing of the accused, including participation of the first accused.

The third and final prosecution witness was Mr. Adolf Rutagwelera Cyrilo, a Ward Executive Officer of Kyebitembe Ward in Muleba District who was summoned as prosecution witness number three (PW3) to testify and tender the statement. In his testimony PW3 stated that on 12th February 2016, the second accused was brought in his office for the statement recording. PW3 stated that before recording of the statement, he complied with all requirements of the law regulating statement recording, including informing the second accused of his rights, inspection of the DW2's body and recording of his own words only. With regard to the body, PW3 testified that he did

not found any wounds, scar, mark or signs of beatings. PW3 stated further that after following all required procedures, he wrote the statement and it was duly signed and thumbed by the second accused.

Finally, PW3 prayed to tender the statement for admission and was admitted as exhibit P.4 in this case. In P.4, the first accused admitted to have killed the deceased and explained in details what transpired during night hours of 6th February 2016 and commission of the offence and mentioned his brother, the second accused as the one who procured him to kill the deceased.

The defense on the other hand protested the allegation and marshalled two witnesses, who were the accused persons themselves and did not tender any exhibit before this court. The first accused was marshalled as defense witness (DW1) and his testimony was short, clear and straight forward. DW1 stated that he knew the deceased and that he was his neigbour and *Mshenga*. DW1 stated that on 6th February 2016, he was at burial ceremony of Anacleth Emmanuel who died on 3rd February 2016. DW1 stated further that he slept at the late Anacleth's residence from the 5th to the 6th of February 2016.

According to DW1, it is from that area of funeral where he heard people saying the deceased was killed. DW1 testified further that it was the news of death of the deceased, which arisen deceased's mother and wife to rush to the scene of the crime, but all men including DW1 remained at the late Anacleth's residence. Finally, DW1 stated to have been arrested by the police when he was attending funeral ceremony of the deceased at Nyakaboma area and was ferried to Kasharara Village Offices and later to police custody in Muleba for interrogation.

DW1 testified that he was interrogated in connection with the death of the deceases, but denied any involvement. According to DW1, they had a land dispute pending in the land court in Bukoba and he has never talked to Alipius on the plan to kill or involved in the killing of the deceased.

On his part when called to testify, the second accused (DW2) stated that he was arrested on the 12th February 2016 by Mr. Aleto Nestory, the deceased's young brother, and two militia men, along the way from his residence to the bush for fire-wood cutting. DW1 testified that he was tied by ropes and was taken to Ward Executive

Offices where two police officers came at 13:00hrs and took him to Muleba police station. According to DW2, they arrived at Muleba police station at 14:30hrs and the police locked him up. DW2 stated further that after like thirty (30) minutes, he was taken in interrogation room where he found two other police officers and Mr. Clemence Kathesigwa.

In the interrogation room, according to DW2, the police officers started to torture him by use of iron stick until 19:00hrs. DW2 testified that on 15th February 2016, the police took him to hospital, but was not treated, instead was asked if he was mentally fit, and replied yes. With regard to cautioned statement, DW2 stated that he narrated the story because he was tortured and the statement because he had no senses during recording of the statement.

From the facts and evidences presented before this case, it is displayed that there is no dispute with regard to the death of the deceased. It is established from statements by both the prosecution and defence side witnesses and cemented by the report.

The matters in dispute are: whether the accused persons have killed the deceased and if so, whether the accused persons caused

the death of the deceased with intention to kill, which is commonly known in murder cases as *malice aforethought.*

During the final submissions from both sides, the defence and prosecution, it was a contest of its kind. The prosecution submitted that it is the accused persons who killed the deceased with malice aforethought whereas the defence protested involvement of the accused persons in the killing of the deceased.

First of all I have to thank both Mr. Nehemia, learned State Attorney for the Republic and learned counsel Ms. Aneth Lwiza for the defence for being very brief on their submissions. Ms. Lwiza briefly contended that there are three issues to be looked upon in this case, namely: dying declaration, extra judicial statement and cautioned statement.

Ms. Lwiza started with the dying declaration and contended that the position of law as in the case of **Florence Mwarabu v. The Republic, Criminal Appeal No. 129 of 2003**, is that the court can act upon a dying declaration if it is satisfied that the declaration was made, if the circumstances in which it was made give assurance to its accuracy and if it is in fact true. Ms. Lwiza stated that in the present

case the first accused was not at the scene of the crime and the statement was made out of rumors and suspicion. Ms. Lwiza cited the authority in **Pius Jasunga v. Republic (1954) 21 EACA 331** stating that it is unsafe to base a conviction on dying declaration without corroboration.

With regard to the statement and cautioned statement, Ms. Lwiza stated that it is now certain as it was settled in the decision of **Tuwamoi v. Uganda [1967] E.A 84**, that trial court may accept any confession, which has been repudiated or retracted or both with caution, but it must be satisfied that the confession is true. To Ms. Lwiza, the second accused had two arrows before the attack, but there is no any which was brought before this court as an exhibit.

With respect to existed land dispute, Ms. Lwiza argued that there must be connection between land dispute and the death of the deceased as the deceased himself said he was suspecting the first accused. Ms. Lwiza argued further that in cases like the present one, direct evidence is very important as per requirement of section 62 of the Evidence Act and cited decision in **Ally Swalehe Msutu v. Republic, (1980) TLR 1** which stated that exculpatory statement

made by one accused cannot be used to incriminate another accused. Finally, Ms. Lwiza submitted that the prosecution side has not established beyond reasonable doubt that the accused persons have killed the deceased.

On the other hand, Mr. Nehemia differed with her and submitted that in the present case there is the statement and cautioned statement of the second accused which were taken at the shortest possible time and followed all prerequisite procedures in recording. Mr. Nehemia stated that in the cautioned statement, the second accused gave details of plan, series of events and execution of the offence, which cannot be given by any other person.

To Mr. Nehemia, the second accused's admission of the offence and details of its execution show truthfulness and voluntariness of the maker and therefore correspond with section 3 of the Evidence Act [Cap. 6 R.E. 2002] (the Evidence Act) and decision in **Tuwamoi v. Uganda [1967] E.A 84**, and cited the judgment in **Shija Lukeyo v. Republic [2004] TLR 254** arguing that the court may convict the second accused of murder without any corroboration.

However, Mr. Nehemia argued further that other evidences in a trial may corroborate the cautioned statement and cited the judgment in **Ramadhani Salum v. The Republic, Criminal Appeal No. 5 of 2004**. To his opinion, Mr. Nehemia, the postmortem examination report corroborate the cautioned statement as they correspond on the use of arrow to attack the deceased.

On the statement, Mr. Nehemia argued that it was recorded by Ward Executive Officer when the second accused was a free person and did not protest the admission of the same in this court. Mr. Nehemia cited the decision in **Umalo Mussa v. The Republic, Criminal Appeal No. 150 of 2005** stating that conviction in cases like the present one can solely base on the statement.

In respect to the first accused, Mr. Nehemia submitted that there was a plan between the first and second accused to kill the deceased. To Mr. Nehemia the first accused is held responsible under the doctrine of common intention under section 23 of the Penal Code even though he was not present at the scene of the crime.

Regarding the argument on the need of corroboration with regard to statements made by the second accused and decision in **Ally**

Swalehe Msutu (supra), Mr. Nehemia replied at three levels, namely: first, in the present case the second accused never extricated himself from the case; secondly, PW1 heard from the deceased to suspect the second accused; and finally the evidence of DW1 who admitted the existed land dispute.

During his submission, Mr. Nehemia invited the element of malice aforethought stating that anyone who killed the accused had intention to cause death because of the type and size of weapon used in the attack. According to him, in the present case it was the arrow made of iron and wood stick.

As I stated before, in the present case, this court is invited to determine two important disputes, namely: whether the accused persons have killed the deceased and if so, whether the accused persons caused the death of the deceased with intention to kill, which is commonly known in murder cases as *malice aforethought*.

I also think, in a situation, like the present one, where no one saw the accused persons launching the arrow to the decease, four things must be taken into consideration, before decision is reached, namely: *evidence against the accused persons, law relating to*

confession, law relating to co-accused persons and malice aforethought.

I understand, learned counsel Ms. Lwiza invited the principle of dying declaration. To my understanding, that cannot be the case here. In the present case, the deceased suspected the first accused to have attacked him because of their land dispute. The deceased did not see the accused attacking him. In any case, it was midnight and any identification would have been questioned. Even if we assume it was dying declaration, still it is unsafe to base a conviction on uncorroborated evidence (see: **Adrian Masongera v. Republic, Criminal Appeal No. 77 of 1990** and **Republic v. Marwa (1971) HCD 473**). From the facts adduced in this case, it is vividly displayed that the accused may have been honestly believed that it was the first accused who shot the arrow.

I also understand that Mr. Nehemia invited the doctrine of common intention and cited section 23 of the Penal Code [Cap. 16 R.E. 2002] (the Code). To say the least, the said section does not apply in the circumstances like the present case where the only justification of the killing of the deceased by the accused persons is based on the

statement and caution statement. In both statements, the second accused stated to have been procured by the first accused to kill the deceased and it was admitted by Mr. Nehemia during the hearing of this case that the first accused was not present at the scene of the crime.

Even if we assume it is correct, the first accused hired the second accused to kill the deceased, that hiring or procuring does not form common intention under the requirement of section 23 of the Code. It was made clear in **Republic v. ACP Abdallah Zombe and 12 Others, Criminal Sessions Case No. 26 of 2016**, but elaborative explanation is found in the decision of **Shija Luyeko v. Republic [2004] 254** where full court of the Court of Appeal stated that:

> *For common intention to be established two or more persons must form a common intention to commit an unlawful act together, but when one hires another to commit an unlawful act on his behalf he does not form common intention with that other person but procures such person to commit the offence on his behalf.*

I also noted the responses of Mr. Nehemia with regard to the decision in **Ally Swalche Msutu** (supra), and will discuss in due course in determining the four stated matters above, namely: *evidence against the accused persons, law relating to confession, law relating to co-accused persons and malice aforethought.*

The guidance with regard to evidence against accused persons is found in the decision of **Magendo Paul and Another v. Republic [1993] TLR 220**, where the full court of the Court of Appeal, held at page 223 that:

> *If the evidence is so strong against an accused person as to leave only remote possibility in his favour which can easily be dismissed, the case is proved beyond reasonable doubt.*

This is the position even in English law were we have adopted our legal system. It was stated in 1947 by a prominent Judge, Lord Denning in the decision of **Miller v. Minister of Pensions [1947] 2 All ER 372** that:

> *The law would fail to protect the community if it admitted fanciful possibilities to deflect the Court of*

Justices. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt.

However, that should be done after considering the evidences of both sides, the prosecution and defense. The advice of the Court of Appeal in **Ligwa Kusanja and other v. Republic, Criminal Appeal No. 133 of 1999** is that:

We think that it is a basic principle in judgment that before reaching a decision a court has to consider, and demonstrate that it has considered, all evidences received. It will then accept or reject certain evidence as it considers appropriate.

In the present case, a total of three prosecution witnesses were summoned and marshalled to substantiate the accused persons killed the deceased. No one stated to have seen the accused persons attacking deceased with the arrow. However, there is statement and cautioned statement admitted in this case as exhibit P.3 and P.4 and

were read before the court by PW3 and PW2 respectively. In the statements, the second accused confessed involvement of the killing of the deceased.

The Law regarding confession is regulated by the provisions of section 27 of the Law of Evidence Act [Cap. 6 R.E. 2002] (the Evidence Act), which provides that:

> *(1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.*
>
> *(2) The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.*
>
> *(3) A confession shall be held to be involuntary if the court believes that it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority*

The provisions under section 27 of the Evidence Act have received judicial interpretation and there is a bundle of precedent. The

precedents state that the validity of confession is that it must be voluntarily made by an accused. In the celebrated case of **Tuwamoi v. Uganda [1967] E.A 84**, the Court of Appeal for East Africa had an opportunity to state on the main important part of confession:

> *The main essential for validity of a confession is that it is voluntary.*

This was echoed by the Court of Appeal of Tanzania in Tanzania in 1992 in the decision of **Shihobe Seni and Another v. Republic** [1992] TLR 330 and **Ernest Chacha @ Henche and Five Others v. The Republic, Criminal Appeal No. 21 of 200.** However, details on importance of voluntariness is discussed and decided by the High Court in the decision of **Josephat Somisha Maziku v. Republic [1992] TLR 227**, where the three holding of the case are quoted hereunder, which are also relevant to the present case. The court held that:

> *(1) While it is trite law that the condition precedent for the admissibility of a confession is its voluntariness, a confession is not automatically inadmissible simply because it resulted from threats or promise, it is*

inadmissible only if the inducement or threat was of such a nature as was likely to cause an untrue admission of guilt;

(2) where you have threats and a confession far apart without a causal connection, and no chance of such threats inducing confession, such confession should be taken to be free of inducement, voluntary and admissible; and

(3) *It is a principle of evidence that where a confession is, by reason of threat, involuntarily made, and is therefore inadmissible, a subsequent voluntary confession by the same maker is admissible, if the effect of the original torture, or threat, has before such subsequent confession, been dissipated and no longer the motive force behind such subsequent confession.*

This detailed position has been adopted and supported by a bundle of precedent (see: **Athumani Hussein v. Republic (1988) TLR 246, Hemedi Abdallah v. Republic (1995) TLR 172, Nyanjige Mahenga v. Republic, Criminal Appeal No. 214 of 1994 (unreported) and Samson Kadeya Kazeze v. Republic,**

Criminal Appeal No. 137 of 1993). This practice may be emanated from the provision of section 29 of the Evidence Act. This section provides that:

> *No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made.*

In the present case, the statement was not protested from its recording to the justice of peace, during preliminary inquiry and preliminary hearing. There was a protest of the cautioned statement that it was extracted from beatings and torture allegedly executed by four police officers at the investigation and interrogation office in Muleba Police Station.

According to the second accused, the torture stated at around 15:00hrs to 19:00hrs in the interrogation room. However, the second accused did not raise alarm anywhere of the beatings and torture from the four police officers. He appeared before justice of peace on 12th

February 2016 to record the statement, and was inspected by justice of peace and his body did not show any fresh wounds, or he inform the justice of the peace of the persecution at Muleba Police Station. When he was testifying in this court he stated that on 15th February 2016, he was taken to Kaigala Hospital, but did not inform or show the doctor wounds emanated from the beatings of torture. He appeared for committal proceedings in P.I. No. 4 of 2016 before Hon. Waane, C.F., learned District Magistrate, between February and December 2016, but remained silent.

The same during the Preliminary Hearing in this court before judge Bongole, S. B., on the 3rd of May 2017, DW2 remained quiet. The second accused stated for beatings and torture for first time during the hearing of this trial, still trial within trial was conducted and found out that the confession before the police was truly free and voluntarily made before PW2.

In any case, the second accused gave smallest details of the killing of the deceased that cannot be told by any other person. The story narrated at page 3 and 4 of the cautioned statement cannot be narrated by any person than the one involved in the killing. The

narrations depict the reasons for the killing, plan to execute the killing, place of killing and where the arrow penetrated.

The law regulating circumstance like the present one is stated in the decision in **William Mwakatobe v. Republic, Criminal Appeal No. 65 of 1995**, where the Court stated that:

> *Confession was so detailed, elaborate and thorough that no any other person would have known such personal details but the appellant.*

A year later, the same Court, in **Kashindye Meli v. Republic, Criminal Appeal No. 12 of 1996** stated that:

> *The details pertaining to the sequence of events leading to the death of the deceased are such that no one else than a participant to the murder could do so.*

In any case, any confession containing nothing but the truth of what transpired can safely be relied by the court to determine its admissibility and conviction (see: **Mukami Wankyo v. Republic [1990] TLR 46**).

In this case, there is no dispute on time period when the interrogation and cautioned statement recording started. However, the second accused registered a complaint with regard to the time when recording of the statement ended. The issue in that regard is whether the contradictions of time complained by the second accused affect the central story of the confession which concerns the killing of the deceased by the arrow.

The position of the law is in section 50 (1) and 51 (1) of the Criminal Procedure Act [Cap. 33 R.E. 2002] (the Act) as it was interpreted by our superior court in **Iddi Muhidini @ Kabatamo v. The Republic, Criminal Appeal No. 101 of 2008,** require four hours from arrest for an accused to be interrogated and recorded his statement.

In the present case, the second accused was interrogated and recorded within the required four hours. At least the statement would have been recorded out of the statutory time requirement (see: **Aziz Rashid v. Republic, Economic Case No. 3 of 1989**) or without cautioning the second accused, the result would have been different

(see: **Juma Ibrahim v. Republic, Criminal Appeal No. 110 of 1989**).

The second accused in his statement made before PW2 and PW3, stated to have been procured by his brother, the first accused to kill the deceased. The brother was arrested and joined in this case as co-accused. The law regulating co-accused in regulated by the provisions of section 33 of the Evidence Act. Section 33(2) provides that a conviction of an accused shall not be based solely on a confession of a co-accused. This section has already received judicial interpretation in the **Republic v. Kusenta Cheligia & Another [1978] LRT No. 11, Ali Salehe Msutu v. Republic [1980] TLR 1 and Asia Iddi v. Republic [1989] TLR 174)**. For instance, in **Republic v. Kusenta Cheligia & Another**, the court stated that:

> *...where an accused person implicates himself with an offence, his statement that a co-accused participated in the commission of the offence must be corroborated by other independent evidence pointing to the guilt of his co-accused.*

In the present case, Mr. Nehemia adduced three reasons to justify that there was independent evidence pointing to the guilty of co-accused, namely: first, in the present case the second accused never extricated himself from the case; secondly, PW1 heard from the deceased to suspect the first accused; and finally the evidence of the first accused who admitted the existed land dispute.

In my opinion, the law is clear with regard to evidence of co-accused. There must be independent evidence (see: **Peter Rajabu Mohamed and Others v. Republic, Criminal Appeal No. 141 of 1992**). In our case, Mr. Nehemia invited the case of **Ramadhani Salum** (supra) and argued that cautioned statement and admission of the first accused on the existence of the land dispute corroborate each other. To my opinion and from the practice of the courts, evidence (cautioned statement) which needs corroboration cannot corroborate another evidence (existence of land dispute). In **Peter Rajabu Mohamed and Others** (supra), Justices of Appeal made it clear that:

> *The only evidence against the third appellant was the confession of a co-accused which was not corroborated.*

As there was no tenable evidence against him his appeal is allowcd.

In our case, there is no any other evidence to corroborate statement made by the second accused in his statements. In any case, to say there was land dispute between the first accused and the deceased cannot substantiate the first accused procured the second accused to kill the deceased. I have not seen any evidence from any prosecution witness who linked the land dispute and the killing of the deceased. The law is certain. That link must be established to land conviction to the first accused (see: **David Livingstone Simkwai and Eight Others v. The Republic, Criminal Appeal No. 146 of 2016**).

Mr. Nehemia also registered evidence of PW1 arguing that it may corroborate the evidence against the first accused. I said in the beginning of this judgment that statement made by the deceased before PW1 is not dying declaration. In any case, the deceased himself suspected to have been attacked by the first accused. It is a settled law that that suspicion alone, however strong is not enough to ground a conviction (**Shabani Mpunzu@ Elisha Mpunzu v. Republic, Criminal Appeal No. 12 of 2002** and **Benedict Ajetu v. Republic**

(1983) TLR 190). There may be no much room for debate over the fact that there was fairly strong suspicion against the first accused in Nyakagoma community in Kasharara Village, but I am warned by case law and jurist to avoid conviction based on suspicion and rumours. In the case of **B. Mapunda v. Republic, Criminal Appeal No. 2 of 1989,** their Lordships stated that:

> *Upon a careful perusal of the record, we think that the evidence as adduced was such as to cast strong suspicion against the appellant. However, it is trite law that suspicion alone, however strong, cannot be the basis of conviction*

Jurist are of the same view that there is no way suspicion can substitute proof in evidence. A well-known Jurist, Field in his book titled *Law of Evidence, 10th Ed. Vol. 1* at page 266 observed that:

> *Law reports are full of access based on the wisdom and experience of eminent jurists that suspicion, however strong, cannot take the place of proof.*

Lastly, I agree with Mr. Nehemia for distinguishing the decision in **Ally Salehe Msutu** (supra) with regard to exculpatory statement which

tend to clear one accused against another. Mr. Nehemia rightly argued that in thc present case the second accused never extricated hlmself from the case. However, the argument does not hold any merit because of the absence of corroboration. The statement of the second accused which needs corroboration, cannot be relied as a base of conviction of the second accused (see: **Peter Rajabu Mohamed and Others** (supra). In any case, if it is alleged the land dispute is related to the death of the deceased, as it was submitted by Mr. Nehemia, that evidence also needed to be corroborated. In that case, we have two evidence of DW1 and DW2 and both need corroboration. In law, it is settled that evidence which in itself requires corroboration cannot corroborate another evidence (see: **Swelu Maramoja v. Republic, Criminal Appeal No. 43 of 1991** and **Ally Msutu v. Republic (1980) TLR 1**).

Finally, Mr. Nehemia invited the provision of section 22 (d) of the Code and authority in **Shija Luyenko** (supra) arguing that if the statement is believed to be true conviction may be landed without corroboration and the first accused may be convicted under this provision as he procured the first accused. I agree with the citation of the law and the argument presented by Mr. Nehemia.

However, the provision in section 22 (d) of the Code comes into play when it is established without any shadow of doubt that the first accused procured the first accused. That evidence is missing in our case. There is again no additional evidence which corroborated the evidence of the second accused in mentioning the first accused that he procured him. If that tendencies of mentioning other persons is allowed, without additional evidence in cases like the present one, it may cause a danger to justice delivery in our country. I am not positioned to accept and subscribe to that school of thought. It will be a grave breach of the well-established practice of this court and our superior court, to which I do not want to be part of it.

I have also gone through the **Shija Luyenko's** case (supra). That precedent is distinguish from the present one. In **Shija Luyenko** case (supra) the accused person/appellant was convicted solely on the strength of cautioned statement of himself and it was admitted without any objection. The facts also displayed that the accused/appellant had found his mother dead with blood on her head and clothes, but his conduct thereafter did not show that he was in any shock.

In the present case, the deceased was not a close relative of the first accused, save for a mere village mate and *Mshenga*. He also said himself and other men remained at the Anacleth's residence because it was deep night and there was a funeral of Anacleth, his Baptist daughter. It was only close relatives, mother and wife of the deceased who rushed to the scene of the crime.

The first accused also protested involvement of the killing since the first day of his arrest to the hearing of this case. In the hearing of this case, the cautioned statement was also protested by the second accused. This brings a lot of uncertainty in serious cases like this one which its penalty upon conviction is death by hanging.

I sat with honourable assessors in this case. They sharply differed on the involvement of the accused persons. One of the assessors stated that the evidences adduced by the prosecution side are full of suspicions and rumours and cannot be relied to convict the accused persons whereas two of the assessors think that the accused persons are responsible for the death of the deceased.

In criminal cases, like the present one, the burden of proof is generally on the prosecution and the standard is beyond reasonable

doubt. (See: **Said Hemed v. Republic [1987] TLR 117, Mohamed Matula v. Republic [1995] and Horombo Elikaria v. Republic, Criminal Appeal No. 50 of 2005).** In the present case, there was no eye witness who was brought up before this court to testify that he saw the second accused killing the deceased or any corroboration to justify statements of the second accused.

I do not think if the prosecution side has proved its case beyond reasonable doubt to the first accused. However, the statement and cautioned statement point a finger to the second accused in the killing of the deceased by the arrow. The prosecution side has established its case beyond any reasonable doubt against the second accused.

The only remaining dispute is whether the second accused killed the deceased with malice aforethought. The law regulating malice aforethought is found under section 200 of the Penal Code to mean:

> *Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances:*

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

This is the enactment of the Code with regard to circumstances to establish malice aforethought, was clearly stated. The Court of Appeal in 1994 in **Enock Kipela v. Republic, Criminal Appeal No. 150 of**

1994, has provided factors to be considered by the court in determining malice aforethought. The factors are important because usually accused persons will admit physical attacks (*Actus Reus*), but will not declare their intention or malice aforethought (*Mens Rea* in murder case) to cause deaths or grievously bodily harm, as in present case.

The duty of prosecution side in that situation becomes more important to prove the *mens rea* of murder, malice aforethought, and at the standard of beyond reasonable doubt. There is guidance of the Court of Appeal decision in **Enock Kipela's** decision (supra) it was stated at page 6.

> *...usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one*

blow may, depending upon the facts of the particular case, be sufficicnt for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing

However, their lordship in that case gave two exceptions at page 5 and 7, that is each case must be decided on its own facts and if there is doubt of two views on the intention of the accused, that doubt is to the benefit of the accused.

In **Enock Kipela's** case (supra), the accused used a big stick wielded by both hands, and delivered three blows on the head and chest. In totality of evidences presented in that case there was no room for divergent views.

In our case, there is arrow penetrating back next to the waist or buttocks of the accused. Mr. Nehemia during his final submission stated there is malice aforethought because of the type and size of the weapon, but never said where it was directed and how long penetrated in the body of the accused. It was also unfortunate that

the medical doctor who examined and wrote the report was not summoned to this court to display what exactly transpired.

However the law as stated in **Republic v. Pangaunusu Mwendagumu (1943) 10 EACA 41** stated that the mere fact of the use of deadly weapon may not in every case be conclusive. I subscribe to this school of thought that the use of lethal weapon may indicate existence of a malice aforethought but it is not conclusive evidence of the existence of an intention to murder (see also: **Nyamusu Kinyabuga v. Republic (1953) 20 EACA 192**). In the present case, the second accused did not directed his arrow in dangerous and vulnerable parts of the human person, like head or neck. It was in buttocks. That cannot be said as an intention to kill.

In absence of malice aforethought, the second accused may be convicted of minor offence of manslaughter, although not charged with it, because it is minor offence of cognate character, the same genus and species. This is allowed by law under section 300 of the Act and practice of courts. The enactment in section 300 of the Act reads:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

This enactment has already received interpretation and precedents are abundant (see: **Tambi Omari v. Republic, Criminal Appeal No. 78 of 2018, Christina Mbunda v. Republic (1983) TLR 340Ali Mohamedi Hassani Mpanda v. Republic (1963) EA 296** and **Robert Ndecho and Another v. Republic (1951) 18 EACA 171**). For instance in the decision of **Robert Ndecho and Another** (supra), their Lordships at page 174 stated that:

Where an accused person is charged with an offence, he may be convicted of minor offence, although not charged with it, if that minor offence is cognate character, to wit, of the same genus and species.

Having found the first accused innocent, I hereby order the first accused, Mr. Elias Singisila, be released from prison forthwith, unless further detained for another lawful cause. The second accused is hereby convicted of lesser offence of manslaughter.

It is accordingly ordered.

F.H. Mtulya

Judge

03/03/2020

ANTECEDENTS

Mr. Nehemla: My Lord, the Republic has no criminal record of the second accused Alipius Singisila. My Lord, even if the court thinks the second accused has committed the offence of manslaughter, but that offence may attract life imprisonment. My Lord, when giving sentence you must consider the following:

i. It is only God who can take life of human being. This second accused, My Lord, has taken the life of the deceased. My Lord, the deceased intended to live longer but his life was intervene by the second accused;

ii. My Lord, the deceased had wife and children. Now they are living without their father. The children loved to have their father;

iii. My Lord, this manslaughter should be treated differently. It is a manslaughter next to murder. The line here between murder and manslaughter is very faint. You may not be able to see it;

iv. My Lord, this manslaughter has serious distinction with other manslaughter. This case was pre – meditated killing. People sat down on how to kill the deceased. The second accused went up

to the bar to see whether the deceased was there. Then he went back home to take his arrow. Hc then took time to wait the deceased along the way. My Lord, the second accused ought not to have done that. It is the manslaughter case of high level.

My Lord, this court has duty to protect the community. This second accused person must be penalized according to his deed. It is very painful to have lost the innocent person. My Lord, the penalty against him must be stiff so that the community get a message that even manslaughter has serious punishment. That is all my Lord.

F.H. Mtulya

Judge

03/03/2020

MITIGATION

Ms. Lwiza: My Lord, this is the time for mercy requesting.

i. My Lord, the second accused has 39 years. He is very young and can assist this nation;

ii. My Lord, this is the first offender. He has no criminal record. It is the Republic which said so;

iii. My Lord, second accused has family of a wife and one children;

iv. My Lord, this is the fourth year in custody. He has leant the lesson.

My Lord, the purpose of penal sanction is not torture. The purpose of penal sanction is to reform the accused. My Lord, I pray for lenient penalty. That is all my Lord.

F.H. Mtulya

Judge

03/03/2020

SENTENCE

Court: I have heard the antecedents of the learned State Attorney and mitigation of learned defence counsel. In this case, the second accused killed another person without any justifiable cause. The second accused also killed the deceased who left behind wife and children. It is also certain that only God can take life of human being to which the second accused decided to corrupt that mandate.

Again, this is a manslaughter case bordering murder, and it may invite stiff sentence. However, the second accused is the first offender who is young and can serve this nation. The second accused has family of wife and one child and all depend on him. In the circumstance like the present one this court need to impose serious penalty, but taking cognizance of the purpose of penal sanctions.

Having said so, and considering the accused has spent four years behind bars, I hereby impose sentence of ten (10) years imprisonment from the date of pronouncement of this judgment that is 3rd March 2020.

It is accordingly ordered.

Right of appeal explained.

F.H. Mtulya

Judge

03/03/2020

Court: This Judgment was delivered under the seal of this court in open court in the presence of learned State Attorney Mr. Nehemia John for the Republic, Ms. Aneth Lwiza for the defence, and in the presence of all accused persons, Elias Singisila and Alipius Singisila.

Honorable assessors thanked and accordingly discharged.

F.H. Mtulya

Judge

03/03/2020