

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT TARIME
(ORIGINAL JURISDICTION)
CRIMINAL SESSIONS CASE NO 39 OF 2020**

THE REPUBLIC

VERSUS

- 1. MACHERA S/O WARYOBA @ GORWE**
- 2. SASI S/O KIBUCHE @ WAMBURA**
- 3. AMOS S/O MWITA @ MASHAURI**

JUDGMENT

24th November and 11th December, 2020

KISANYA, J:

Machera s/o Wayroba @ Gorwe, Sasi Kibuche @ Wambura and Amos s/o Mwita @ Mashauri have been arraigned before this Court for offence of murder contrary to sections 196 and 197 of the Penal Code [Cap. 16, RE 2019]. It is alleged that on 4/11/2015, at Magatini Village within Serengeti District in Mara Region, all accused persons murdered Mwita Machera @ Waryoba.

In view of the evidence adduced by the prosecution and the defence, the brief facts of this case can be highlighted as follows: On 7th November, 2015, Marwa Irengero (PW5) found a human head in a forest located at Magatini Village, within Serengeti District. He then informed the village authority which organized and conducted a search for the dead body. The same was found on 8th November, 2015 at a distance of about 400 meters from the place where the head was found. Both the head and dead body had started to decompose. The

first accused, Machera Waryoba @ Gorwe recognized and identified the dead body as that of his son, Mwita Machera @Waryoba who went missing from 4/11/2015.

This incident was reported to Mugumu Police Station. An investigation commenced whereby police officers in companion of a clinical officer (PW1) went to the scene where the human head and body were found. PW1 examined the deceased body. His examination was to the effect that, the human head and dead body belonged to the same person. As regards the cause of death, PW1 formed an opinion that, it was due to excessive bleeding following cutting of arteries and vein blood vessel. He tendered the report on post mortem examination which was admitted in evidence as Exhibit PE1.

Thereafter, the deceased body was handed over to the first accused who proceeded with the burial arrangements. The deceased was buried on 09/11/2015. PW2, a neighbour to the first accused person was among of the persons who attended the burial. She heard the first accused's mother and other persons stating that, the deceased had been killed by his father, that is the first accused.

On 10/11/2015, Amos Mwita @ Mashauri (the third accused) was arrested and presented to Mugumu Police Station by the first accused. It was reported by the first accused that the third accused was the last person to be seen with the deceased. When interrogated by PW3, the third accused confessed orally to have participated in killing the deceased. He told PW3 that the deceased was cut with a panga at his neck by the first accused and that, he (the third accused) and the second accused assisted him by holding the deceased's legs and hands.

Basing on that information, the first and second accused were arrested at their respective houses on 11/11/2015. The accused took the police to the place

where the deceased was killed which happened to be the same place where the dead body was found. The second accused recorded a cautioned statement before F.1819 D/C Mauzi Lyawatu (PW4) and confessed to have killed the deceased. At the instance of the second accused, the cautioned statement was recorded in the presence of his relative one, Moses Mchanake Gorwe(PW6). The second accused's cautioned statement was admitted in evidence as Exhibit PE2 without being objected by the defence. On his part, the first accused denied the offence upon being interrogated by F. 3785 D/C Proches (PW3).

This Court was satisfied that, a prima facie case had been established by the prosecution. The accused persons gave their defence on oath. In addition to his evidence, the first accused called his wife Otaigo Machera (DW2) to supplement his testimony. According to DW1 and DW2 the deceased left home on 4/11/2015. It was deposed further that, the first accused did not leave his home place on the fateful day and that, the first accused participated in finding the deceased.

The second accused testified as DW3. He stated on oath that he was sick on 4/11/2015. As regards the cautioned statement (Exhibit PE2), the second accused person repudiated it. He contended to have signed the said cautioned statement (Exhibit PE2) without reading the same and upon being induced by PW6 that the police would discharge him.

The third accused (DW4) testified that he was at the *shamba* on 4/11/2015. He stated he was taken to the deceased house on 10/11/2015 and asked to tell the whereabouts of the deceased. He contended to have been coached by PW6 to state that, they were abducted by the first accused who killed the deceased. He did not dispute to have confessed before the police as adduced by PW3. However, he stated to have told the police lies about the killing of the deceased

in order to save his life. He went on to contend that, it was his first time to be at the police and that he was beaten.

In general, the accused persons dissociated themselves from the offence leveled against them. They prayed for their acquittal.

During the hearing of this matter, the prosecution was represented by Mr. Frank Nchanila. On the other hand, the first, second and third accused had the legal services of Mr. Tumaini Kigombe, Ms. Pilly Marwa and Ms. Rebeca Magige, learned advocates respectively.

As required by the law, the Court sat with three assessors namely, Mr. Laurent Ochieko, Mrs. Esther Nyigega and Mrs. Hadija Haji. Upon summing up the evidence adduced by both parties and point of law involved in this case, all assessors were of the opinion that, the prosecution had proved its case beyond all reasonable doubts. In that regard, they opined that the accused persons were guilty of murder as charged.

It is settled principle that in criminal trial, the key issue for the determination by the Court is whether the evidence adduced by the prosecution has proved the charge against the accused beyond reasonable doubt. The accused cannot be convicted basing on the weakness of his defence or inability to defend himself or because of lies. They are required to be convicted basing on the strength of evidence adduced by the credible and reliable witness (es) of the prosecution.

As far as the offence of murder subject to this case is concerned, the prosecution is also charged with a duty of proving that, the deceased died of unnatural death, the accused unlawfully caused death of the deceased and, that the accused had malice aforethought.

It is not disputed that none of the prosecution witnesses who testified to have seen the accused killing the deceased. The prosecution case hinges on the circumstantial evidence that, the deceased went missing from 4/11/2020; human head/skull and dead body were found in the forest; though no scientific examination was conducted, the dead body was identified by the first accused as that of the deceased and buried by the first accused; and that the second accused confessed to have committed the offence and also named other accused. There was also oral confession by the third accused before PW3 which led to the arrest of the first and second accused and that, the accused led the police in the forest to show the place where the deceased was killed and that it happened to be the same place where the body was found by villagers.

As rightly argued by Mr. Kigombe, learned advocate for the first accused, the law is settled that, where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In **Mark Kasimiri vs R**, Criminal Appeal No. 37 of 2017, the Court of Appeal restated the following principles governing reliability of the circumstantial evidence to convict the accused:

- i. That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was*

*committed by the accused and non-else (See **JUSTINE JULIUS AND OTHERS VS REPUBLIC** , Criminal Appeal No. 155 of 2005 (unreported)).*

- ii. *That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See, **SIMON MSOKE VS REPUBLIC, (1958) EA 715A and JOHN MAGULA NDONGO VS REPUBLIC, Criminal Appeal No. 18 of 2004 (unreported)]**.*
- iii. *That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. [See - **MATHAYO MWALIMU AND MASAI RENGWA VS REPUBLIC (supra)**.]*
- iv. *That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected, [see **SAMSON DANIEL VS REPUBLIC (1934) E.A.C.A. 154**].*
- v. *That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person, [See **SHABANI MPUNZU @ ELISHA MPUNZU VS REPUBLIC, Criminal Appeal No 12 of 2002(unreported)**].*
- vi. *That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See **ALLY BAKARI VS***

***REPUBLIC (1992) TLR, 10 and ANETH KAPAZYA VS REPUBLIC,
Criminal Appeal No. 69 of 2012 (unreported).***

The Court will be guided by the above principles in the course of determining whether the circumstantial evidence in the case at hand infers to the guilty of the accused persons.

As stated earlier on, there is evidence that: A human head/skull and dead body were found in the forest and that, the body was identified by the first accused as that of the deceased, buried by the first accused. It is common ground that no scientific examination which was conducted to prove that the head and body belong to the same person let alone the deceased. It is the first accused who is stated to have recognized and identified the body by looking at the fingers and nails. He also deposed that fact before the Court. Having considered that, the dead body had started to decompose, I am of the view that, there was a need of conducting an examination to establish whether the body belonged to the accused.

However, there is an oral confession by the third accused before PW3 and the cautioned statement (Exhibit PE2) by the second accused person which was recorded by PW4 in the presence of PW6. The said oral confession and cautioned statement are to the effect that, the deceased head was cut by the first accused aided by the second and third accused. It follows that and I agree with Mr. Frank Nchanila, learned State Attorney who argued that this case rests on the confessions made by the second and third accused persons as testified by PW3, PW4 and PW6.

The question that follows is whether such evidence can be used to convict the accused persons. It is gathered from section 3 (1) (a), (b) and (d) of the Evidence Act, Cap. 6, R. E. 2019 that, a confession to a crime may be oral,

written, by conduct, and or a combination of oral, written and conduct or some of them. Now, in terms of section 27 of the Evidence Act (supra), the prosecution is duty bound to prove that, the confession was made by the accused and that, it was made freely and voluntarily.

Oral confession has the same weight as written confession. It does not matter as to whether it was made before a civilian or not. What matters is reliability of the witness whom the confession was made to and whether it was made freely and voluntarily. See the case **Posolo Wilson @ Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015 (unreported) where the Court of Appeal held that:

*"It is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect (**Director of Public Prosecutions v. Nuru Mohamed Gulamrasul [1988] TLR 82.**)"*

In the present case, the written confession by the second accused was made before a police officer (PW4). The second accused person requested the presence of his relative (PW6) at the time of recording the cautioned statement. Likewise, the oral confession by the third accused was made before a police officer (PW3). It is the oral confession by the third accused which led to the arrest of the first and second accused. The said witnesses (PW3, PW4 and PW6) who heard the confession appeared and adduced their evidence before this Court. I assessed their credibility and demeanor and found no reason to hold that they were not reliable witnesses. For instance, it is not disputed that, PW6 is second accused person's relative (brother). No evidence was adduced to indicate that he had bad intention against the second accused. Even the second accused did not cross examine PW6 to discredit his credibility.

Therefore, the next issue is whether the said confessions were made freely and voluntarily. PW4 deposed how the second accused was not forced or tortured to record the cautioned statement (Exhibit PE2). He was duly informed of his rights including that of having relative or advocate present at the time of recording the statement. The second accused exercised that right by requesting the presence of PW6. In his evidence, PW6 was firm that, he was called by the police and that, he witnessed the second accused making the statement without being tortured. He testified that, it was the second accused who was narrating the statement before PW4 who put the same into writing. As that was not enough, the cautioned statement by the second accused was admitted in evidence without being objected. It was upon being called to defend his case, when the second accused repudiated to have made the cautioned statement and that, he was induced by PW6 to sign it on the promise that, he would be discharged. I find such contention by the second accused as a mere afterthought. Had the second accused objected admission of Exhibit PE2, the Court could have conducted a trial within trial to determine whether the statement was made by him and whether it was made voluntarily. Furthermore, PW4 and PW6 were not asked anything in line with the 2nd accused person's defence.

In relation to the oral confession by the third accused, PW3 testified that, the third accused was taken to the police station by the first accused. This fact was not disputed by the defence. Now, upon interrogating him orally, the third accused confessed before PW3 to have participating in the killing of the deceased. He went on to name first and third accused. PW3 stated on oath that the third accused was free agent at the time of giving the oral confession which led to the arrest of the first and second accused. In his defence, the third accused person stated to have lied before the police on the reason of fear and

torture. However, such fact was not proved. Even PW3 was not asked anything about the torture.

In view thereof, I am satisfied that the oral confession by the third accused and the cautioned statement by the second accused were given voluntarily. Both confessions reveal the role played by each accused in killing the deceased at the instigation of the first accused. In that regard, both confessions fit within the meaning of confession provided for under section 3 (1) (a) of the Evidence Act (supra).

Even if it is taken that the oral confession by the third accused and cautioned statement by the second accused were retracted or repudiated during the defence, this Court is still required to consider whether the same is true. Upon being satisfied that, the confession is true, the trial court can proceed to convict the accused. This stance was taken in **Hamisi Meure v. Republic** [1995] TLR 213 in which the Court of Appeal cited with approval the case of **Tuwamoi v. Uganda** [1967] EA 84, where it was held that:

"What this passage says is that in order for any confession to be admitted in evidence, it must first and foremost be adjudged voluntary. If it is involuntary that is the end of the matter and it cannot be admitted. If it is adjudged voluntary and admitted but it is retracted or repudiated by the accused, the court will then as a matter of practice look for corroboration. But if corroboration cannot be found, that is, if the confession is the only evidence against the accused, the court may found a conviction thereon if it is fully satisfied that the confession is true."

Generally, it is unsafe to convict the accused person basing on uncorroborated retracted or repudiated confession. However, the trial court may act upon

uncorroborated repudiated or retracted confession provided that it is satisfied that the retracted or repudiated confession is true. See for instance, **Bombo Tomola v. Republic** [1980] TLR 254, in which it was held:

"Generally it is dangerous to act upon a repudiated [or retracted] confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances, is satisfied of its truth".

Guided by the above position, I have gone through the confessions made by the second and third accused to find out whether the same is true. As stated herein, PW3 testified how the third accused confessed that the killing had been instigated and executed by the first accused by chopping the deceased head with panga whereby the second and third accused held the deceased hands and legs. PW3 stated further that, the accused persons took the police at the place where the deceased was killed which happened to be the very place where the body was found.

The story in the cautioned statement (Exhibit PE2) is not different to the oral confession by the second accused before PW3. In the cautioned statement, the second accused went on to state that, upon cutting the deceased at the neck head, the first accused ordered them to throw the body in bush (*kichaka*). It also depicted from Exhibit PE2 that the first accused warned the second and third accused not to disclose about the deceased death. Further to that, Exhibit shows that the accused person led the police to the place where the deceased person was killed. That fact was corroborated by PW3.

At this juncture, I am satisfied that the oral confession by the third accused and the cautioned statement (Exhibit PE2) by the second accused are nothing but the truth. I hold so upon considering that, both confessions are so detailed and

elaborate. Furthermore, Exhibit PE2 gives a narrative of the second accused's personal particulars. Also both confessions outline the series of events resulting to the killing of the deceased to the extent that no other person except an offender of the crime would have known. It is for the foresaid reasons that, this Court finds it safe to rely on Exhibit PE2 and oral confession by the third accused as adduced by PW3.

Before arriving at that decision, I have considered the defence by the second and third accused. The second accused person stated that he was sick on the material date and that he did not go anywhere. On his part, the third accused stated how he was arrested and implicated in the case at hand. He also stated to have informed the persons who arrested him that, he was farming at Charles Ghati Maswi's *shamba*. Thus, the second and third accused persons raised the defence of *alibi*. However, no prior notice was given before the closure of the prosecution as required under section 194 of the CPA. Belated defence of *alibi* casts doubts on its authenticity. Furthermore, they did not call the witnesses who were with them. For the foresaid reason, and in view of what was held **Masoud Amlima vs R** (1989) TLR 25, the defence of *alibi* raised by the accused person cannot be considered. It did not raise doubt to the prosecution's case. Therefore, I accord insignificant weight to the evidence adduced by the second and third accused.

As to the first accused person, the sole evidence which connects him in the offence levelled against him is Exhibit PE2 and oral confession by the third accused. In terms of section 33(1) of the Evidence Act, if it is proved that one accused made a confession affecting himself and other accused person jointly charged for the same offence, that confession may be taken into consideration against other accused. However, no conviction of an accused person shall be based solely on a confession given by the co-accused. This position was well

stated in **Seleman Rashid and others vs R** (1981) TRL 252 (HC) where it was held that:

*"The court of Appeal has on numerous occasions held that a confession by an accused person can only be used as lending assurance to other evidence against the co-accused and that it cannot be used as the basis for the prosecution case. See **Gopa V.R (1993) 20 EACA 318 and Ezera V.R. (1962) EA 309**. Thus, as a matter of practice, a conviction should not be based solely on the co-accused..."*

Likewise, in **Pascal Kitigwa vs R** (1994) TLR 65, the Court of Appeal stressed that, while uncorroborated testimony of the co-accused may be used to convict the accused and it is not illegal, a trial court must warn itself of the risks of relying on such testimony. The Court of Appeal held:

"However, as correctly observed by the trial magistrate and the learned judge, even though the law is such that a conviction based on uncorroborated evidence of an accomplice is not illegal, still as a matter of practice, the then Court of Appeal for Eastern Africa and this Court have persistently held that it is unsafe to uphold a conviction based on uncorroborated evidence of a co-accused. In this case, the trial magistrate as well as the learned judge on first appeal apart from warning themselves of the danger of convicting on uncorroborated evidence of the second accused (DW2), went further to look for other evidence implicating the appellant. It is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words of the accused."

It is deduced from Exhibit PE2 that the first accused warned the second and third accused not to disclose the fact as to how the deceased got killed. Now an inference can be drawn from the first accused conduct upon the deceased's disappearance. Was the matter reported to the neighbours or village authorities? The first accused and his wife (DW2) stated on oath that the first accused went to search for the deceased in the forest before reporting the matter to the village executive officer and neighbors, PW5 inclusive. DW1 went on to depose that, upon receiving that information, the VEO raised an alarm and the villagers went in the forest. Lastly, in his evidence in chief, DW1 contended to have reported the matter to the police who went to the scene of examine the body. However, according the neighbour (PW2) of the first accused, the villagers went in the forest after getting an information of the head found in the forest. Further, PW5 who found the head in the forest deposed that, the first accused was not his neighbour. When asked by one of the assessors, PW5 testified that he had no information as to whether the deceased went missing. This suggests that the first accused did not testify the truth on the report made by him when the deceased went missing. Such lies may be used to corroborate the prosecution's case as held in **Felix Lucas Kisinyila v. R**, Criminal Appeal No. 129 /2009 that:

"Lies of the accused person may corroborate the prosecution's case."

I have also considered the fact that the second accused is the first accused's relative. When cross examined by the learned counsel for the second accused, the first accused person stated that he has no grudges with second accused. Therefore, I find nothing to hold that the second accused had different motives or malice of implicating and getting the first accused person in sufferance with him. In the circumstances and having warned myself on the danger of relying on confession of co- accused, I am of the considered view that the confessions

made by the second and third accused may safely be relied upon to convict the first accused person.

There is also issue as to the value of evidence of PW6. According to his evidence, he was among of the persons arrested for the case at hand and discharged. Therefore, he is an accomplice. Pursuant to section 142 of the Evidence Act (supra), an accomplice is a competent witness against an accused person. A conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Further, in **DPP V.P. 2261 Capt. Sam Mwanidela and 3 others**, (CAT) Mbeya Criminal Appeal. No. 14 of 1991 (unreported), it was held that, corroboration of accomplice evidence is not necessary and that, a court may act on uncorroborated evidence upon being satisfied such evidence can be relied upon.

In this case, the Court found PW6 as competent witness. His evidence was to the fact that, he witnessed the second accused recording the cautioned statement. PW6 told the Court that, he was asked by the second accused himself to be present. Having considered the Exhibit PE2 was not objected and that PW6 was not challenged to have induced the second accused, I am of the considered view that, this Court can rely on his evidence.

Therefore, in terms of the oral confession and the cautioned statement, it is clear that the deceased was killed by the accused persons. PW1 examined the dead body found in the forest whereby the accused confirmed that, it was the same place where the deceased was killed. However, the report on post mortem examination (Exhibit PE1) cannot be considered by the Court. It was not signed by the PW1 who prepared it thereby contravening section 11(3) of the Inquest Act, Cap. 24, R.E. 2019. I accordingly expunge Exhibit PE1 from the record. Even if Exhibit PE1 is expunged, PW1's oral testimony as to the cause of death

remains intact. Moreover, even if the evidence of PW1 did not establish whether the body belonged to the deceased, the fact that Mwita Machera Waryoba is dead and that he died unnatural death was well proved by the confessions by the second and third accused. It was also not disputed by DW1 and DW2 who alleged to have identified the dead body as that as of the deceased, their son.

It is also necessary to consider whether the accused persons killed the deceased person with malice aforethought within the meaning of section 200 of the Penal Code (supra). Courts have discussed situations which constitute malice aforethought. For instance, in the case of **Moses Michael Tall V R. (1994) TRL 195** it was stated that-

- (i) *Malice aforethought may be inferred from the amount of force which an offender employs in inflicting fatal injury;*
- (ii) *The conduct of the accused may be indicative of malice aforethought as it was in this case where the appellant was persistent in beating the deceased for a long time and prevented intervention by persons who wanted to help the deceased.*

There is evidence that the accused was cut and his head chopped, the body was thrown in the bush (*kichaka*), all accused person did not disclose the fact about the deceased. In my opinion, such evidence proved that the accused person had malice aforethought.

Reading from Exhibit PE2, it was contended that the second and third accused were forced by the first accused person to kill the deceased. The issue then is whether the defence of compulsion can stand in favour of the 2nd and 3rd accused. In terms of section 17 of the Penal Code, a defence of compulsion can only be accepted upon showing that during the whole of the time in which the

act of killing was being done the accused was compelled to do the act under pain of instant death or grievous bodily harm if he refused to kill. Threats of future injury, a fear to displease does amount to compulsion within the meaning of section 17 of the Penal Code. In this case, neither the second accused nor the third accused who adduced evidence to prove that they participated in killing the deceased under pain of instant death or grievous harm upon refusing to kill. They opted to raise the defence of *alibi* which was also not demonstrated on the balance of probabilities as earlier on stated. However, reading from Exhibit PE2 nothing suggesting that, the second and third accused were compelled to participate in killing the deceased under pain of death or grievous harm if refused to kill the deceased. Thus, the defence of compulsion cannot stand in the circumstances of this case.


In the final analysis, I am in agreement with the lady and gentleman assessors who opined that the prosecution case was proved on the required standard and found all accused persons guilty of murder of Mwita Machera Waryoba. Consequently, I find all accused persons guilty and convict them of offence of murder under sections 196 and 197 of the Penal Code (*supra*) as charged.

DATED at TARIME this 11th December, 2020.




E.S. Kisanya
JUDGE

Court: Judgment delivered in open court this 11th December, 2020 in the presence of the accused persons and Mr. Tumaini Kigombe, Ms. Rebecca Magige and Ms. Pilly Marwa, learned counsel for the defence and Mr. Frank Nchanila, learned State Attorney for the Republic.


E.S. Kisanya
JUDGE
11/12/2020

SENTENCE


Having heard the submissions by both parties on the appropriate sentence, and in view of section 197 of the Penal Code (supra) and section 322 of the Criminal Procedure Act (supra), Machera s/o Wayroba @ Gorwe, Sasi Kibuche @ Wambura and Amos s/o Mwita @ Mashauri are hereby sentenced to suffer death by hanging


E.S. Kisanya
JUDGE
11/12/2020

COURT:

- (i) The right of appeal to the Court of Appeal explained. It should be filed within thirty (30) days from the date of this judgment.
- (ii) Assessors thanked and discharged.




E.S. Kisanya
JUDGE
11/12/2020