

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

SITTING AT BARIADI

CRIMINAL SESSION NO 64 OF 2016

REPUBLIC

VERSUS

BOMOLA S/O MADUHU.....1st ACCUSED

IMMA S/O LIGU @ NTANI.....2nd ACCUSED

JUDGMENT

Date of the last Order: 6th November 2020

Date of the Judgement: 5th February, 2021

MKWIZU, J.:

Nchama Mazala and Limi Jeje died unnatural death on 14/2/2013. Their death is associated with witch craft. It was alleged that Nchama Mazala had be witched Gineri Lukonza who in revenge hired the accused persons **SITTA S/O JOHN @ MWANAZABE, BOMOLA MADUHU, IMMA LIGU @ NTANI** and another person to kill her. The particulars of the offence as well as the prosecution evidence is to the effect that on 14th February, 2013 the accused persons invaded the residence of Jeje s/o Luchogela (Nchama

Mazala's husband and a father to Limi Jeje) at Banemhi Village- Mitimongi within Bariadi District in Simiyu Region and murdered the two deceased persons by cutting them with a panga on different parts of their body.

The arrest of the accused persons was not done immediately. They were arrested three years after the incident. On 28/3/2016 acting on information from their informer, PW4 a police officer, managed to arrest **SITTA S/O JOHN @ MWANAZABE** at Nyamikoma village. According to PW4's evidence, Sitta John was being associated with the killing of elderly people (Vikongwe) in their locality. On interrogation, PW4 testified, Sitta John @ Mwanazabe confessed to have murdered Nchama Mazala and Limi Jeje and mentioned **BOMOLA MADUHU, IMMA LIGU @ NTANI** and another person as his associates. PW4 testified further that, Sitta John led them to the residence of the two accused persons and managed to arrest them on 7/4/2016. Accused were taken to Bariadi Police station where they arrived at 5.00hours, accused's cautioned statement's recorded followed by an information of murder comprised of two counts of murder contrary to **Section 196 and 197 of the Penal Code Cap 16 RE 2002.**

During preliminary hearing all accused persons pleaded not guilty to the charge. Before the commencement of the trial, this court was informed by the Prison authorities that 1st accused person, Sitta John @ Mwanazabe has passed away. The said information were backed up by the death certificate. Thus, the court marked the case against the 1st accused as abated, his name was hence expunged from the list of the accused persons and the trial on that ground proceeded against Bomola Maduhu as 1st accused and Imma Ligu @Ntani as 2nd accused.

To prove their case, prosecution paraded a total of 4 witnesses supported with 5 exhibits namely the two Post Mortem Examination report, sketch map of the scene of crime, 1st and 2nd accused's cautioned statement which were admitted as exhibit P1, P2, P3, P4 and P5 respectively. The defence on the other hand, called two witnesses, the accused persons who testified in person.

During trial the accused enjoyed the services of Mr. Martine Sabini learned counsel, whereas, the respondent/Republic was represented by Rehema Sakafu learned State Attorney assisted by Ms. Chema Maswi and Violeth

Mushumbuzi also learned State Attorneys. The trial was assisted by two ladies and one gentleman assessors.

The first prosecution witness is a police officer from Bariadi Police station, Detective Corporal Noelia, with Police Force Number WP. 3917. She participated in recording the cautioned statement allegedly made by the 2nd accused, Imma Ligu @ Ntani in his office on 7th April 2016. This witness recounted on how she received instruction from her boss to interrogate the second accused. She said, she took Imma Ligu @ Ntani (2nd accused) from the police Lock up to the investigation room. She recorded the statement from 7:00hrs to 8:15hrs after she had complied with all necessary procedures governing interrogation, including informing the accused of his basic rights, including that he may wish to give his statement which may be used in evidence against him in a court of law, right to call a relative or lawyer to be present while his statement is being recorded. PW1 said, 2nd accused consented to his statement recorded in the absence of any other person and signed the statement signifying his understanding of the process.

In his cautioned statement, stated PW1, Imma Ligu @ Ntani admitted to have murdered Limi Jeje and Nchama Mazala at Mitimongi in Banemhi village and mentioned his associate in the commission of the alleged offence to be Sitta John @Mwanazabe (deceased), Bomola Maduhu (first accused) and Kafula Mang'ombe who is not in court. After the recording, PW1, said, she read the statement to the accused person who signed the statement by use of thumb-print. The cautioned statement was admitted as exhibit P4.

PW2, is also a police officer from Bariadi Police Station criminal investigation department with Police Force Number **F 1143 D/CPL VEDASTUS**. He testified on three main issues. **One**, that he visited the scene of crime on 14/2/2013 where he drew a sketch map (Exhibit P3). **Two**, that he participated in arresting 1st and 2nd accused persons on 7/4/2016 at Mwadobano and Banimhi village and **three**, that he recorded the cautioned statement of the 1st accused on 7/4/2016 (exhibit P5).

On how he happened to visit the scene, PW2 said, on 14/2/2013 while at Bariadi Police Station he received information from OC/CID Bariadi – ASP Anord Mbise that there is an incident involving the murder of two women

Limi Jeje and Nchama Mazala at Banemhi Village .With his other colleagues including Dr. Nteremko, PW2 visited the scene and witnessed the two dead bodies with cut wounds on different parties of their body. PW2, narrated further that, Dr. Nteremko examined the bodies, and he, himself drew a sketch map plan of the scene and other police officers took the witnesses statements. In his evidence, PW2 said, no information from the scene enabled them to know the perpetrator. Jeje Luchogela, the father of Limi Jeje (deceased) and a husband to Nchama Mazala (also deceased) was arrested and taken to the police for further investigation. The reason why they arrested Jeje Luchogela was that he was sleeping at the sitting room on the fateful date while the murder was committed in the bedroom inside the same house.

On the other hand, PW2 testified that on 7/4/2016 at 2.00 am along with Assistant Inspector Gaudent and other police officer went to Mwadobana Village. At Mwadobana they were taken by Sitta John one of the suspects for purposes of showing them his associate in the murder of Mazala and Limi Jeje. At Mwadobana, they arrested Bomola Maduhu @ Magembe at 2.30 am

before heading to Banehmi village where they arrested Imma Ligu @ Ntani at 4:30 am and at 5.00hrs they were at Bariadi Police Station.

On how PW2 came to record the 1st accused's statement, he testified that he took the accused from the police lock up after he was instructed by his boss to record his statement at 7.00 am. The interrogations were conducted at the investigation room between accused Bomola Maduhu and PW2, in exclusion of other people after Bomola Maduhu had accepted to give his statement in the absence of his relative or lawyer. He said, the recording was done from 7:05 am to 8:10 am. Before the interrogation, PW2 said, he complied with all necessary procedures governing interrogation, including informing the accused person of his basic rights, including that he is not forced to give his statement, but if he so wishes, he may wish to have his relative or lawyer present during the interrogation. PW2 said, the 1st accused was literate and therefore he gave him the statement to read and signed the same by his own hand. The cautioned statement was tendered as exhibit P5.

PW3 is Liberata Muhagama a former Primary Court Magistrate at Somanda Primary Court. She testified to have recorded the extra judicial statement of

Imma Ligu, on 9/4/2016. She stated that, Imma Ligu @ Ntani had confessed to have killed Nchama Mazala and Lima Jeje by cutting them with a panga.

E 2878 D/CPL DOMINIC testified as PW4. He is a police officer and the investigator of this case. His evidence was to the effect on 14/2/2013 with Dr. Ntelemko , D/CLp Vedastus and other police officers visited the scene of crime at Banemhi Village. He said, the two deceased persons were Nchama Mazala and Limi Seje, a wife and a daughter of Jeje Luchogela. He interviewed villagers at the scene but could not get hints as to who was responsible.

Three years later, that is, in the year 2016 he got information that Sitta John @ Mwanazabe was engaging in killing elderly people (Vikongwe) in the village. He managed to arrest Sitta John at Nyamikoma village on 28/3/2016. On interrogation, Sitta John confessed to have murdered Nchama Mazala and Limi Jeje and mentioned Bomola Maduhu of Mwadobana Village, Imma Ligu @ Ntani of Banemhi village and Kafula Mang'ombe of Maswa as his associates. It was PW4's evidence that, Sitta John @ Mwanazabe assisted

the Police on the arrest of the 1st and 2nd accused persons on 7/4/2016. He confirmed to have the information that Sitta John is now dead.

DW1, is Bomola Maduhu. He disassociated himself from the offence. He said, he was arrested at his home on 6/4/2016 at 00:00 hrs and joined with the second accused person whom he never knew before. They were taken to Bariadi Police station where they arrived at 2.00am. DW1 refuted to have volunteered to give a cautioned statement. On this, he said, he was taken out of the police lock up on 11/4/2016 five days after his arrest, beaten and forced to sign the statement he did not know.

DW2 is Imma Ligu @ Ntani, second accused person. Like the first accused person, he disowned the charges against him. His defence was that he was arrested by police officer on 6/4/2016 at 22:00 hours, taken to Bariadi Police where they arrived at 2:00 am and on 8/4/2016 he was taken to the investigation room, beaten and forced to sign the cautioned statement. He denied to have killed the deceased person and wondered why he is connected with the murder of Nchama Mazala and Limi Jeje.

After the closure of the case by both sides, both counsels presented their closing submissions. Defense counsel's submission was geared at challenging the prosecution that it failed to prove its case beyond reasonable doubts while the prosecution side maintained that they managed to prove the case against the accused persons beyond reasonable doubts.

On their part, having being invited to give their opinion, all three assessors were of the opinion that the prosecution has failed to prove the case beyond reasonable doubts. They were of the view that, accused are not guilty of the offence charged.

It is clear from the evidence on the record that the two deceased persons are dead. Their death was substantiated by the Postmortem examination reports exhibit P1 and P2 plus the evidence of PW2 and PW4 who visited the scene on the material date. Now, the court's duty is to see whether accused persons are responsible or not. In their evidence as well as the final submissions, prosecutions ascribe the guilt in this case with the accused person Bomola Maduhu and Imma Ligu@ Ntani while the defence denies the blame. Observed from the evidence by the prosecution in this case is that

there is no direct evidence. Prosecution relies much on circumstantial evidence as none of the witness saw the accused person committing the offence. Now to ground a conviction on circumstantial evidence, such evidence must be incapable of more than one interpretation. This is the guiding principle. See the case of **Magendo Paul And Another v. R** (1993) TLR 219, **Hamidu M. Timotheo v. R and Another** (1993) TLR 125 **Hassani Fadhili v. R** (1994) TLR 89, and **Abdul Muganyizi v. R** (1980) TLR 263 to mention just a few. The important questions therefore are:

1. Whether the circumstantial evidence led by the prosecution in this case has sufficiently managed to hold accused persons responsible, if yes,
2. whether the commission was with malice aforethought.

Going by the evidence adduced by both parties, the murder was committed on 14/2/2013 and accused person were arrested on 7th April 2016 three years after the said murder. Again, it is evident from the records that, no eye witness who saw the accused persons, Bomola Maduhu and Imma Ligu, killing the deceased Nchala Mazala and Limi Jeje. I am alive of the principle

of the law that where no witness testified direct to the facts, proof may be carried out by a series of facts which in their combination lead to one satisfactory conclusion that it is the accused person who committed the offence.

The prosecution's evidence in this case is based on the accused's cautioned statement, Exhibit P4 and P5 admitted after being found voluntarily obtained in a trial within a trial. This version of evidence was supported by the evidence of PW4, investigator of the case.

As hinted above, no one, at the scene, or elsewhere had knowledge on who murdered the deceased persons on the material date at Jeje Luchogela's residence in Mitiming - Banemhi Village until 2016 when PW4 received information connecting Sitta John @Mwanazabe with elderly killings. He arrested Sitta John on 28/3/2016 who confessed to have killed the deceased in this case and mentioned his colleagues as Bomola Maduhu, Imma Ligu and another person who is not in court. PW4 said, Sitta John assisted the police in arresting the accused in this case. On how Sitta John was arrested and accused persons implicated, PW4 said:

"In my investigation I got information of the people responsible. This was in 2016 We were informed that the killing was executed by one person known as Sitta John @ Mwanazabe. ...I went to Nyamikoma village and arrested Sitta John @ Mwanazabe. I was with my fellow police officer D/C Alloyce. We took Sitta John to the police station, on interrogation he confirmed to have killed Nchama Mazala and Limi Jeje. He said he killed the said people with Bomola maduhu , Imma Ligu @ Ntani of Banemhi village and Kafula Mang'ombe of Maswa. He also agreed to take us to the residence of his fellow..."

In another version of his testimony, PW4 stated that:

"Sitta John recorded his extra judicial statement. Imma Ligu confessed before the justice of peace but Bomola maduhu did not confess before the justice of peace..."

Regrettably, Sitta John's statement, be it cautioned statement or extra judicial statements incriminating the accused persons in this case was not made part of the court records. PW4's evidence doesn't show as to whom, Sitta John confessed and before whom he (Sitta John) recorded his extra judicial statement. This court is therefore denied the advantage of seeing

this important piece of evidence whose details could have connected the accused person to the murder of Nchama Mazala and Limi Jeje.

In its stead, the prosecution relied on the accused's cautioned statements which though admitted were retracted by the accused persons in their defence. It is a trite law that, for a court to convict an accused person on a retracted /repudiated confession, that confession must be corroborated by other independent evidence unless the court is satisfied that the confession contain nothing but the truth. This was so said by the Court of Appeal in the case of **Hatibu Ghandi & Others v. Republic** [1996] TLR 12 and **Kashindye Meli V. R** (2002) TLR 374 to mention just a few.

In **Tuwamoi v. Uganda** [1967] EA 84, 91 the court said:

*"If the Court is satisfied that the statement is properly admissible and so admits it, then when the court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted. In assessing a confession, the main consideration at this stage will be, is it true? And if the confession is the only evidence against an accused then the **court must decide whether the accused has correctly related what happened and***

whether the statement establishes his guilt with that degree of certainty required in a criminal case. This applies to all confessions whether they have been retracted or repudiated or admitted, but when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession is true" (Emphasis added)

Again, in **Ndorosi Kudekei vs The Republic**, Criminal Appeal No.318 of 2016- CAT Arusha, (unreported) cited by the defence counsel in his final submissions, the Court held:

"A trial Court should accept any confession which has been retracted or repudiated or both the retracted and repudiated with a caution and must before founding a conviction on such a confession be fully satisfied in all circumstances of the case that, the confession is true."

In another case of **Hemed Abdallah V. Republic**, (1995) TLR, 172 the court also said:

"Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular or unless the court after full consideration of the circumstances, is

satisfied that the confession must be true; and that once the trial court warns itself of the danger of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true, it may convict on such evidence without any further ado."

To conclude whether accused persons are responsible or not, under the principles elaborated on the cited cases above, it is important to examine the accused's cautioned statements (exhibit P4 and P5) along with the remaining evidence available. At page 4 of his statement (*Exhibit P5,*) *1st accused person is alleged to have said, I quote:*

"...mnamo mwezi February 2013 majira ya usiku sikumbuki muda mimi na mwenzangu Ntani Ligu @ Hima tulipata kazi nyingine ambapo tulifika kitongoji cha mitimingi Kijiji cha Banimhi nyumbani kwa Jeje s/o Luchogela, tuliua watu wawili, mke wa Jeje s/o Luchogela aitwaye Nchana d/o Mazala na binti yake aitwaye Limi d/o Jeje. Wote tuliwauwa kwa kuwakata na mapanga sehemu mbalimbali za miili yao baada ya kuvunja mlango"

According to the portion of Exhibit P5 quoted above, 1st accused allegedly confessed to have committed the offence with the 2nd accused Ntani Ligu. Confessing on the same incident, 2nd accused's statement (exhibit P4) at page 2 reads:

"... mwezi 2/2013 huko katika kitongoji cha mitimingi Kijiji cha Banemhi, mimi , Bomola s/o Maduhu, Kafula S/o mang'ombe tulimuua mama mwingine aitwaye Nchama s/o Mazala pamoja na mtoto wake aitwaye Limi Jeje. Tuliwauwa kwa kuwakata mapanga na mimi nilikuwa na panga nilimkata Nchama Mazala na Limi d/o Jeje

.....Ila mwenzetu ambaye tunakuwa naye katika kikosi cha kuuwa SITTA JOHN@ MWANAZABE naye tulimpatia pesa Tsh 50,000/="

None of the two statements above mentioned Sitta John @ Mwanazabe as a person cooperated in killing Nchama Mazala and Limi Jeje. As stated earlier, there is no statement by Sitta John @ Mwanazabe on the record detailing his involvement in the murder with the two accused persons in court. Thus, as far as the prosecution evidence is concern, the issue whether Sitta John implicated the accused person or not is an extraneous fact not brought for court's consideration. This being the case, the accused's caution statement remains the only evidence relied upon by the prosecution. Exhibit

P4 and P5 are at variance with PW4's testimony on the participation of Sitta John @ Mwanazabe on the said murder. On their defence, both accused persons refuted to have volunteered giving the statements. Their defence was that they were beaten and forced by police officers to sign the statement they do not know.

Initially in his evidence in chief, PW4 said, Sitta John @ Mwanazabe confessed to have killed the two deceased persons and implicated his two co accused person Bomola Maduhu and Imma Ligu @ Ntani. On cross examination, PW4 clarified that, Sitta John was mentioned to be among persons involved in killing elderly people (vikongwe) in their locality. On a further cross examination on whether Nchama Mazala and Limi Jeje were elderly women. PW4 answered affirmatively that, Nchama Mazala was of 55 years of age while Limi Jeje was killed because she identified the killers at the scene. I have examined the entire evidence on the records, nothing was brought to suggest that Nchama Mazala was 55 years of age. The Post mortem examination report, (Exhibit P1 and P2) both of Limi Jeje and Nchama Mazala had categorized the two deceased persons as adult persons. No mention of age was preferred. This piece of evidence is again destitute

on bringing home the prosecutions allegations. This evidence cannot by any standard support the information against the accused person.

There is yet another unexplained fact. In this case, apart from the police officers who allegedly attended the scene of crime on the material date, arresting officers and the officers who recorded the accused's cautioned statement plus the justice of peace, no an independent witness called to testify in court. Jeje Lushogela witnessed the killing. It is the prosecution's evidence that Jeje Lushogela was at the sitting room when the deceased were being killed in the bedroom of the same house.

Though I agree with the learned State Attorney that according to section 143 of the Evidence Act, Cap 6 R.E 2019, there is no specific number of witnesses requires to prove a fact. What is required is the quality of evidence and credibility of witnesses as per the clarifications given in **Geoffrey Sichizaya V. DPP**, Criminal Appeal No, 176 of 2017, (Unreported). I do not, however, agree that Jeje Lushogela was immaterial witness worth ignoring in this case. It should be remembered that Jeje Lushogela was the only independent witness who witnessed the incident on the material date. He

was in the same house. I think Jeje Lushogela was necessary such that had he been called to testify he could have informed the court the factual circumstances of the commission of the offence. Unfortunately, this witness was not called. It is an established principle of the law that an inference may be drawn where the person(s) omitted is within reach and not called without sufficient reason being shown by the prosecution side. This was said in the case of **Aziz Abdalla v. Republic** [1991] T.L.R. 71 where it was stated thus:

*"The general and well known rule is that the prosecutor is under **a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts.** If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*
(Emphasis added)

See also the case of Hemedi **Said V. Mohamedi Mbilu**, (1984) TLR.113, **Julius Kandonga v. R.**, Criminal Appeal No. 77 of 2017 (unreported) and **Bashiri John v. Republic**, Criminal Appeal No. 486 of 2016 (unreported).

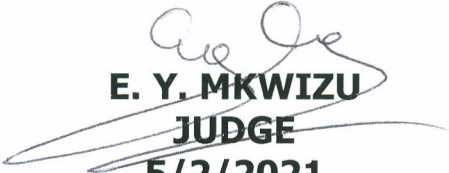
In this case, prosecution did not summon Jeje Lushogela as a witness and no reason were adduced as to why he was not brought to the witness box. I find the omission to summon this important witness without explanation a mistake attracting the court drawing an adverse inference as I hereby do. This, with the above explained reservations, raises doubt as to whether accused person statements speaks of the true story accused narrated to the police or something else. This is so because, accused person made their statement while under police restraints, thus without extra judicial statement and in the absent of an independent corroborative evidence connecting them with the alleged murder committed on 14th February 2013 three years prior to their arrest raise reasonable doubts which I resolve in their favour.

I have to categorically reiterate here that burden of proof in this matter lies on the prosecution. Given the analysis of evidence above, I find that prosecution have failed to discharge that duty. As a result, like the

honorable court assessors, I am convinced that prosecution has failed to prove their case to the required standards. Consequently, accused persons are hereby acquitted of the offence of murder under the provisions of sections 235 (1) of the Criminal Procedure Act [Cap 20 RE 2019] with further directions that, accused persons, **Bomola Maduhu** and **Imma Ligu @ Ntani** be released immediately from prison unless they are otherwise lawfully held.

It is so ordered.

DATED at **BARIADI** this 5th day of February 2021



E. Y. MKWIZU
JUDGE
5/2/2021

COURT: Right of appeal explained.



E. Y. MKWIZU
JUDGE
5/2/2021

COURT: This judgment was delivered **virtually** through **video** conference today, 5th February, 2021 where Ms. Rehema Sakafu learned State

Attorneys for the prosecution, Mr. Martine Sabini learned advocate for the accused persons and the accused person were connected electronically.



E. Y. MKWIZU
JUDGE
5/2/2021