

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

SITTING AT TABORA

(Tabora Registry)

CRIMINAL SESSION CASE NO. 53 OF 2018

THE REPUBLIC

VERSUS

1. JILEKA S/O MACHIYA

2. NGASA S/O HINGU

JUDGMENT

Date: 17/02/2021 & 5/3/2021

BAHATI,J.:

The facts of this case are brief and straightforward. The accused persons namely **JILEKA MACHIYA @ JILEKA** and **NGASA HINGU** stand charged with two counts of murder contrary to section 196 of the Penal Code, Cap.16 [R.E 2019]. It was alleged that on the 23 February, 2016 around 23:00 at Legezamwendo, Uyui District, Tabora region the

accused persons together murdered one Fumbo d/o Jileka and Kabunye s/o Njige.

When the information was read over and explained to the accused persons in their language; the accused persons pleaded not guilty to the information.

The prosecution was led by Mr.Deusdedit Rwegira, learned State Attorney. The accused persons were represented by Mr.Khasimu Musa, and Ms.Elizabeth Kijumbe, learned counsels.

The Honourable assessors who sat with me, in this case, were Ms.Muhtaza Hussein, Ms. Grace Mwigira, and Ms. Rehema Mwambelo.

It is not in dispute that the deceased's persons are dead and they died a violent death. This was confirmed by the evidence of all witnesses who testified to the court that the deceased body had injuries on the head and part of the body. This is further confirmed by the report on the post-mortem examination tendered as Exhibit "P1" and P2 respectively that;

“The body found lying in the house with the depressed wound on frontal skull bone. The depression of skull injured the brain, hence respiratory and cardiac arrest leads to death.” and

P2

"The body was found lying on the bed with clotted blood and depression on the skull left side (temporal bone area). This depression causes brain injury which leads to respiratory and cardiac arrest lead to death."

Basing on the state of the body, there can be no doubt that the deceased met a brutal death and whoever is responsible must have intended to cause death or grievous harm. The only issue for determination therefore in this court is whether the accused persons in the dock who with *malice aforethought* caused the deaths of **Kabunye s/o Njige and Fumbo d/o Jileka**.

The Republic represented by learned State Attorney Mr. Rwegira Deusdedit summoned and marshaled a total number of seven witnesses and four exhibits namely, Post-Mortem Report, Cautioned Statements, Extra Judicial Statement, and a sketch map to prove its case.

The first prosecution witness **PW1, Sindabakila Serejio** a medical doctor who examined the bodies testified that on 24/02/2016 he examined the bodies of Kabunye Njige and Fumbo Jileka. That, he found the bodies in two different houses at the same compound, and after the examination; he revealed that both deaths were unnatural.

He testified further that, both bodies had wounds that seemed to have been caused by a heavy blunt object. This witness prayed to tender two postmortem reports, one of Kabunye Njige and the other of Fumbo Jileka. The two documents were admitted by this court and marked as **Exhibit P1** and **P2** respectively.

When cross-examined, PW1 stated that he has been working for 37 years. Ten years of experience as an assistant doctor. On 24/2/2016, he examined the bodies of the deceased persons at 17:30hrs at Lutona village which were in different rooms. He then wrote a summary report after examined the bodies of the deceased at 18.30hrs.

In re-examination, he stated that he examined the deceased body and filled the form.

When asked by the second assessor, PW1 answered that he started with the female body and later on a male and filled the form.

PW2, Kija Kabunye testified that the deceased Kabunye Njige and Fumbo Jileka were his parents, the two were murdered on 23/02/2016 while at home during night hours.

Further that, he was awakened by his wife who informed him that his mother has been killed; he went to the place and found his mother's body lying on a bed. He went on to wake his father but he found him snoring after being cut by a machete.

This witness informed this court that, he didn't see a person who committed the crime but his wife informed him that, the crime was effected by two people whom she couldn't identify. PW2 stated further that, he suspected Jileka Machiya of being responsible for the killing.

He stated that Jileka is his relative, before the killing Jileka had threatened to kill Fumbo for the reason that she was bewitching his mother. They also received a letter which they suspected was written by Jileka, the letter had a message that *"Fumbo Jileka, Mchawi uhamela sivyoye tutakukata mapanga."*

That the matter was reported to the Village Chairman, Jileka was called and he admitted having written the letter but he assured the Village Chairman that he has suspended the plan so there was no need for Fumbo Jileka to move from her house. The matter was later taken to the Ward Executive Officer who fined him.

That, after that meeting Jileka left his home and shifted to another place called Ihumbu, Sangalawe. Basing on that prior incidence that the witness believed that Jileka was responsible for the crime.

When cross-examined he stated that he had already explained to the police what he knows. He stated that there is nowhere he was fined TZS 900,000/=. He was so confused because his parents were dead. Jileka was arrested at Sangawale, Nkongwa but was not found with any weapon. The matter was settled so they left the letter to Ward

Executive officer. He stated further that he had no letter which Jileka wrote to his mother. He further stated that he did not report the matter to the police but through their local leaders since the VEO was also a leader. He stated to the court that Jilekas' mother is still alive but they have moved to another place.

In re-examination, he stated that he came to this court to testify on the death of his parents who were killed by machete "mapanga" and nothing was stolen after the death.

When clarification by the third assessor was sought he stated that the accused person did not attend the funeral.

PW3, Mwagi Mayaya testified that Fumbo Jileka and Kabunye Njige who are now dead were his parents. The two were killed after being injured by a machete. This witness's testimony does not differ from that of PW2. He also believes that it is Jileka who was responsible for the crime because he had earlier threatened to kill his parents.

During cross-examination, he stated that there was a dispute between his mother and Jileka, in 2013. The letter was taken to the VEO (Mtendaji). He received information from his late mother. The accused's mother is still alive at Mwamlela. He did not witness the killings of his parents.

In cross-examination by the second defence he stated that he suspected the accused person.

In re-examination, he stated that Jileka killed his parents after he wrote a letter and admitted to having written the letter.

When sought for clarification by the first assessor he stated that Jileka killed his parents.

PW4, Hamadi Nzuki testified that in the year 2016 he was holding the position of Acting Deputy Village Executive. The deceased Fumbo and Kabunye were residents in his area of administration and they were killed by machete “mapanga”. That he received information about the incident because he was a leader, he went to the scene where he found two people had been killed, he then informed the police.

He testified further that; deceased’s relatives were suspecting Jileka because he earlier threatened to kill the deceased by writing them a letter. That, after fourteen days he got an order from the police to arrest the second accused Ngasa Hingu. He called Hingu to report to his office but he never reported instead he absconded to his in-laws in another village where he was arrested.

When cross-examined by the first defence counsel he said that he did not see who killed the deceased persons and he knew nothing about the letter.

Further, when cross-examined by the 2nd Defence counsel, he said that he used Militiamen "Mgambo" to arrest the accused person.

In re-examination, PW4 stated that the accused person was presumed to have committed an offence when he was called by his leaders for no reason runs away.

When sought for clarification by the first assessor he told this court that Ngasa Hingu was suspected to have killed the deceased.

PW5, E9471 DC Elli testified to the court that he works as detective police at Uyui Police station in the Criminal Investigation Department; his roles are to investigate crimes.

That, after the killing incident at Legezamwendo village, the information reached his department. On 24/02/2016 they went to the scene of the crime. That, at the scene they found two dead bodies, one was of a female person identified as Fumbo Jileka who was killed in her house and the second body was of a male person who was identified as Kabunye Njige.

Further to that, during an interview with the deceased's relatives, they informed him that there was a dispute between Jileka Machiya and Fumbo Jileka so they suspected Jileka Machiya to be responsible for the crime.

Jileka Machiya was arrested on 03/03/2016 and he was handed over to police on 05/03/2016 in the evening and on the same night he was transferred to Uyui Police Station, he reached the place on the same night. The following day he was ordered by OC-CID to record the cautioned statement of the accused, during the interview the accused Jileka admitted to having collaborated with Ngasa Hingu, Manyerere Kilo, and Mashinyari Shimba.

On 17/02/2016 they received information that Ngasa Hingu has been arrested and he was at the Village office, they went to the place, the accused was handed over to him and they took him to the police station on the same date in the evening.

Further to that, the accused was in healthy condition because no force was used during his arrest. During the interview, the accused admitted to having participated in the killings.

The prosecution prayed to tender two cautioned statements one of Jileka Machiya and that of Ngasa Hingu as prosecution exhibits, the prayer received objections which led this court to go for trial within a trial. Later the statement of the first accused Jileka s/o Machiya was admitted and marked Prosecution Exhibit P3 and that of the second accused was rejected.

The accused also mentioned Ngasa, Manyere, and Moshi Nyeli Shimba. The accused Ngasa Hingu was arrested by VEO on 17/3/2016 and he

was sent to the office of VEO. They took the accused person to the police station on 17/3/2016. He admitted having committed offence. He was in a good condition. Therefore he started to interview after he had explained his rights. He started recording from 08:30 hours completed around 10 hours at VEO's office Lutoro. He took both statements which he prayed to tender these exhibits in court.

In cross-examination, he said that Jileka was arrested on 3/3/2016 at Sangabale, Nkongwa village, and was sent to Village Executive Officer, Loya village. The accused was apprehended from 3/3/2016 – 5/3/2016. The police received information on 5/3/2016. It was 3 days since he was apprehended. The form is clear on what he recorded.

In re-examination, he told this court that the accused was arrested by the civilians. He was brought to the police on 6/3/2016. The forms/format are set in PGO and the police have a detention register where has the time, date, and condition of the accused, the property, reasons for detention, the book is kept in the charge room. It is found at Uyui where the accused's statement was taken since 2016 it is kept in the storeroom.

When sought for clarification by the 1st Assessor he stated that he handed over the statement of Jileka Machiya. The second accused's statement was rejected by the court.

PW6, Felix Wapalila testified that he is a magistrate working at Kigwa, and among other duties of a magistrate, he works as a justice of the peace. On 14/03/2016 Jileka Machiya was brought to him by Detective Elli to record his extra-judicial statement. He inspected the body of the accused person and found no wound.

The accused person informed him that the dispute commenced on suspicion that his aunt was bewitching his mother, he was arrested and sent to VEO regarding the murder. The accused told him that he was with four others who went to kill his aunt and uncle.

On 18/03/2016 the second accused Ngasa Hingu was brought to him by Detective Corporal Elli for being a suspect of murder. He also examined him and he wrote his statement.

The prosecution prayed to tender the two extrajudicial statements as exhibits but the defence side raised objections that the statements contravened Section 57(3) of the Magistrates' Courts Act, Cap.11, and they were recorded against the Chief Justice's guidelines on recording the extrajudicial statement.

The court ruled out that the extra-judicial statement of Jileka Machiya was admitted while that of the Ngasa Hingu was rejected as it contravened the guidelines set by Chief Justice.

In cross-examination, he further stated that before he was brought he did not know the accused person. The Chief Justice guidelines provide

for criteria. There is no place where he was arrested and nowhere had he slept before he was taken to him on 14/3/2016.

In re-examination, he told this court that the accused was expressing himself but did not tell him specifically where he was arrested.

When sought for clarification by the third assessor he told this court that he did not threaten the accused person.

PW7 D/C Shadhiri testified that he is an investigation officer and he has 10-years' experience. That on 24/02/2016 he went to the scene of the crime to draw a sketch map at Legeza Mwendo where two people were murdered. The sketch map of the scene of the crime was admitted and Marked Exhibit "P5".

During cross-examination by defence he stated that he went to the scene of the crime on 24/2/2016 at 14hrs. He did not indicate the date on a sketch map and signature.

Further, he told the second defence counsel that Kija Kabunye assisted them in the direction of North or South as they were not familiar with that place. That marked the end of the prosecution witness.

Having heard the evidence adduced by the prosecution side the court ruled out that in terms of section 293 of the Criminal Procedure Act, Cap.20 [R.E 2019] the evidence is sufficient to require the accused

person to give his defence which means the prosecution has established a *prima facie* case against the accused persons and they were given their right and was invited to make their defence.

The defence counsel Mr. Musa Kassim notified this court that the defence has one witness and that is the accused person and it has exhibit while the second accused person notified that he had no exhibit and both will defend under oath. Since the court had no time, it started to hear the defence side with the second accused Ngas Hingu, and the First accused was given time to prepare for his documents.

In his defence, DW1, the second accused **Ngasa Hingu** featured as **DW1**, and he had this to say, on 16/03/2016 while at home at Igunga militiamen entered his room and kept him under arrest. That, they assaulted him before taking him to the Village Executive Office at Lutona, he was jailed until the following day 17/03/2016 when the police came and left with him around 10:00hrs.

The police told him that he was a suspect of murder then they took him to Tabora Central Police station where he stayed until the following day 18/03/2016. That the following day he was taken to another room where he found two tables, iron bar and they started interviewing him. When he denied the allegations, they assaulted him using clubs then he was sent back to the cell.

That, he stayed at Tabora Station for many days then he was transferred to Isikizya, then the police at Isikizya took him to a Justice of the Peace at Kigwa to record the extra-judicial statement. This witness reiterated that; he is not responsible for the crime so he prayed this court to release him.

During cross-examination, DW1 told this court that he shifted from Igunga to Legeza Mwendo. He did not know the deceased persons as he was living far and also he did not receive any information on this event of murder. He only met with the accused person in prison. He was arrested by militiamen at Lutona. He had only one case before this court.

During re-examination, he told this court that before he was leaving at Legeza Mwendo he was at Igunga. He denied knowing any person nor the 1st accused Jileka Machiya.

When sought for clarification by assessors he informed this court that he was living at Igunga and moved to Legeza Mwendo in 2014 and he was arrested in 2016. Further to that, he stated that he heard the door was broken and was arrested by militiamen. He had no dispute with the militiamen.

DW2, Jileka Machiya testified that he used to live at Legezamwendo but he shifted to Sangawale in 2013; the reason why he

moved was just to change the environment. That, detective Elli came to testify that he wrote a letter something which is not true. He remembered that sometimes in 2013 his neighbor Fumbo Jileka received a letter from an unknown source but he was suspected to be the one who wrote the letter nonetheless he denied the allegations. They tied him with rope and started to assault him, he consistently denied the allegations but after a long time of the assault, he decided to admit and they locked him in VEO's office from 20:00hrs.

The next morning, Fumbo Jileka and Kabunye Njige came to the Office, the VEO questioned him in respect of the said letter, and he denied having written the letter. About the allegation that his mother was sick, the accused testified that his mother is alive and healthy she never got sick.

That, he was ordered to pay the fine but he refused they were advised and the dispute was settled. He returned home where he stayed for one month then he moved to Sangawale village and her mother moved to another place, the whole family moved, no one remained.

The accused testified further that, he didn't know Ngasa Hingu before they first met in jail and he is not responsible for the murder.

The accused added that on 28/02/2016 he was arrested at Sangawale by two militiamen then they took him to Loya, on arrival he

was placed in VEO's office; the following day he was interviewed and he denied the allegations.

On 01/03/2016 three policemen came, they sent him to Kigwa where they started interviewing him on the murder; they chained him on both hands and legs, tortured him while writing a statement. Later he decided to admit it because of the imposed torture.

During cross-examination, he told the court that his statement was written on 1st March 2016 and it was not true that he was interviewed on 6th March 2016. He does not know how to read nor write he can write his name but with uncertainty. The wholly caution statement by PW5 is not true. It was involuntarily taken as he was tortured hence he developed a disability on his left knee and had a scar which the accused person showed in the court.

In respect of PW6, Justice of Peace, he did not inspect him, since he could have seen the wounds. When interviewing no relative or friend was present. He told him he would like his relative to be there. It was not true the information given by the witness that he will kill his mother. Until now his mother is still alive and healthy. He was sent to the cell on 1st March, 2016.

During cross-examination by the State Attorney, he informed the court that he was arrested at Sangalawe. Before he shifted he was living at

Mawogo. His neighbors were Mandalu Mahona, Kabunye, Fumbo Jileka. Fumbo and Jileka are all dead. He received information through Loya office on their death. He stated that the letter was indeed thrown and they suspected him but he denied having written the letter. He found many people at Kabunye's home. There was no dispute with the deceased persons but they pointed fingers at him.

He moved where he was living before to change the environment. He said the statement was not true. He told his defence counsel that he was tortured by the Police but the justice of the peace did not torture him.

Both counsels did not wish to make the final submissions after closing their cases however prayed the court to proceed with the summing up to assessors.

After the said summing up to the Hon. Assessors, all were of the *unanimous opinion* that the accused persons are guilty of the offence charged and thus the court should enter a conviction and accordingly sentence the accused persons.

Before going into details of the prosecution evidence, it is apposite to arrange the major issues involved in this case. It is a fundamental principle of criminal jurisprudence that an accused person is presumed innocent until proven guilty. Essentially the burden of

proving the guiltiness of the accused persons lies with the prosecution and the standard set is beyond a reasonable doubt. These principles are meant to ensure that no innocent person is convicted of a crime on weak evidence. This Court is moved to determine whether the prosecution proved the case beyond reasonable doubt that the accused murdered the deceased persons. In answering these major issues, it is appropriate to address some legal issues involved in this case.

First, this is a criminal case that must be proved beyond reasonable doubt. The requirement is stipulated under section 3 (2) (a) of the Evidence Act, Cap. 6 [RE 2019] which reads:

“A fact is said to be proved when—

*(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the **prosecution beyond reasonable doubt** that the fact exists;”*

The above position is also stated in the case of **Hemed v. Republic [1987] TLR 117** where the Court held that:

“...in criminal cases, the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities.”

Second, the prosecution has the onus of ensuring that the offence is proved to the required standard. The stance was fortified in the case of

Mohamed Matula v. Republic [1995] TLR 3 where the Court insisted that:

“Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.”

Third, the accused is charged under section 196 of the Penal Code, Cap. 16 which establishes the offence of murder. It is therefore appropriate for the elements of the offence to be proved before a conviction can be entered against the accused. The section provides:

*“Any person who, with **malice aforethought**, causes the death of another person **by an unlawful act or omission** is guilty of murder”*

Four elements must be proved for the offence of murder to stand:

- i. There must be the **death** of a person;
- ii. Death must be a result of an **unlawful act** or by an **unlawful omission**;
- iii. It must be proved that the **accused** is the one who killed;
- iv. The killing must be preceded by a pre-meditated evil intention (**malice aforethought**).

The issue is who **did the act of killing** and whoever is responsible for that act must be proved by the prosecution that has done so with **malice aforethought**.

It is therefore with these legal principles and the provision of the law in mind, that I will now turn and analyze the evidence adduced by both prosecution and defence before this court.

On the facts, there is no dispute that **the deceased persons are dead** already the victims were murdered because they had wounds on the frontal skull bone which is unnatural death. The issue is who **did the act of killing** and whoever is responsible for that act must be proved by the Republic that has done so with **malice aforethought**.

Regarding the question of malice aforethought, it will be noted that the accused person, **Jileka Machiya** was accusing the deceased persons of being a wizard. The accused himself is piercingly clear in his confessional statement (Exhibit P3) that the deceased was practicing witchcraft to the extent of bewitching his mother. With great respect, therefore, I agree with the assessors who sat with me and opined that the accused person killed the deceased unlawfully and with malice aforethought.

The position of law on **malice aforethought** entail nothing than the **intention to kill** under section 196 of the Penal Code, Cap. 20.

According to the medical doctor who examined the bodies; the deceased bodies had cranial injuries. As earlier stated, the evidence before me shows that the prosecution discharged its burden of proof in terms of section 200 of the Penal Code, Cap. 16. The deceased persons were invaded and attacked during the night in their own house. There was no evidence of the deceased being armed. In attacking the two deceased, the accused persons formed the necessary malice intended to cause death.

I am convinced that the gravity of the injuries suffered by the deceased, the parties of the bodies targeted, and the nature of the weapon used implies malice aforethought. However, it is not always possible for one to declare or disclose his intention before killing a person. But through various case laws, the malice aforethought has been expounded to be revealed or present in various circumstances of each particular case. The Court of Appeal in the case of **Enock Kipela V Republic**, Criminal Appeal No. 150 of 1994 CAT (Unreported). The accused persons in the caution statement admitted to having used machete 'panga' to kill the deceased persons.

Although in this case, nobody testified in this court to have seen the accused persons directly killing the deceased person the whole case against the accused persons is based on **circumstantial** evidence of

PW2, Kija Kabunye, and PW3, Mwagi Mayaya who went at the scene of the crime when the deceased were already dead in which case they were not in a position to give evidence on what exactly had taken place. All that emerged from the evidence of these witnesses, PW2 and PW3 is the background relating to the life of the accused person who had a conflict with the deceased person for bewitching his mother.

It is after the dispute has been resolved by the WEO by paying a fine. The accused then shifted to Sangawale. Furthermore, **the accused's conduct** before the killing suggests that he had evil intentions against the deceased person for he wrote a letter and threw it outside the door of the deceased intending to kill them. This was also confirmed by the Prosecution witnesses that the accused had a dispute with the deceased. That being the case, it knocks my imagination as to how all the details on the sequence of events leading to the death were obtained and included in the accused's statements who else could have supplied such details if not a person who either saw or involved in it.

Having examined the **malice aforethought** of the accused person, in this case, the only evidence implicating the accused persons depends solely on the retracted **caution statement and extrajudicial statement** of the accused person. Since the accused person has denied having made it, legally it is called a repudiated confession.

Despite denial to have made the **caution statement**, a trial within a trial was held in absence of the assessors and the finding was that the accused person **Jileka Machiya** had made the statement voluntarily. This finding led to its admission as exhibit P3.

Like the ladies' assessors, I am also of the view that the allegation in the confession is corroborated by PW5_E9471 DC Eli and PW2, Kija Kabunye who testified to this court that the accused person Jileka Machiya had a dispute with his mother over bewitching his mother. The mentioned evidence stated matches in the confessional statements. I am of the view that this is not a coincidence. They are evidence of proof that the confession is true. In the same vein, since it is corroborated, it is safe to act upon it. I agree and I wish to add that the statement itself shows that before it was recorded the accused was asked several questions which includes:-

"Swali – Je uko tayari kutoa maelezo yako?"

Jibu- Ndiyo niko tayari kutoa maelezo yangu.

The same applied to the extrajudicial statement No.7 *"Mtuhumiwa anatoa maelezo kwa hiari yake bila kulazimishwa na mtu yeyote."*

It is my view that no better evidence could be found in this case as far as voluntariness of the statement is concerned.

However, for that matter for the court to act on it, it must pass three important tests: **Firstly**, it must be corroborated by independent evidence. **Secondly**, it must be established that the maker made it out of his free will, and **thirdly**, its central theme is believed to be nothing but the truth. According to the evidence of PW5, Detective Corporal Eli, in the making of the statement, the accused confessed to him. Hence the Detective Corporal Eli, PW5 is a credible witness because he is the only witnesses who testified on the confession, one alleging it was made the other one disputing. In such circumstances, he is the credible witness who is to be believed.

I have also noted that the Caution Statement and extra-judicial statement which were also admitted in this court answered the legal issue posed as follows:- Firstly, that the confession was voluntary and truthful because the extrajudicial statement has enough corroboration from the evidence of PW5 No. E9471 detective corporal Heri and PW6 PW6: Felix Rwapalila, Justice of Peace; that the statement says,

“ Mwaka 2006 nilihama kutoka kijiji cha Iyumbu kilichopo Singida kijijini na kuhamia kitongoji cha Mabogo kijiji cha Legezamwendo Kata ya Lutona ambako nilikuwa naishi na mama yangu mzazi pamoja na familia yangu. Jirani yetu wa karibu zaidi alikuwa ni shangazi yangu aitwaye Fumbo Jileka pamoja na mume wa

shangazi yangu aitwaye Kabunye Njige. Ilipofika mwaka 2013 mama yangu mzazi ambaye nilikuwa nikiishi naye aliugua maradhi ya tumbo ambapo tumbo lilikuwa linamuuma hali hiyo ilipelekea mama akawa anasema kwamba amelogwa na shangazi yangu Fumbo Jileka. Ndipo mimi nilichukua uamuzi wa kuandika barua ya vitisho kumtishia shangazi yangu nikimtaarifu kwamba aache kumloga nitamuua na kumtaka ahame hapo kijijini. Baada ya kuandika nilikwenda na kuitupa nje ya nyumba yake karibu na mlango wa mbele ...” Walinikamata baada ya kulipa faini ya TZS 900,000/= nilirudi nyumbani na kuendelea kukaa kwa muda wa mwezi mmoja nikahamia kijiji cha Nkongwa kitongoji cha Sangabale. Nilikaa pale hadi tarehe 21/2/2016 nilichukua panga na tochi na kuvaa kaptula na jacketi nilitembea kwa miguu nilitembea kwa miguu hadi kwa rafiki yangu Ngasa Hingu na yeye alichukua panga na tukaenda tukatekeleza mauaji hayo....”

The accused person repudiated his confession statement as he was tortured by the police before he went to the Justice of Peace for an extra judicial statement. The **Extra-Judicial Statement** was admitted by the Court and marked as an Exhibit P4. According to the Justice of peace when the accused was before him PW6 (Felix Rwapalila he cautioned him that he was before a Justice of peace and that he was

free to tell what had happened in relation to the incident if he so wished. There was no police around but still, the accused did not raise the question of having been tortured. A physical examination of the body of the accused was done which did not reveal any marks or injuries on his body. However, as it turned out, it was later on belatedly challenged during the defence case after the accused and his defence counsel had made sure that the Police Officer (**PW5**) to whom it was made had left the witness-box. The most sensible view I hold in this case is that the accused made a statement to PW5, in which he freely and unequivocally confessed to having unlawfully killed the deceased. In the circumstances, he cannot be heard today to seek to repudiate, retract or otherwise challenge his confessional statement. The court has properly directed itself on the evidence which the accused person Jileka Machiya in his defence and is satisfied as to its truthfulness.

The court is aware that it is trite law that generally a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with 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. See **Hatibu Gandhi and Others V Republic [1996] TLR.12**, **Tuwamoi V Uganda**, [1967] EA 84 p 88 the Court of Appeal for Eastern Africa said:

"... A retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words, that statement was not a voluntary one."

The same standard of proof is required in all cases and usually, a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is necessary for law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.

I have considered the danger of acting on a repudiated confession without corroboration and found no such danger because I am satisfied that the confession cannot be but true. The accused's confessions reveal nothing but the truth about how they culpably played part in the death of the deceased persons.

On voluntariness of the ***extrajudicial statement***, it is my opinion that it was voluntary, made because there is no evidence of torture. In the confession, the accused stated about his involvement in committing the alleged crime. That he was accompanied by Ngasa Hingu to the

scene of the crime where they attacked the deceased persons separately. That thereafter, he paid him TZS. 400,000/= for his participation.

Secondly, on credibility, I am of the view that PW5 (police) is more credible than the accused person because firstly, his statement that the accused cannot read or write has been confirmed by the accused himself.

Thirdly, the accused has admitted to being unfamiliar with the justice of the peace. For this reason, PW7, Felix Rwapalila (Justice of Peace) to be able to record the history of the accused person as it reads in the confession, must have heard it from the accused person or another person familiar with him. The statement is such that it must have been said by no other person than the accused himself. PW7 (Justice of Peace) had no reason to lie against the accused person to the extent of fabricating the confession statement.

Fourthly, PW7 is a credible witness in evidence who stated that the accused signed by thumbprint because he (accused) said can neither read nor write which he also confirmed when he testified in court. I am of the view that there is no evidence that the justice of peace received this history from another source than the accused

person himself. I find and hold that PW5 and PW6 are credible witnesses.

On this Number. 4 of his extra-judicial statement, he inspected the accused person before recording the statement and found him without injuries are true. *Then, where did the accused person get the scars he showed herein court from?* The accused person had scars before his arrest because he did not show them to the Justice of peace when he was examined. I agree with this testimony that before recording that confession, he examined the accused person to find any fresh mark of injuries but he saw none.

On the **doctrine of common intention**, since both caution and extrajudicial statement mentioned that the DW1, Ngasa Hingu, co-accused was also among who involved in the killings of the two deceased persons by accompanying one Jileka Machiya who killed Kabunye Njile though the caution statement was objected by Elizabeth Kijumbe, Counsel for the DW1 the accused person in his defence defended himself that he informed the court that he does not know the accused person, he was arrested and assaulted before he was taken to the VEO at Lutona where on 17/3/2016 police took him as a suspect of murder and he never confessed to having taken part in the killings of the deceased persons.

Having considered the defence given by Ngasa Hingu, the evidence of PW6, Justice of Peace, PW5, No. E 9471 Detective Corporal Heri and PW4: Said Hamadi Nzuki. It cannot be held with absolute conviction that the caution statement was made by Ngasa Hingu voluntarily as required under section 27 of the Law of Evidence Act, Cap.6 [R.E.2019].

Above all, as the accused person repudiated his statement, it will not be safe to rely on it unless it is corroborated with independent evidence. In support of the case of **Ali Salehe Msutu v. R [1980] TLR No. 1** where it was held that;

" It has long been established as a rule of practice in East Africa, including in this country that repudiated confession, though as a matter of law may support the conviction, generally requires corroboration as a matter of prudence as is in the case with a retracted confession."

I have crossed through the evidence over and over again yet I have not come across independent evidence to corroborate the exhibit. In law, such confession is referred to as exculpatory confession involving the removal of blame from someone which cannot solely be relied on for conviction in absence of corroboration as held in the case of **Msutu** (supra). The Assessors who sat with me had varying opinions on the liability of the accused person in this case. The Assessors opined that

the circumstance was conclusive in pinpointing the accused person as the actual penetrator of the death of Kabunye Njige and Fumbo Jileka. In their views, he was responsible for that death and should be punished accordingly.

With all due respect, I differ with them due to the reasons demonstrated that confession against co-accused is a situation whereby the accused confesses a co-accused, however no person can be convicted solely based on the confession of the co-accused. The confession must be corroborated by independent evidence. A mere fact of being mentioned in the statement does not implicate a person. Section 27 of Evidence Act, Cap.6 provides for that;

"A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person."

It is the view of this court that the accused person, Ngasa Hingu is innocent as the evidence against him is doubtful for only being mentioned in the caution statement and extrajudicial of the co-accused that *"Mimi nilimpa Ngasa TZS 400,000/= amuue mume wake na wakati wa mauaji nilikuwepo"* while in the caution statement he stated that;

"...Niliondoka kijiji cha Mabogo na nilifika majira saa 22hrs na kufikia nyumbani kwa Ngasa Hingu ambaye ni rafiki yangu ambaye nilikuwa nimemtaarifu siku za nyuma kwamba kuna kazi ya kuua shangazi yangu."

Now, can this be treated as a confession or admission as the case maybe? The answer is emphatical no. To constitute a confession that can be relied on by the court in convicting an accused person, a caution statement must contain necessary facts or ingredients of the offence which incriminates the accused person of the offence which he is charged with.

In the upshot, Ngasa Hingu, the accused person is hereby found innocent from the charge against him as his evidence is not corroborated and accordingly he is acquitted.

On the other hand, while I understand that it is not upon the accused person to prove he's innocent, I am certain in my mind that when it comes to proof of specific facts, the party alleging the existence of that fact must prove it. This does not amount to shifting the burden of proof. There is a clear distinction between burden of proof generally and burden of proof of a particular act under sections 110 and 112 of the Evidence Act, Cap. 6 [R.E. 2019] respectively. Section 110 of the Evidence Act read together with section 3(2)(a) of the same Act means the prosecution can get conviction only when they prove all the ingredients of the offence charged beyond reasonable doubts. The accused, Jileka Machiya in this court submitted the exhibit for identification by the court but the court did not admit since those

documents did not show what he was alleging that he had wounds when entering custody, the court noted that those exhibits which were not admitted were only medical prescription from 2019 and 2020 which do not tally with the issue of being injured before being admitted in prison in 2016.

Having considered the defence of the accused person, Jileka Machiya , the evidence adduced reveals and leaves no shred of doubt that the accused had grudges against the deceased persons and this has been sufficiently demonstrated by PW2 and PW3. Though casually, the accused maintained that he did not kill the deceased persons and that the confessions relied upon were involuntarily given. The accused has also denied knowing the deceased persons. A careful scrutiny of the defence testimony exposes loads of blatant lies, evasive denials on basic harmless matters. For instance, the accused denied knowing the deceased persons and the co- accused while PW2, PW 3 testified to this court that they are relatives. These lies justified my resort to the reasoning in **Felix Lucas Kisinyila v. R, Criminal Appeal No. 129 /2009**. It was held in that case, thus: "*Lies of the accused person may corroborate the prosecution's case.*" As he indulged in these unnecessary denials, the accused cast a blind eye on some of the stunning revelations made by PW2, PW3 whose testimony was left lethal and unhurt by the defence.

Therefore it is my conviction that the accused's defence lacked the support or any challenging effect that would shake the prosecution's case or raise any reasonable doubt which would move the Court to hold that the accused's guilt has not been proved. In view thereof, there is an insignificant weight to the defence evidence established.

I am convinced, that the first accused person Jileka Machiya killed the deceased persons with malice aforethought, and Ngasa Hingu is not guilty. I am of the considered opinion that it casts no doubt on the prosecution evidence which I consider to be watertight. From the foregoing, I find that the accused person had not raised a reasonable doubt in his defence and that the prosecution has proved beyond reasonable doubt. Therefore, the offence of murder that requires the existence of malice aforethought has been proved. I have also considered the opinions of assessors who unanimously opined that the accused persons killed two people with malice aforethought. I, therefore, convict the accused, Jileka Machiya as charged and Ngasa is hereby discharged.

A.A BAHATI

JUDGE

5/3/2021

SENTENCE

The only punishment for the murder offence in our country is a death sentence. That is the law to which I am constrained to apply it as it is. In that regard, therefore, having in mind the conviction I entered, I hereby sentence the accused person namely Jileka Machiya to death which shall be suffered by hanging.

Order accordingly.



A.A. BAHATI

JUDGE

5/3/2021

Right of appeal fully explained.

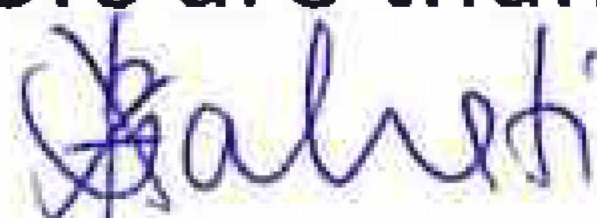


A.A. BAHATI

JUDGE

5/3/2021

Court: Gentlemen Assessors are thanked and discharged.



A.A. BAHATI

JUDGE

5/3/2021

