

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL SESSION NO. 101 OF 2019

(Originating from P.I No. 1 of 2018, Monduli District Court)

REPUBLIC.....COMPLAINANT
VERSUS

LENGAKWII SEPELE @ SHININI.....1ST ACCUSED

ELISHA SEPELE @ NISII.....2ND ACCUSED

JUDGMENT

09/04/2021 & 23/04/2021

M. R. GWAE, J

The accused persons notably; Lengakwii Sepele @ Shinini and Elisha Sepele @ Nisii stand charged with an offence termed "murder" contrary to section 196 of the Penal Code Cap 16 Revised Edition (Code) 2002. The prosecution alleged that on the 27th December 2017 at Lemooti Village, within Monduli District in Arusha Region the accused persons did murder one Ndimayo S/O Ladalo (Herein shall be referred to as deceased).

The accused persons blatantly pleaded not guilty to the charge of murder leveled against them thereby provoking the prosecution through her learned state attorneys who were under the lead of **Ms. Adelaide Kasala** (SSA) assisted by

Ms. Akisa Mhando (SA) and **Ms. Janeth Masonu** (SA) to call a total of nine (9) witnesses namely; Yona Athumani (**PW1**), Lucas Paul (**PW2**), F. 2233 D/CPL Raymond (**PW3**), D. 6339 D/SGT David (**PW4**), Lomnyaki Laizer (**PW5**), E. 9723 CPL Hassane (**PW6**), Castro Shirima (**PW7**), A/INSP Israel (**PW8**) and Mungeli Sabana (**PW9**).

The prosecution also tendered a number of twelve (12) exhibits which shall be referred to as prosecution exhibit (PE) to wit; Postmortem Report (**PE1**), a Sketch Map (where the offence of cattle (sheep) theft occurred) (**PE2**), Sketch Map (where the deceased was murdered) (**PE3**), Warrants of commitment relating to the offence of cattle theft in which both accused persons were duly charged and convicted of on the basis of plea of guilty vide Criminal Case No. 5 of 2018 at Monduli District Court (**PE4**), certificate of seizure with regard to the skin (**PE5**), Certificate of seizure with regard to the bush knife commonly known as "sime" (**PE6**), Skin and 'sime' collectively marked as **PE7**, a cautioned statement of the 1st Accused (**PE8**), a cautioned statement of the 2nd Accused (**PE9**), Extra-judicial statement of the 1st Accused (**PE10**), Identification Parade register for the 1st Accused (**PE11**) and Identification Parade register for the 2nd Accused person (**PE12**).

On the other hand, the defence was able to bring two defence witnesses that is the accused person did not call any witness on their behalves except

themselves with no exhibit to tender. Both accused persons were duly represented by the learned advocates secured by the court these were; **Mr. Ephraim Koisenge** and **Mr. Aggrey Kamazima** respectively.

Brief facts of this criminal case can be recapitulated as follows; that, on the 28th December 2017 at Lemooti village there was an information that there was a young boy of an estimated aged of ten (10) years old who was murdered. Following that information PW5, the then village chairperson called for a village urgent meeting to discuss on the alleged incidence among them was PW2, a militiaman who proceeded to the scene of crime at Lemooti at the jungle forest where they found the dead body of a young boy. An information was furnished to Lokisare Police Station, the police came and the deceased's body was taken to Monduli Hospital for examination. The autopsy (PE1) revealed that the deceased's body sustained injuries on the head, neck and hand, the injuries were inflicted by a sharp object. The cause of death was due to cut off a large blood vein which led to excessive bleeding.

On the 31st December 2017 PW5 received information that there were young men who were grabbing the livestock which were being taken care by children among them is PW9 who identified the accused persons as the ones who stole the cattle, he was grazing. Those thugs closed his eyes using a piece of cloth so that he could not identify them. Upon receiving such information, the villagers started

searching for the perpetrators, consequently, on the 3rd January 2018 the first accused was arrested at Lonjoo and taken to Monduli Police Station when, upon interrogation, he confessed to have murdered the deceased. His cautioned statement (PE8) was recorded by PW4 and in the presence of PW5. In that interrogation the 1st accused mentioned the 2nd accused as his co-accused who also took part in the commission of the crime at hand.

Eventually, the 2nd accused person was also apprehended on the same date on which the 1st accused person confessed to have participated in the offences of cattle theft and murder of the deceased, Ndimayo Ladalo. The 1st accused person, on the same date on which his confession was recorded by police, was taken to a justice of peace, PW7 where his extrajudicial statement, PE10 was recorded. The 2nd accused equally confessed to have participated in stealing the cattle and the murder of the deceased.

On the 10th January 2018 both accused persons led the investigation team, PW3 together with PW2 and PW5 to the scene of crime at Lemooti village. At the scene of crime, the accused persons were able to show the police, a hidden piece of skin of a sheep slaughtered by the accused persons. The accuseds further went on to show the investigation team, the place where the deceased person was murdered and a bush knife was shown by the accused persons and seized by police. Two sketch maps were drawn in respect of the place where cattle theft

occurred as well as the place where the deceased person was murdered, they were marked as PE2 and PE3 respectively. PW3 who was also in the investigation team filled in a certificate of seizure in respect of the skin and the offensive weapon (bush knife) marked as PE5 and PE6 respectively.

More so, the skin and the bush knife collectively marked as PE7 were also seized. Upon seizure of the exhibits aforementioned the accused persons were brought back to the Monduli Police Station and eventually they were identified by the one who was grazing goats and sheep including the one stolen vide Criminal Case No. 5 of 2018. This briefly marked the end of the prosecution case.

~~The prosecution case having been formally closed, both accused persons~~ were availed and opportunity to enter their defence, the 1st and 2nd accused stood as DW1 and DW2 respectively. In their defence, both commonly admitted to have committed the offence of cattle theft and to have been duly convicted of the said offence after they had pleaded guilty to the said offence before the District Court of Monduli at Monduli where they were subsequently convicted to the term of four (4) years imprisonment and to have their cautioned statements recorded but they seriously contended that the same were only in respect of the offence of cattle theft. More so both accused persons admitted to have led to discovery of the piece of sheep skin (PE7) and to have been unmistakably identified by PW9 at the two parades of identification supervised by Inspector of Police, PW8.

In different way, the 1st accused admitted to have his statement recorded by police in the presence of PW5 and to have named the 2nd accused only to the extent of cattle theft. He also contended that the seized bush knife which he contended to have been used in slaughtering the sheep. He therefore strongly denied to have led to discovery of the bush knife where the deceased was murdered.

However, in common both accused person denied to have participated in the killing of the deceased, Ndimayo Ladalo as alleged by the prosecution. The 2nd accused absolutely denied to have led the investigation and other civilians to the discovery of the bush knife nor did he witness the 1st accused impounding the same. The 2nd accused, in his unique defence he contended that his cautioned statement was recorded out of time (lapse of four hours) as according to him he was arrested on the 2nd January 2018 while his cautioned statement was recorded on the 6th January 2018.

Having summarized the evidence adduced by both sides during trial, it is now the noble duty of this court determine the following issues which was made known by the court's assessors during summing;

1. Whether the conducts of the accused persons to wit; taking a lead to the scene of crime, discovery of the weapon (sime) and the skin of the sheep which was stolen and slaughtered are incriminator against the accused persons to the offence of murder.

2. Whether the confession to the offence of cattle theft by the accused persons is in any way linked to the murder of the deceased.
3. Whether the prosecution has proved its case beyond reasonable doubt.

During trial of this case, I was assisted by three assessors namely; Ms. Joyce Edward, Mr. Lembrise Ndeese and Mwanaidi d/o Hassan. Having summed up to the court's assessors, the court assessors were of the unanimous opinion that both accused persons are guilty of the offence of murder of the deceased. Ms. Joyce opined so simply because the 1st accused person's cautioned statement and his extra-judicial statement were made voluntarily taking into account that the same were not objected by defence and for the 2nd accused, Ms. Joyce gave reason that, he was named by the 1st accused.

On his part, Mr. Lembrise reasoned that, act of the accused persons of leading to the discovery of the bush knife is an indication of guilt and that if it were true that the bush knife was belonging to the 1st accused, he could not hide it whereas the main reason given by Ms. Mwanaidi as to why both accused persons are guilty was the disclosure of the place of murder by the accused persons directly linking them with the murder of the deceased and therefore.

I now turn to the above issues for determination of this particular murder case after I have outlined what the court's assessors have opined. Starting with the **1st issue**, whether the conducts of the accused persons to wit; taking a lead

to the scene of crime, discovery of the weapon (sime) and the skin of the sheep which was stolen and slaughtered are incriminator against the accused persons to the offence of murder. I am aware that some of the police officers (PW2) or civilians (PW5) might have prior knowledge of the scene of crime in connection with the death occurrence of the deceased due to the fact that the deceased's body was discovered and picked from where he was murdered before the alleged accused persons' leading. Thus, mere allegation and or opinion that the accused persons took lead to the scene of crime (fateful incidence) is not a strong piece of evidence unless associated with other pieces of evidence as shall be discussed in the 2nd issue.

However, when I carefully look at the evidence of PW2, PW3, PW4 and PW5 as well as documentary evidence, sketch map (PE3) where the deceased was murdered which is self-explanatory signed by both accused persons as opposed to the seizure certificate (PE3) in respect of the impounding of the bush knife which was only signed by the 1st accused. PE6 is indicative in detail on how the murder was implemented. The manner and where the deceased person was grievously harmed by the use of the bush knife for the first time and where he was finally murdered and where his dead body was thrown.

Similarly, there is evidence of showing the bush knife allegedly used in the killing of the deceased. I have carefully considered the defence of the 2nd accused

person seriously disputing to have led the team to the discovery of the bush knife nor did he witness the 1st accused person showing the team the same. This took me to the evidence of PW2, PW3 and PW5. PW3 and PW4 who testified, during examination in chief that, it was both accused persons who lead to discovery of the knife while during cross examination by the 2nd accused's counsel they stated that it was the 1st accused. The evidence of the prosecution on who precisely led to the discovery of the offensive weapon (bush knife) is certainly contradictory and of little weight in respect of the 2nd accused unless the same is corroborated with other credible evidence as to whether the 2nd accused also participated to the showing of the place where the bush knife was hidden. It is at this juncture this court is moved to have a look at the position of the law with regard to contradictory evidence.

It is settled law that, where there are contradictions in evidence the court is duty bound to reasonably consider and evaluate those inconsistencies and see whether they are minor or major ones that go to the root of the matter as was rightly emphasized by the Court of Appeal in the case of **Sahoba Benjuda vs. The Republic**, Criminal Appeal No.96 of 1989, it was held that: -

"Contradiction in the evidence of a witness's effects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching

on the particular point **unless it is supported by some other evidence."** (emphasize is mine)

Having explained as herein above relating to the contradictory evidence on whether the 2nd accused took the lead in showing the bush knife and in adherence to the above cited precedent, I apprehend doubts as to the 2nd accused's alleged lead into showing of the offensive weapon, bush knife.

On his part, the 1st accused person also attempted to tell the court that it was his bush knife which he used in slaughtering the sheep, this testimony is conveniently found to be an afterthought since the bush knife was found at the place where the offence of murder was committed as per PE3 which is different from PE2, the place where the sheep was stolen and slaughtered. The evidence relating to showing or leading to discovery of offensive weapon or a stolen article is always credible as I hereby consider (See section 31 of Tanzania Evidence Act, Cap 6 Revised Edition, 2002 and **Michael Mgowole and another v. Republic, Criminal Appeal No. 205 of 2017** (unreported-CAT)). In view of the above, the 1st issue is answered in affirmative

Coming to the **2nd issue**, whether the confession to the offence of cattle theft by the accused persons is in any way linked to the murder of the deceased. According to the evidence adduced by the both sides, it is no doubt that the piece of sheep skin was recovered and bush knife was impounded under the lead of the

2nd accused persons and 1st accused person respectively. And that during defence, both accused persons glaringly testified that they did not confess to the offence of murder except the offence of cattle theft. I am of an observation that, though the sheep skin is not in connection with the present murder case and despite the fact that, the warrant of two commitment warrants are in relation to the offence of the cattle theft but the information received by Lamooti villagers, PW2 and PW5 that, it was the accused persons known by PW9 who threatened him, covered his eyes with a piece of cloth and thereafter they stole the PW9's sheep which was then slaughtered, the sheep whose piece of its skin was discovered through the lead of the accused persons as earlier explained.

In my view, this kind of evidence is an indication of *modus operandi* used by the accused persons in the later offence (cattle theft occurred on 31/12/2017) in comparison with the offence in the former offence (murder). Though in law this kind of evidence alone cannot form basis for conviction of an accused person unless the same is corroborated by other pieces of evidence. This piece of evidence is often useful for investigation machinery.

In the **3rd issue**, whether the prosecution side has proved its case beyond reasonable doubt. In determining this issue, I am going to diligently consider the evidence adduced by witnesses from both sides in its totality and not in isolation

that is circumstantial evidence as explained in the 1st and 2nd issue herein above and other pieces of evidence including confessions of both accused persons.

Starting with the cautioned statement and extra judicial statement of the 1st accused person. These statements were vividly produced by the prosecution and received by the court for evidential value without any objection from the 1st accused. The best evidence in a criminal trial is a voluntary confession by an accused person himself or herself (See **Paulo Maduka and 4 others vs. Republic**, Criminal Appeal No. 110 of 2007 (unreported) and section 27 (1) and section 28 of Tanzania Evidence Act, Cap 6 Revised Edition, 2002.

~~Furthermore, the cautioned statement together with the extra-judicial~~ statement of the 1st accused person support the conducts of the accused persons in leading the police officers' and civilians' team to the discovery of the place where cattle theft occurred and to the place where the deceased person was brutally killed. In the extra judicial statement, the 1st accused stated as follows and a wish to quote;

".....baada ya hapo alikata roho akafa kabisa ndipo huyo Naasi s/o Sepelee akamburuza kwenda kumficha kichakani na mimi nikaenda kubeba mchanga nikamwaga pale kwenye eneo tulilomchinja nikafuta zile alama za damu. Pia ile sime ya marehemu tuliifukia pale kwenye huo mchanga na mimi nilinawa mikono na mkojo wangu....."

Let us also see what the 1st accused stated in his cautioned statement in extenso;

".....mimi nilimkamata na kumwambia ainaume chini nilichukua sime yake huyo kijana/mtoto na nikamwekea shingoni kwa nyuma nikamkata, mtoto alikimbia na nikamkimbiza akaingia kwenye kichaka cha mti (mti wenye miiba) hapa nilimtoa naye akawa anasema NISAMEHE MIMI NIMEKOSA, NISAHEME NAOMBA SANA NISAMEHE, hapo mimi nilimtoa na kumkata kweye bega sehemu ya mgongoni na hapo nilimpeleka kwenye mti wa mbuyu. Alikuwa Elisha s/o Sepele @Nasii na Loserian Longoya hapo Elisha Sepele @ Nasii alimshika huyo mtoto kichwa na kumwinamisha alimkata kidogo shingoni kwa kutumia sime yake mwenyewe na mimi nikaendelea kumkata wakati huo Loseriani Longoya yeye alikuwa amemkamata huyo mtoto miguu ili asirukeruke mimi niliendelea kumkata shingo kwa nyuma hadi alipopoteza fahamu, baada ya kuona hivyo niliamua kuchukua mchanga na kuanza kuvuraga eneo ambalo lilikuwa na damu ya huyo mtoto baadae tulimkamata huyo mtoto mimi na Elisha na kuanza kumburuza hadi kwenye kichaka kuuficha huo mwilli wa huyo mtoto.....sime niliyotumia kumchinja huyo mtoto iko wapi? JIBU: niliificha kwenye mchanga huko korongoni."

Perhaps, I should recall the prosecution evidence with regard to two scenes of crime. The evidence available in particular that of PW2, PW3 and PW5 shows that the accused persons led the team into two different scenes of crime, the same is also supported by exhibits PE2 and PE3 which are the sketch maps depicted above. It follows that, it is credibly proved by the prosecution that it was the 1st

accused person who showed the team where he had hidden the bush knife just like how the 2nd accused had stated in his cautioned statement.

In their defence, the accused persons have consistently testified that, they only committed the offence of cattle theft and not murder. I have looked at the 1st accused's defence where he stated that he indeed made a statement before the police officer and before a justice of peace however his statements were limited to the voluntary confessions of the commission of the offence of cattle theft. Perhaps it is pertinent to know that when the said statements were tendered in court, copies of the same, were already availed to him and his counsel. if at all, the 1st accused had made the statements only in respect of the offence of cattle theft and not the offence of murder, he would have objected the said statements in the first place when the prosecution sought the leave of the court to tender them. Failure of which may justify this court to hold that, this kind of defence to be an afterthought as he legally deemed to have accepted that fact taking into account that what is contained in both statements is all about the fateful incidence in question (**Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (Unreported-CAT).

More so, I have considered the detailed contents of the 1st accused person's cautioned statement as well as taking into account that the 1st accused person's extra-judicial statement was made before a free and independent officer. To my

considered view, the act of the 1st accused of rejecting the same at this stage is an afterthought and is as good as running from his own shadow. It follows therefore, the prosecution evidence is sufficiently credible against 1st accused person.

As to the weight of the prosecution against the 2nd accused person. Before assessing the weight of the evidence adduced by the prosecution and that of the 1st accused incriminating the 2nd accused person such as orally naming the 2nd accused person before PW4 and in the PW5's presence, equally in both cautioned statement and extra-judicial statement, I think, in the circumstances of this case,

I must be guided by judicial precedent in **Paschal Kitigwa v. Republic** (1994)

TLR 65. In this case, the District Court of Ilala convicted the appellant relying on the evidence of co-accused person, on a second bite by the appellant, the Court of Appeal of Tanzania observed that, it is safe to look at other pieces of incriminating evidence such as circumstantial or conducts or words of the accused in order to uphold a conviction founded on uncorroborated evidence of co-accused and it went on stating;

"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".

I am also not unsound of the provisions of the law regarding confession of co-accused, particularly section 33 (1) of the Evidence Act Cap 6 R. E, 2002 which reads:

"33 (1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other persons".

See also **in Mohamed and others v Republic** [1990–1994] 1 EA 376, where Court of Appeal held that it is a common knowledge that the admission of a confessional statements against a co-accused is governed by the provisions of section 33 of the Evidence.

It is in the light of the above cited provision of the law of evidence (supra); the confession of a co-accused person may be considered against another accused and a conviction may be grounded from it provided that there are other pieces of evidence and the court warns itself of the danger of such evidence.

In our instant criminal case, the cautioned statement and extra judicial statement of the 1st accused serious incriminate the 2nd accused corroborated with his cautioned statement, PE9 though retracted confession as he objected its tendering.

Though as already alluded herein above, that it a conclusion of the court that it was the 1st accused person who led to the discovery of the bush knife which was used to murder the deceased. The question that follows is, does this alone exonerate the 2nd accused from participating in the commission of the offence. This has promoted me to go back to PE8 and PE10 which are the 1st accused's cautioned statement and extra judicial statement respectively giving detailed information of how the accused persons together with another person who is not a party to this proceeding (Loseriani Longoya) to this case took part in the killing of an innocent young boy.

These pieces of evidence clearly implicate the 2nd accused person in the commission of the crime-participet criminis. It is common knowledge that under section 142 of the Evidence Act Cap 6 R.E. 2019, the evidence of an accomplice is admissible against a co – accused. It reads as follows;

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Another piece of evidence incriminatory to the 2nd accused is that of showing of the place where both accused persons started stabbing the innocent boy, the place where they deadly cut the deceased and the place where they hid the dead body as per sketch map, PE3 where the 1st and 2nd accused duly signed. If as contended by the 2nd accused that he did not lead to the place where the deceased

was killed, why did he sign? Was he intimidated or compelled to sign? The answer is negative since seizure certificate in respect of the impounding bush knife was not signed by him (2nd accused) as opposed to seizure note, PE5 of sheep skin he thus took part in the commission of the offence in terms of section 22 of the Code

It is also worth noting that, even if there were no corroborative pieces of evidence yet the 2nd accused person's retracted confession would be relied by the court, as the court first instance, to convict the 2nd accused provided that the court is cautious of the danger and if eventually it is fully satisfied that the same is nothing but the truth. This legal position was stressed in the case of **Tuwamoi v Uganda** (1967) 1 EA 84 approved the Court of Appeal of Tanzania in the case of **Hatibu Handhi and Others vs. Republic** (1996) TLR 12 where it was correctly held:

"A conviction on a retracted uncorroborated confession is competent if the court warns itself of the danger of acting upon such a confession and is fully satisfied that such confession cannot but be true".

The 2nd accused attempted to convince the court to believe that he only confessed the offence of cattle theft and not murder case but when I carefully look at the contents of his cautioned statement, I find it to be amply detailed to the extent that the recorder, PW6 of the same could not be able to know the same if

he was not told so including the fact that it was the 1st accused person who actually hid the offensive bush knife. If the recorder of the cautioned statement was with ill motive why he did not incriminate him in that fact? Above all, the cautioned statement of the 2nd accused is all about the murdering of the deceased, Ndimayo Ladalo ("..Lengakwii Sepere alisema kuwa yawezekana huyo mtoto ndiye anachunga wale mbuzi kumi tuliwaona na huyo mtoto, wote tulimtambua kwa jina la NDIMAYOS/O LADALO") and not one Mungeli Sabana, PW9.

I have further considered that the 2nd accused's defence that, he was arrested on the 2nd January 2018 and that his statement was recorded on the 6th January 2018 trying to establish that his cautioned statement was recorded out of prescribed period. This assertion is not backed by PE9 since it is clear from the prosecution witnesses that he was arrested on the 3rd January 2018 and sent to Monduli police station in the morning hours and his statement was recorded on the same date at about 16:25 hrs.

Having considered pieces of evidence incriminatory to the 2nd accused as exhibited herein above and having cautioned myself of the danger of the nature of the evidence against the 2nd accused, I am fully satisfied without any scintilla of doubt that the 2nd accused is equally guilty of the offence of murder as unanimously opined by the court's assessors.

In the eventuality, I unhesitatingly find both accused persons guilty as charged, therefore, I hereby convict you Lengakwii Sepele @ Shinini and you Elisha Sepele @ Nasii of the offence of Murder contrary to section 196 of the Penal Code, Cap 16 Revised Edition, 2002

I so order



M. R. GWAE
JUDGE
23/04/2021

~~**Court:** Right of appeal to the Court of Appeal of Tanzania fully explained~~



M. R. GWAE
JUDGE
23/04/2021

