

**IN THE HIGH COURT OF TANZANIA**

**AT GEITA**

**ORIGINAL JURISDICTION**

**(MWANZA.REGISTRY)**

**CRIMINAL SESSION CASE NO. 51 OF 2017**

**THE REPUBLIC**

**VERSUS**

**MARCO S/O SHIJA @ MWEBELE**

**JUDGMENT**

*Date of Last Order: 20.04.2021*

*Date of Judgment Date: 23.04.2021*

**A.Z.MGEYEKWA, J**

The Accused **MARCO SHIJA** stands charged with murder contrary to section 196 of the Penal Code, Cap.16 [R.E 2002]. The Accused Person denied the charge and hence the full trial involving calling of two prosecution witnesses and one for the defense. The prosecution had alleged that on the 22<sup>nd</sup> August, 2014 at about 21:00 hours at Kaduda village within Geita District in Geita Region did murder one **ESTHER D/O JOHN**.



During trial, Mr. Erasto Anosisye, learned Senior State Attorney represented the Republic while Ms. Penina, defence counsel represented the accused. The trial was conducted with the aid of three assessors namely; Mabula Lucas, Shija Malale, and Jumanne Nkana. The ladies and gentleman assessors who sat with me in the trial of this case were divided in their opinions. The two ladies' assessors thus entered a guilty verdict against the accused person. The gentleman assessor entered a not guilty verdict against the accused person.

In building its case, the prosecution called two witnesses, namely; Christopher Johana Matola and E8779 D/C Edmond. The prosecution side also tendered one exhibit namely; the cautioned statement of the accused person (Exh.P3). The prosecution witnesses testified as follows:-

Breaking the ice for the prosecution was Christopher Johana Matola, (PW1). He testified to the effect that he is a medical Doctor. On 23<sup>rd</sup> August, 2014 while at Geita District Hospital he was instructed to examine a deceased body, thereafter, he prepared a Post Mortem Examination Report. During cross examination, PW1 testified that he did not know who murdered the deceased He added that the examination is not connected with the accused murder case.

The last witness was E.8779 D/C Edmond (PW2). He testified to the effect that he is a Police Officer working at Investigation Department.



PW2 testified that on 07<sup>th</sup> December, 2014 at 13:58 hours, he was instructed to record the accused cautioned statement. PW2 stated that he introduced himself to the accused person and informed him that he is charged with murder case. PW2 testified that he informed the accused about his rights and that he has right to write his own statement and call relatives or friend. Thereafter, PW2 stated that he read over the statement and asked him if it was correct, the accused person said no.

It was PW2 further submission that the accused informed him how the incident occurred and who was involved. PW2 testified that the accused was in good condition with no any scar. PW2 identified the accused cautioned statement and the same after clearance was admitted as exhibit P3.

During cross examination, PW2 testified that he is the one who recorded the accused statement under both sections 57 or 58 of the Criminal Procedure Act, Cap.20. He testified that the time limitation for recoding a cautioned statement is 4 hours. PW2 testified that the arresting Officer is the one who was supposed to know when the accused was arrested. He added that the accused person did not know how to write and read. PW3 testified that he did not ask him if he wanted to add or omit any word because the appellant said that the statement was correct.



On his side, DW1 Marco Shija, denied the chargers. He testified that he was arrested on 07<sup>th</sup> December, 2014. DW claimed that during his arrest there was no any street leaders. DW1 said that the Police Officers took him in the car heading to Bwanga area then they headed to Lwamgasa and arrived at the Police Station at 18:00 hours. DW went on to testify that on 08<sup>th</sup> December, 2014 morning hours a Police Officer named Marwa took him out from the prison and they asked him about his name, address and age. DW1 testified that the Police Officers tortured him, Marwa slapped and hit him with a thick stick on his head and hands and he fall down.

DW1 testified that he saw the Police Officers writing something then they gave it to him to sign but he refused then Marwa slapped him, he fall down, thus, he decided to sign the papers. DW1 testified that he does not know Esther John, the deceased and he did not kill anyone. DW1 urged this court to set him free.

During cross examination, the accused person testified that he moved to Mwendakulima in 2006. He was tortured by Marwa, a Police Officer. DW testified that he was arrested on 07<sup>th</sup> December, 2014 at 18:00 hours and Marwa recorded his statement on 08<sup>th</sup> December, 2014. DW claimed that he was joined in a case with someone Joseph. He denied the chargers.



Having heard the testimonies of the prosecution and defence witnesses and the final submissions made by both learned counsels, there is no doubt that Esther D/O John is dead, and she died of unnatural death. The issue for determination is who killed the deceased. Aided with the predominant legal principles which cover aspects of criminal law, as well as the law of evidence that area of relevance to this case, I am duty-bound to ensure that no innocent person is convicted of freak or flimsy evidence.

The first long-established principle in criminal justice is that of the onus of proof in criminal cases, that the accused committed the offense for which he is charged with is always on the side of the prosecution and not on the accused person. It is reflected under Section 110 and Section 112 of the Evidence Act Cap.6 [R.E 2019], and cemented in the case of **Joseph John Makune v R** [1986] TLR 44 at page 49, where the Court of Appeal held that:-

*"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defense of insanity in which case he must prove it on the balance of probabilities..."*

In respect of murder cases, the above authority must be read together with section 200 which defines malice aforethought as to the requisite



ingredient of the offence of murder. The term malice aforethought has been interpreted by the Court of Appeal of Tanzania in the case of **Bamboo Amma and Petro Juma @ Lanta v The Republic**, Criminal Appeal No. 320 of 2016 - CAT - Arusha (unreported) to mean one or more of the following circumstances. a) An intention to cause the death of or to do grievous harm to any person whether that other person is a person actually killed or not; b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to the same person. It is with those principles in mind that I am going to base my judgment. In determining this case, I will determine the issue *as to whether the accused persons murdered the deceased*.

It is from the court record that the accused denied having murdered the deceased and there is no any witness who testified to have seen the murderer. The prosecution accusation is entirely based on cautioned statement of the accused. The first prosecution witness one Christopher Johana Matola was called to prove the death of Esther D/O John. There is not dispute that the deceased died and her death was unnatural death. The records reveals that during hearing, E8779 D/C Edmond testified that he is the one who recorded the cautioned statement of the accused person and in his statement the accused person confessed to have



murdered the deceased. There was no any other direct evidence which supported the documentary evidence.

The records reveal that the accused cautioned statement was admitted in court as exhibit.P3, being the sole evidence which was used by the Republic to prove their case. This court admitted the cautioned statement after noting that there was uncertainty of the arresting date. Therefore, I admitted the cautioned statement to certify myself when exactly the accused was arrested to enable this court to account the hours used to record the accused cautioned statement. I have perused the court records and found out that PW2 in his testimony testified to the effect that he was the one who recorded the accused person cautioned statement but he did not arrest the accused person. DW1 testified that he was arrested on 07<sup>th</sup> December, 2014 in the morning and PW2 recorded his statement at 13:58 hours it was unknown when exactly the accused was brought to the Police Station. It is upon the prosecution to prove when exactly the accused person was arrested. Relying on the accused testimony, means the four hours lapsed at 12:00 hours and PW2 recorded the cautioned statement after approximately 2 hours later.

In terms of section 50 (1), (a) and (b) of the Criminal Procedure Act, Cap. 20 [R.E 2019], unless extended, a cautioned statement of a suspect is required to be recorded within a period of four hours commencing at the



time when he was taken under restraint. Thus, the cautioned statement of the accused person was taken beyond the prescribed time of four hours and no extension was sought and granted. The effect of recording a cautioned statement out of the prescribed time is to render it invalid and inadmissible. See the case of **Samwel Henry Juma v Republic**, Criminal Appeal No. 211 of 2011, which was delivered on 5<sup>th</sup> May, 2016.

The learned counsel for the accused person also complained that the cautioned statement was not complied with section 57 (4) (c) of the Criminal Procedure Act, Cap. 20 [R.E 2019]. PW2 in his testimony did not say if he afforded the accused right to make any correction. For easy of reference I find it prudent to reproduce the section hereunder:-

*“ 57 (4) Where the person who is interviewed by a police officer is unable to read the record of the interview or refuses to read, or appears to the police officer not to read the record when it is shown to him in accordance with subsection (3) the police officer shall-*

*(b) ask him whether he would like to correct or add anything to the record;*

*(c) permit him to correct, alter or add to the record, or make any corrections, alterations or additions to the record that he requests the police officer to make....”*



In the case of **James Kazungu Ntambara and another v R**, Criminal Appeal No. 177,178 of 2011 the Court of Appeal of Tanzania observed that the cautioned statement was recorded contrary to section 57 (4) (b) of the Criminal Procedure Act, Cap. 20 [R.E 2019] that the maker who read the cautioned statement did not inform the suspect whether he wanted to make corrections or add anything to the statement. The Court of Appeal of Tanzania found that the omission was a fundamental glaring defect as a result the cautioned statement was expunged from the court record.

Applying the above holding of the court and considering that the cautioned statement was recorded contrary to sections 51, 57 and 58 of the Criminal Procedure Act, Cap.20 [R.E 2019], I find that non-compliance with the law in recording the cautioned statement renders the cautioned statements of no probative value. The link between the accused person and the incident of murder equally dissipates.

I am not fully satisfied in all the circumstances of the case that the confession in exhibit P3 is wholly true and the same cannot left to stand therefore the same is expunged from the proceedings.

After I have expunged the accused person cautioned statement which the prosecution relied upon so much, the question now is whether the remaining evidence supports the charge of murder. I am in accord with



the opinion of one assessor that there is no any cogent evidence to link the accused person with the murder case. I differ with two assessors who opined that Marco Shija is guilty.

I, therefore, in the light of what I have stated hereinabove, I am of the settled mind that the prosecution has not proved this case to the standard required by section 3 (1) of the Evidence Act, Cap. 6 [R.E 2019]. That is, proof beyond reasonable doubt. Consequently, I acquit the accused persons; Marco Shija of the offence of murder contrary to section 196 of the Penal Code Cap.16 [R.E 2019]. He should forthwith be released from custody unless otherwise held for some other offence.

Order accordingly.



  
A.Z.MGEYEKWA

**JUDGE**

23.04.2021

Right to appeal fully explained.