

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

SITTING AT URAMBO

(Tabora Registry)

CRIMINAL SESSION CASE NO.25 OF 2018

THE REPUBLIC

VERSUS

1. MUHONYIWA S/O MHONYI @ KITUNGURU

2. JOSEPH S/O RAMADHAN

JUDGMENT

10/5/2021-31/5/2021

BAHATI,J.:

The accused persons namely **Muhonyiwa Mhonyi @ Kitunguru** and **Joseph Ramadhani** are charged with the offence of murder contrary to section 196 of the Penal Code, Cap.16 [R.E.2019].

Brief facts leading to the present case can be explained as follows. It was alleged that on the 25th day of January 2017 during night hours at Kiza Village within Kaliua District in Tabora Region the accused murdered one **Kashindye d/o Kulwa**. The accused persons allegedly attacked the house of the victim old woman and cut her head and neck by using machete (*Sime*) alleging that she was a witch. As a result of the

attack, she died instantly. The accused persons pleaded not guilty to the charge.

Four witnesses to the event merely testified on the happening of the event as indicated hereinbelow. According to them, they did not see any of the accused persons at the event.

It is worth appreciating that the prosecution side was led by Ms. Gladness Senya, learned State Attorney while the defence was represented by Mr. Kanicius Ndunguru, learned counsel.

I sat with and enjoyed the assistance of Ms. Pili Nassoro, Ms. Cesilia Mathias and Mwanjaa Issa Mgunda, lady assessors.

There is no dispute that **Kashindye d/o Kulwa** is dead and she met a violent death. This was confirmed by the evidence of all witnesses. This is further confirmed by the post-mortem examination report tendered as exhibit "P1". The report states that the death was due to cut wounds and severe hemorrhage.

Basing on the state of the body, there can be no doubt that the deceased **Kashindye Kulwa** met a brutal death and whoever is responsible must have intended to cause death or grievous harm.

The only issue for determination in this court is whether the accused persons in the dock with malice caused the death of Kashindye Kulwa. The prosecution summoned four witnesses and produced two

exhibits which are a post mortem report of the deceased (P1) and extrajudicial statements (P2) while defence side has the services of Kanisius Ndunguru.

Jeremiah Nguvumali, village chairman who was featured as **PW1** testified that on 25/01/2017 the killing incident occurred at Utumbula Keza village, he received the information from the village secretary that an old woman known as Kashindye Kulwa was killed. He instructed his Secretary to visit the scene of the crime and the latter confirmed the incident in the manner it was reported to him.

Further that, he went to report the matter to the police at Ulyankulu. Together with the police and doctor, he went to the scene of the crime and found that the deceased had been killed with a sharp object on her neck and head and she was bleeding. The doctor who accompanied examined the body of the deceased.

One of the deceased's relatives was interrogated by police and he stated that he knew nothing. Then the police allowed them to proceed with burial while investigation of the matter was mounted. During cross-examination, this witness stated further that, the event occurred during night hours around 1:00 and the deceased had habitation in his area of administration.

PW2, William Benedict Kaijage testified that he is a medical doctor and his duty post is at Ulyankulu having transferred from St.

John Health Center at Kaliua. He accounted that on 25/01/2017 he received a call from the police informing him of the murder incident at Utumbulu, Kiza Village, and requesting him to perform a post-mortem examination.

He stated further that he examined the deceased and found her with wounds on her neck and head and the wounds were caused by a sharp object. He added further that, the cause of death was excessive bleeding. He wrote a report and submitted it to the police. He added that the deceased was a female estimated to be 85 years old.

This witness prayed to tender a post-mortem examination report of the deceased and it was admitted and marked as Exhibit "P1". When the assessors requested more clarification of facts from this witness, he stated that he does not remember whether the deceased body was inside the house or outside due to the passage of years.

PW3, H1623 DC Saguda testified that he used to work at King'wangoko police post at Kaliua but now he has been transferred to Uyui police post. His relevant testimony is to the effect that on 04/03/2017 he received information from an informer who told him that there are criminals in Tabora and Kaliua. Following the information, he was told that the accused persons have been involved in a murder incident at Utumbulu, Kiza where they had killed one Kashindye Kulwa.

On 06/03/2017 around 5:00hrs, he went to Ibapa village with other policemen namely PC Pius, Moses, and D/Constable Pantaleo. At the place, they managed to arrest Muhonyiwa who informed them that he was with Joseph Ramadhani alias *mjomba mjomba* during the commission of the crime. They also arrested the latter on the same day around 11:00hrs.

That, after the arrest both accused persons confessed that a witch doctor named Agwa gave them some local medicine as protection. They went to the witch doctor around 12 hrs, the man identified the duo and confirmed that they went to him seeking protection.

The accused persons were taken to the police station where OC-CID directed the police to interview the suspects. PW3 added that before writing the 1st accused's statement he informed him of his rights then the suspect agreed and signed using a thumbprint.

Further, he requested the 1st accused, to tell the truth; the 1st accused explained to him that, it was Muli who asked them to kill Kashindy, the deceased, he did not know exactly who was behind it but he admitted to having committed the act of murder with one Joseph Ramadhani.

PW3 stated further that, he started recording the statement around 13:30hrs and completed it at 15:54 hrs; after completing he

read the caution statement to the accused who signed it using his thumbprint.

This witness prayed to tender the said cautioned statement of the accused person but the defence side objected to, an objection which after conducting the trial within trial was upheld hence the rejection of the statement.

PW4, Chilemba Chikawe testified that he is a magistrate and now works at the High Court, Division of Corruption and Economic Crimes, but before that he used to work as a magistrate at Kashishi Primary Court, Kaliua District.

That on 07/03/2017 while in the office one Police Constable Moses came to him with two suspects of murder, and requested him to take their extra-judicial statements; the names of the suspects were Muhonyiwa Kitunguru and Joseph Ramadhani.

That, before he took their statements, he ordered the police to leave the place. While with the 1st accused he informed him that he is a justice of the peace and asked him if he voluntarily came to him to give a statement, to which query the suspect replied affirmatively and added that he was ready.

He requested him to undress and inspected his body where no scar or wound was found. Muhonyiwa informed him that he was

arrested at Ibapa and he slept at King'wangoko until he was brought to him.

That, it was during the night when his colleague came to him to tell him that there was a deal at Utumbulu and the deal was to kill an old person, he went with Joseph Ramadhani and Muli. Before engaging in the killings, they went to a witch doctor who gave them some medicines for protection that they would not be identified. Thereafter, they went to Utumbulu where they killed Kashindye and left. PW4 stated further that, he read the statement to the 1st accused prior to his signing.

As for the 2nd accused, PW4 stated that he asked him if he voluntarily wanted to give his statement and he accepted. He also informed him that, his statement may be used against him and he was ready to give the statement. He told him that, on that day Muli, Muhonyiwa, and himself went to the deceased place and on arriving, Muli entered the house and killed Kashindye Kulwa, he also told him that they passed to a witch doctor where they received some medicines for washing before and after the act for their protection. He read the statement to the accused and he signed after him.

The two extra-judicial statements were received collectively and admitted as Prosecution Exhibit "P2" after the court had overruled the objection raised by defence side.

The defence side had only two witnesses 1st and 2nd accused persons.

In his evidence, **Muhonyiwa Mhonyi @Kitunguru** who was featured as **DW1** testified that he lives at Ibapa, Kaliua District and that he was charged with the offence of murder of Kashindye. He denied knowing her. He also stated that he went to the Justice of the Peace on 7/3/2017 and he confessed that he killed a person but he named no one. He told this court that, he did not kill Kashindye Kulwa and he never knew who killed Kashindye Kulwa.

DW2, Joseph Ramadhani testified that he lives at Ibapa and he is arraigned for the murder case of one Kashindye Kulwa. He stated further that he does not know Kashinje Kulwa and that he went to the justice of the peace on 7/3/2017 where he confessed to having killed but he did not tell who he killed.

On cross-examination, the 2nd accused person stated that he confessed because he was forced to do so.

Both counsels did not wish to make final submissions after closing their cases but prayed the court to proceed with the summing up to assessors. After the said summing up of the case to Hon. Assessors, all were of the unanimous opinion that the accused persons are guilty of the offence charged with and thus the court should enter a conviction and accordingly sentence the accused persons.

The offence of murder is committed when an accused person kills with malice aforethought.

Section 200 of the Penal Code, Cap. 16 [R.E 2019] defines '*malice aforethought*' as an intention to cause death or grievous harm to the person killed or not or acting with knowledge that the act or omission causing death will probably cause the death or grievous harm or an intention to commit an offence.

In criminal cases, the prosecution must prove its case beyond reasonable doubt. The prosecution has to prove that the offence was committed, and it was committed by the accused persons and not anybody else. Normally, criminal cases are proved by direct evidence or can also be proved through circumstantial evidence.

There are established principles in a criminal prosecution to ensure that no innocent person is convicted on a framed case. There must be cogent evidence to prove the prosecution case beyond reasonable doubt. On the other hand, the accused persons only have to raise doubt on the prosecution's evidence.

Essentially the burden of proving the guiltiness of the accused person lies with the prosecution and the standard set is beyond reasonable doubt. In **Hemed vs R [1987] TLR 117** and **Mohamed Said Matula v R [1995] TLR 3**. The offence of murder has mainly four ingredients that must be proved beyond a reasonable doubt that;

1. *There is a death of a person,*
2. *The death was caused by an unlawful act or omission of the accused persons,*
3. *The act causing the death of the deceased was accompanied by malice aforethought.*
4. *That it is the accused persons who caused the death of the deceased. Death can be caused by the accused alone or in conspiracy or common intention with others.*

The main issue for determination by this court in the case at hand is whether the prosecution evidence adduced has proved the above-listed elements beyond reasonable doubt.

As stated earlier issue involved in the determination of this matter is a legal matter because in this case, the prosecution depends wholly on the *extra-judicial statements* of the accused persons.

The evidence of the prosecution is very clear that no one came before this court and said he saw the accused persons committing the offence. The prosecution is relying on the extrajudicial statement. Though, informers told PW3, DC. Saguda, that the accused persons were involved in the commission of the offence. PW3 and other policemen went straight away to arrest the accused person who cooperated with them and went to another accused person Joseph Ramadhan who confessed to them that they were hired in killing the deceased person. It is however clear from the evidence that on

07/03/2021 the accused persons were taken to the Primary Court of Kashishi where they recorded the extrajudicial statement before Chilemba Chikawe, a Primary Court Magistrate and Justice of the Peace who testified as PW4. In their statements, he recorded them stating that, at the scene of the crime, Muli attacked the victim by cutting her on the head and the neck. Death was confirmed by PW2, a doctor where he tendered the examination report which stated the same thing. That the deceased had been cut with sharp objects on her head and neck and the cause of death was severe bleeding.

When the witness sought leave of the court to tender the accused's extrajudicial statements, Mr. Kanisius Ndunguru learned counsel for defence rose objection on the ground that, the justice of the peace took the statements of the accused involuntarily that is to say the justice of the peace never requested if he will give his statement voluntarily.

As rightly pointed out in the Chief Justice guidelines to justices of the peace, the record should state *"Whether he wishes to make the statement of his own free will."*

The court went through the extrajudicial statement and found that; according to their evidence, the accused persons were willing to confess. As a result, PW4 proceeded to record the appellant's extra-

judicial statement whereupon at the end, the appellant signed it. The statement was admitted in evidence as exhibit P2 which stated that;

“Nimemwuliza mahabusu maswali kama inavyoorodhesha hapo na baada ya kuyakiri kwa makini majibu yake nimeandika kwamba mahabusu yu huru na kwamba maelezo ambayo anayatoa ni kwa hiari yake na kwamba hakulazimishwa kueleza kwa vitisho au njia yoyote.

Sahihi ya mahabusu.”

For a reason that the learned counsel's objection premised on that aspect, the court overruled the learned advocate's objection and admitted the accused's extrajudicial statement made before PW4 as exhibit “P2”.

Much as I rejected the caution statement from being admitted as an exhibit on an account that, it was not made voluntarily, thus I find the extrajudicial statement to have been made voluntarily and freely and whatever is contained therein is reliable and nothing else but the truth of the plight. I am mindful of the law concerning a confession. The law on the extrajudicial statement is provided under section 28 of the Evidence Act, Cap 6 that;

“A confession which is freely and voluntarily made by a person accused of an offence in the immediate presence of a magistrate

as defined in the Magistrate 's Courts Act, or a justice of the peace under the Act, may be proved as against that person."

In Songwe Ngedelele vs Republic [1968] HCD. 178

"a confession is a direct acknowledgment of guilty on the part of the accused."

For the confession to be admitted the following ingredients of a confession must be met. First, such confession must be made to an authorized person as per section 27(1) and section 28 that was justice of peace and magistrate. Second, confession will be valid if made freely and voluntarily, and last but not least for the confession to be valid, it must be made by the accused himself.

In this case, I also sought the opinion on the credibility of PW4 regarding the making of the statement that it must be proved that the accused was actively involved in the murder.

As a matter of law concerning *retracted confession*, I am aware that the rationale is that depending on the circumstances of the case, a conviction can be founded on such a statement after the court has properly directed itself on the evidence and is satisfied with the truthfulness. This is the position in **Hatibu Gandhi and others v Republic 1996 TLR 12.**

Having examined all factors, I agree that the confession was voluntary and truthful as the extrajudicial statements had enough

corroboration from the first and second accused. Further, the statements indicate that the cut of the victim on the head and neck which was also stated by the Doctor who examined the body of the deceased.

In respect of the voluntariness of the statement, it is my view that this was voluntarily made because there is no evidence of torture as clearly stated by PW4, justice of the peace.

Despite denial to have made the extrajudicial statement, this court ruled out that the accused persons made the statement voluntarily as corroborated by PW4. This finding led to its admission as exhibit "P2"

Like the assessors, I am also of the view that the allegation in the confession was corroborated by the Doctor. The mentioned part matches the head and the neck in the confession stated by the accused person therefore it is corroborated and it is safe to act upon it. I wish to add that the statement itself shows that before it was recorded to the justice of the peace. Hence I am of the settled mind that no better evidence could be found as far as voluntariness of the statement is concerned.

In this case, DW1 and DW2 admitted having murdered the deceased but not the one, Kashindye Kulwa as they did not tell the court who they killed.

According to the witness, the first accused person, Muhonyiwa Kitunguru, and the second accused Joseph Ramadhani confessed to having killed the deceased but did not mention her name. This court went through the extrajudicial statements and noted that although the first accused person never mentioned the gender nevertheless the second accused person on his statement did, as I quote;

“Nakumbuka siku hiyo ilikuwa usiku mimi Muhonyiwa na Muli tulienda Utumbulu kufanya mauaji ya bibi mmoja ambaye kwa jina simfahamu.”(sic)

This Exhibit P2 was admitted, but the same was attacked during defence case. DW2 insisted during cross-examination that his statement was taken involuntarily as there were police standing near the door and was tortured. PW4, Chikawe did not agree that the suspect's confession was made because of police torture. Exhibit P2 indicates that the accused person confessed before PW4 who testified that he was arrested on 6/03/2017 by police.

Although in his defence, DW2, Joseph Ramadhan contended that he never gave the statement voluntarily; I have considered the detailed contents of the 2nd accused person's extra-judicial statement which was made before a free and independent officer. To my considered view, the act of the 2nd accused of rejecting the same at this stage is an afterthought and is as good as running from his own shadow. This is because, apart from having not objected to the admission of the

statement when he was allowed to do so, he raised that complaint in his defence and reclined to this court that he never mentioned gender.

In the case of **Vicent Homo v. The Republic, Criminal Appeal No. 337 of 2017 (unreported)**. The Court cited a passage from the case of **Emmanuel Lohay and Another v. The Republic, Criminal Case No. 278 of 2018** (unreported). In that case, the Court had this to say when confronted with a situation similar to the one which is applicable in this case:

"It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross-examination or defence."

Also in **Shihoze Semi and Another v. Republic [1992] TLR 330**, the appellants 'missed the boat' by trying to disown the statements at the defence stage as in the present one. Since this court overruled the objection of the defence counsel basing on the grounds meted on the Chief Justice guidelines, the extrajudicial was admitted.

When I summed up to the assessors I informed them that the prosecution case depends on extrajudicial statements of the accused persons which had been retracted by the respective accused person through defence. I told them of the legal position that the court has to act on a retracted or repudiated confession only when it is fully satisfied in all the circumstances of the case that the confession is true.

Otherwise, the court will act on a retracted or repudiated confession only when the same is corroborated.

The issue before this court is whether or not conviction can safely be sustained based on an extra-judicial statement. The response will be in the affirmative. In the case of **Mashimba Dotto @ Lukubanija v. Republic, Criminal Appeal No. 317 of 2013 (unreported)**, the Court observed as follows:

"... As correctly opined by both learned counsel, the judge was certainly correct in saying that under normal circumstances, a conviction could safely so long as the court warns itself of the danger of acting on the statement without corroboration. It is trite law that as a matter of practice a conviction would not necessarily be illegal but it is a matter of practice in such cases for a trial court to warn itself and if the trial is with the aid of assessors to direct them on the danger of convicting without corroboration."

A vital question that has to be answered is whether, the purported confession statements of the accused persons are of such a nature that, a conviction can be based upon them without corroboration. It is true that in terms of the decision in **Zakayo Shungwa Mwashilindu and two others Vs. Republic, Criminal Appeal No. 78 of 2007** it was too late for the second accused to challenge the admissibility of Exhibit P2 after the same had been admitted.

In the present case, the accused persons' claims that he had been tortured by the police before being taken to a justice of the peace are not backed up. I, therefore, accord little weight. I agree with the assessors who pointed that since the accused persons confessed freely and voluntarily before the justice of the peace and during the defence that leads me into holding that the prosecution has managed to prove its case beyond reasonable doubt against the accused persons.

It is my view that since the accused persons were arrested on 6/03/2017 and the following day on 7/03, 2017 when their extrajudicial statement was recorded before a justice of the peace. In my observation, the accused confessed voluntarily to the Justice of Peace. The recording of the purported statement earlier is consistent with a view that the confession was voluntary.

Considering the circumstances of the case, the evidence intensified by the prosecution and the Hon. Assessors who sat with me, in this case, opined that the prosecution evidence proved the prosecution case beyond any reasonable doubts. I concur with them on the reasons demonstrated above. I am convinced, that the accused persons killed the deceased with malice aforethought, one Kashindye Kulwa, since the elements of malice under section 200 of the Penal Code, Cap 16 [R.E 2019] has been proved. 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 persons in their defence did not make the court believe on their defence that they killed a person but not Kashindye Kulwa does not hold water as they confessed to the justice of the peace. Furthermore, the accused persons failed to convince the court that they were tortured. Even if they were tortured by the police, they had an opportunity to state the story before the justice of the peace when recording their extrajudicial statements.

I, therefore, find both the accused persons Muhonyiwa Kitunguru and Joseph Ramadhani guilty of the offence as they stand charged and accordingly convict for the murder of Kashindye Kulwa contrary to section 196 of the Penal Code, Cap. 16 [R.E 2019].

A. A. BAHATI

JUDGE

31/05/2021

SENTENCE

Having convicted the accused persons for the offence of murder, there is only one sentence for that offence. Therefore, my hands are tied and I cannot impose a lesser sentence than the one stipulated under the law. I hereby sentence the accused persons, namely

Muhonyiwa Muhonyi Kitunguru and Joseph Ramadhan to suffer death by hanging.

Order accordingly.



A. A. BAHATI

JUDGE

31/05/2021

Judgment delivered in the open court on this 31st May, 2021 in the presence of Kanisius Ndunguru, Learned Counsel and State Attorney, Upendo Malulu for Republic.



A. A. BAHATI

JUDGE

31/05/2021

Right of Appeal Explained.



A. A. BAHATI

JUDGE

31/05/2021