

IN THE HIGH COURT OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

CRIMINAL SESSION NO. 59 OF 2016

THE REPUBLIC

VERSUS

1. JUMA S/O MOHAMED @ BUDAGARA

2. FIKIRI S/O THOMAS

JUDGMENT

Date of Last Order: 22.04.2021

Date of Judgment: 30.04.2021

A.Z.MGEYEKWA, J

The two accused persons, JUMA S/O MOHAMED @ BUDAGARA and FIKIRI S/O THOMAS stand charged with two counts of murder contrary to section 196 of the Penal Code, Cap.16 [R.E 2002] now [R.E 2019]. The Accused Persons denied the charge and hence the full trial involving calling four prosecution witnesses and two for the defense.

On the first count; the prosecution alleged that JUMA S/O MOHAMED @ BUDAGARA and FIKIRI THOMAS are charged on 28th August, 2008 at

about 00:00 hours at Katete village within Chato District in Geita Region, did murder one SEGENER S/O HUNGHURU.

On the second count; the prosecution alleged that JUMA S/O MOHAMED @ BUDAGARA and FIKIRI S/O THOMAS are charged on 28th August, 2008 at about 00:00 hours at Katete village within Chato District in Geita Region, did murder one SAI W/O SEGENER.

During trial, Mr. Mwasimba, learned Senior State Attorney assisted by Ms. Winfrida, learned State Attorney represented the Republic while Mr. Liberatus, learned counsel represented the first accused person and Ms. Doreen, learned counsel represented the second accused person. The trial was conducted with the aid of three assessors namely; Shija Malale, Jumanne Nkana, and Basobile Sospeter. After each of the cases had been closed, the counsels for both parties made their final submissions. I thank the counsels for their informative submissions, and the same has been considered in this judgment. I extend my thanks to the lady and gentlemen assessors who sat with me and stated their opinion basing on the facts of the case.

In summing up to the Lady and Gentlemen Assessors, all of them opined to find both accused persons guilty.

In building its case, the prosecution called four witnesses, namely; Emmanuel Sengija, D6444 D/C Emmanuel, Mossi Soro, and F1251 D/C

Majani. The prosecution side also tendered three exhibits namely; Extra Judicial Statement of the first accused person (Exh.P4), cautioned statement of the first accused person (Exh.P5) and cautioned statement of the second accused person (Exh.P6). The Post Mortem Examination Report for Segenera S/O Hunghuru and Sai W/O Segenera were tendered during the preliminary hearing, the same was admitted and marked as exhibit P.2 and exhibit P3 respectively. The Doctor sufficiently proved that Segenera S/O Hunghuru and Sai W/O Segenera were indeed dead. And to cap it all, luckily, both deceased deaths are among undisputed matters which were agreed upon pretrial and a memorandum thereof signed by the parties; the State Attorney, counsel for the accused person, and the accused person himself. The prosecution witnesses testified as follows:-

The first prosecution witness, Emmanuel Sengija, testified to the effect that in 2008, he was a Ward Executive Officer at Kasilamafuka Ward within Mkoloni village. On 28/08/2008 at 00:00 hours while asleep some young men waked him up, informing him that there was an alarm raised at Mzee Segenera's house. PW1 went on to testify that they arrived at the scene of the crime and saw Segenera's coat was outside, there was blood outside and inside the house. It was PW1's testimony that they reported the matter to the Police Officers and took the child to the hospital.

PW2, D6444 D/C Emmanuel, an Investigator. He testified that on 28/03/2014 he received information that a murder occurred at Katete village within Chato District. PW2 testified to the effect that one of his informer named Juma Mohamed @ Budagala as a suspect. PW2 interrogated the first accused about the alleged murder, DW1 confessed to have murdered Segenera and his wife by using a bush knife. PW2 testified that upon his arrest they headed to Lunzewe Village, the suspect was directing them where he had committed such crimes. PW2 testified that DW1 named his fellow culprit one Faustine. PW2 pointed toward the witness box and said Juma Mohamed is the one wearing a hat.

During cross-examination, PW2 testified to the effect that on 28/03/2014 DW1 was brought to Mwenzelu Police station. PW2 added that DW1 informed him that he has committed more than 10 murder crimes.

PW3, Mossi Soro @ Sasi, testified to the effect that she is a Resident Magistrate of Kiteto District Court. On 07/04/2014 she was in her office and saw Angelo accompanied by the suspect; Juma Mohamed Budagala approaching her office. PW3 went on to testify that she is the one who recorded the first accused Extra Judicial Statement. The Extra Judicial Statement of the first accused was admitted as exhibit P4. PW4, F1251 D/C Majani is the one who recorded the cautioned statements of Juma

Mohamed @ Budagara who confessed to have murdered Segenera and his. He also recorded the cautioned statement of Fikiri S/O Thomas. The same was admitted as exhibit P5 and Exhibit P6 respectively.

On the defense case; on his sworn evidence Juma S/O Mohamed @ Budagara (DW1), denied all the charges. He testified that on 28/03/2014 he was at the center of Mnekasa village and Police Officers found him fighting with someone else, therefore, they arrested him and he was brought to Runzewe Police Station. DW1 further testified that on 30/03/2014 the Police Officers interrogated him regarding the issue of fighting. DW1 added that on 04/04/2014 at 10:00 hours the Police Officers took him to the investigation room. DW1 stated that they asked him if he was involved in the murder case, but he denied the charges. DW1 claimed that he was forced to sign the papers. He complained that one Police Officer stood up and slapped him on his ears thus he decided to sign the written papers.

DW1 did not end there, he continued to testify that he was asked about his history background and he only told them that he was doing fishing activities. DW1 denied to have known the deceased persons and he claimed that he has no any history of assaulting and killing people by using bush knives.

During cross-examination, DW1 said that he knew Fikiri Thomas as an accused person and also denied to have appeared before the Justice of Peace and denied to have signed the papers. DW1 testified that this is his second murder case whereas in the first case he was convicted.

On his side, DW2, Fikiri S/O Thomas, denied the charges. He testified was arrested on 07/04/2014 at 13:00 hours then he was brought to Chato Police Station and arrived at 17:00 hours. DW2 went on to state that he was locked up until the following day, and around 16:00 hours they took him to an investigation room. DW3 testified to the effect that the Police Officers asked him several questions about his life and the murder of Sai and her husband. DW2 lamented that he was forced to sign the papers. DW2 stated that he did not appear before the Justice of Peace. He prayed this court to set him free.

During cross-examination, DW2 testified that the deceased was his grandmother's husband. DW2 claimed that he was tortured and forced to sign the papers. He lamented that the Police Officer did not afford him any rights. DW2 further testified that Faustine Thomas is his brother and Kwilija is his grandmother. He admitted that all of them were charged with the same case.

Having considered the evidence on record and the final submissions of both learned counsels, no I am in position to determine the case. The

main issue for determination are; *whether it is the accused persons, Juma S/O Mohamed @ Budala and Fikiri S/O Thomas who killed the deceased persons, Segenera S/O Hunghuru and Sai W/O Segenera*. I will address other issues as I go on determining the instant case.

Upon a charge of murder being preferred against an accused person, the onus is always on the prosecution to prove not only the death of the deceased but also the link between the said death and the accused person. The onus never shifts away from the prosecution and no duty is cast on the accused person to establish his innocence. See the case of **Mohamed Haruna @ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported). The standard of proof is one beyond reasonable doubt. By that, it means the proof of the charge against an accused person must not leave a shadow of any reasonable doubt that the person charged did indeed kill the deceased in the manner stated in the information.

In case the evidence leaves the court with any reasonable doubt as to the accused person's guilt, the court must acquit the accused person even though it believes him to be guilty. In the premises, the acquittal of an accused person does not always mean the accused person is innocent; it simply means that a case against him has not been proved to the required standard; that is, beyond reasonable doubt.

In a murder charge, it is also important to prove malice aforethought, for murder entails the killing of a person with malice aforethought. Section 196 of the Penal Code, Cap.16 [R.E 2019] under which the accused person in the present case was charged provides as follows:-

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

Therefore, it is the duty of the prosecution to prove the case against the accused persons at two stages; first that it is the accused person who killed the deceased Segenera S/O Hunghuru and Sai W/O Segenera, and secondly, that they did commit the killings with malice aforethought. As stipulated under section 200 of the Penal Code, Cap.16 [R.E 2019].

In the premises, I am satisfied and take it as proved that Segenera S/O Hunghuru and Sai W/O Segenera are indeed dead and that their death was due to severe bleeding from multiple cuts in her different parts of her body, she had head injury and hypovolemic shock following severe bleeding as appearing in the Post Mortem Examination Report (Exh.P2 and Exh.P3). Therefore, *actus reus* is proved. The report revealed that the deceased parts of bodies' had multiple cuts wounds on Sengerea S/O Hunguru head and large cut wounds on his hand. Also as per Exh.P3, Sai W/O Segenera had a deep cut wound on her face and back side. It seem they were inflicted by using a sharp object therefore malice aforethought

is proved too. There is no dispute that the assailant contemplated and intend to kill.

Now, the most contentious issue before me and which prompted the trial of this case is *whether it is the accused persons, Juma S/O Mohamed @ Budala and Fikiri S/O Thomas who killed the deceased persons, Segenera S/O Hunghuru and Sai W/O Segenera.*

In determining the above issue I need to address my mind to the predominant legal principles which are of relevance to this case and will guide me in this judgment. These cover aspects of criminal law, as well as the law of evidence. These principles are meant to ensure that no innocent person is convicted of freak or flimsy evidence.

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 based on Extra-Judicial Statement of the first accused, the Confession Statements of both accused persons, and prosecution witness statements.

The prosecution's evidence pointed towards the accused persons. It is alleged that the first accused in his cautioned statement named the second accused person. The Extra-Judicial Statement (Exh.P4) of the first accused person was admitted by this court even when Mr. Liberatus raised

an objection that the Extra Judicial was recorded contrary to the Chief Justice Guide. This court in its ruling stated that the defects were noted but this court proceeded to admit the Extra-Judicial Statement to enable this court to scrutinize whether defects prejudiced the first accused person.

The importance of compliance of the said Guide was reiterated in the case of **Japhet Thadei Msigwa** (supra) where the Court held that:-

"...when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter. The section is couched in mandatory terms. Before the Justice of peace records the confession of such person, he must make sure that all eight steps enumerated therein are observed."

In the same case the Court went on to state that:-

"The Justice of Peace ought to observe, *inter alia*, the following:

- (i) *The time and date of his arrest;*
- (ii) ***The place he was arrested;***
- (iii) *The place he slept before the date he was brought to him.*
- (iv) *Whether any person by threat or promise or violence has persuaded him to give the statement.*
- (v) ***Whether he really wishes to make the statement on his own free will.***

(vi) That if he makes a statement, the same may be used as evidence against him." [Emphasis added].

Compliance with the above conditions is crucial to enable the Court to ascertain if the suspect was willing at the time of making his confession and knew the implications of making the statement or not, and to enable the Court to know the circumstances which prevailed at the time the statement was taken and be in a position to determine if the said statement was made voluntarily or not. If the criteria are not observed it may lead to a finding that the same was not voluntarily made and hence inadmissible.

In this case, two conditions as were rightly observed by Mr. Liberatus, defence counsel, were conspicuously not complied with. In paragraph 5 of the Extra Judicial statement under discussion (which relates to the item (v) of the Guide), the Justice of Peace indicated that:-

"Mshitakiwa ameelezwa kuwa yupo mbele ya Mlinzi wa Amani na ameelezwa kama anataka kutoa maelezo. Mshtakiwa anajibu "ndio,"

In relation to paragraph 7, *the place he was arrested was not stated*. In paragraph 5 of Extra Judicial Statement Form, he did not show that the appellant wishes to make his statement on his own free will. It reads *Mshtakiwa aeleze kuwa yuko mbele ya mwanaki aulizwe kama anataka kueleza chochote*. As it is, he just asked the appellant if he wanted to give

his statement and he replied that he was ready to give his statement. He did not go further to state that he wanted to do so on his own free will.

Applying the conditions set out in **Petro Teophan v Republic**, Criminal Appeal No.58 of 2002, **Japhet Thadei Msigwa v. Republic**, Criminal Appeal No.367 of 2008; and **Raphael Mhando v Republic**, Criminal Appeal No. 54 of 2017 delivered on first March, 2019 TANZLII (all unreported) in which the Court stressed the need to comply with the Chief Justice Rules. I agree with Mr. Liberatus that PW3 failed to comply with the Chief Justice's Guide for Justices of Peace.

It is my view that the procedure in recording the Extra Judicial Statement of the first accused was not proper. It cannot be said that the first accused person really confessed the commission of the offence voluntarily or rather on his own free will. Failure to comply with the Guide for Justices of Peace, in my considered view, is fatal with a consequence of rendering the said statement to be expunged from the record.

Regarding the cautioned statement of the second accused person; Ms. Doreen, the learned counsel for the second accused, and Mr. Liberatus, the learned counsel for the first accused raised an objection that the second cautioned statement was recorded out of time. In my ruling, I proceeded to admit the said cautioned statement since the two accused persons were both involved in the serious offence of murder

giving myself time to scrutinize the cautioned statement when analyzing and composing the judgment.

Unlike, the first accused cautioned statement which was recorded out of time, PW4 and Mr. Mwasimba, learned Senior State Attorney convinced this court that the delay was due to complication of investigation of the murder case. The Court of Appeal in the case of **Chacha Jeremiah Murimi and Others**, Criminal Appeal No. 551 of 2015 observed that:-

*“ What was contravened was procedural matter which does not affect the weight attached to the substance in the cautioned statements. Also we looked as whether the failure to record the said cautioned statements within a period of four hours prejudiced the appellants. In **Nyerere Nyague v R**, Criminal Appeal No. 67 of 2010 (unreported), this Court was faced with similar predicament but after being satisfied that the trial court in admitting the cautioned statement of the accused took into consideration and was satisfied that the investigation of the case was complicated, the benefit of public interest and that the rights and freedom of the accused was not unduly prejudiced, the Court had.”*

Applying the above authority, I proceeded to resolve this objection, I was satisfied that the investigation of the case was ongoing and that the rights of the first accused person was not prejudiced. Therefore the

cautioned statement of the first accused person was admitted and marked as exhibit P5.

Regarding the objection that the second accused person cautioned statement was recorded out of time. I have scrutinized the testimony of PW4 and found that the delay was not well counted. PW4 testified that the second accused person was arrested on 07/04/2014 late hours and he claimed that on the following day there was no any Police Officer who could record the second accused person's cautioned statement until on 08/04/2014 at 16:00 hours. In my view, the delay was not justifiable, the delay creates doubt whether the second accused person was not threatened to sign the cautioned statement.

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 second 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. The same was held in the case of **Samwel Henry Juma v Republic**, Criminal Appeal No. 211 of 2011, which was delivered on 5th May, 2016.

Therefore, I am in accord with the learned counsels that the second accused person cautioned statement was recorded out of time, thus, the same is hereby expunged from the court records.

PW4 testified to the effect that the second accused person was brought before the Justice of Peace, however, his statement was not tendered in court. In normal circumstances, the confession given to the Police Officer by the second accused person was required to be repeated before the Justice of Peace. Failure to have the Extra Judicial Statement of the second accused person may justify his claim that he was tortured.

A person who freely confess before a Police Officer would not have it difficult to repeat such confession before a Justice of Peace. A presence of an Extra-Judicial Statement may act as an assurance of voluntariness of a cautioned statement. In the case of **Ndorosi Kudekei v Republic**, Criminal Appeal No. 318 of 2016, the Court of Appeal of Tanzania facing with a case where only a cautioned statement and the Extra-Judicial Statement was not tendered, observed that:-

"...what was placed before the court in evidence was the cautioned statement only (exhibit P1), whereas the whereabouts of the extra judicial statement which was made to the justice of peace was nowhere to be seen. With the absence of the extra judicial statement, the trial judge was not placed in a better position of assessing as to

whether the appellant really confessed to have killed the deceased or not."

Guided by the above authority, the same cement the doubt which I have whether the second accused person confessed before the Police Officer.

Next for consideration is *whether the remaining evidence implicates the accused persons with the murder of Segenera S/O Hunghuru and Sai W/O Segenera*. Mr. Liberatus objected the tendering of the cautioned statement of the first accused of the reason being that the additional information was recorded contrary to the law. He claimed that the accused person was not addressed whether he wants to make the statement freely and he was not given his rights before recording.

I have perused the first accused person's cautioned statement and realized that the additional information was recorded without following proper procedure; the maker did not afford the accused person his rights. He did not ask the first accused if he wanted to make his statement freely and PW4 in his testimony admitted that he did not write those words. Failure to follow proper procedure in recoding the cautioned statement renders the statement fatal. Therefore, I disregard the additional cautioned statement of the first accused person. However, the first cautioned statement which was recorded on 04/04/2014 remains intact.

The only evidence to connect the second accused with the alleged murder case is his cautioned statement and the evidence of PW2. The cautioned statement of the first accused was ruled to be voluntarily made and was admitted by this court as Exh.P5 after it was subjected to trial within a trial test. DW1 in his defence maintained that he was tortured, threatened, and forced to sign the statement. In the cases of **Bombo Tomola v Republic**, [1980] TLR 254 and **Hemed Abdallah v Republic**, [1995] TLR 172, it was held that:-

*"Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular or unless the court after full consideration of the circumstances, is satisfied that the confession must be true; and that once the trial court warns **itself of the danger of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true**, it may convict on such evidence without any further ado."* [Emphasis added].

Applying the above authority, in the instant case, DW1 did not prove that he was tortured, his claims were mere words. He did not tender any PF3 to prove his claims. In the case of **Richard Lubilo and Another v Republic**, Criminal Appeal No. 10 of 1995, it observed that where there was a cautioned statement no evidence of torture through PF3 that the

cautioned statement by the second accused which incriminated the first, second and third accused was obtained through torture thus the second accused person confession was inadmissible. In the instant case, the accused did not tender any PF3 to prove the alleged torture as it was in the case of **Richard** (supra). At this juncture, I find it safe to consider the confession tendered before this court for the purpose of ascertaining its truthfulness or otherwise.

The Court of Appeal of Tanzania in the case of **Nyerere Nyague v Republic**, Criminal Appeal No.67 of 2010 upheld the decision in **Tuwamoi v Uganda** (1967) EA 91 it set a principle that even where voluntariness of a repudiated or retracted confession statement has been cleared, a prudent court should always evaluate the entire evidence and assess the weight to be attached to it. The court observed that:-

“ Even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case.”

Applying the above authority, this court will evaluate the evidence in respect of the first accused confession as follows; in his testimony, DW1 stated that after closing his shop business he decided to join the gang which involved assaulting people with bush knives. DW1 went on to state

that some of his friends passed away therefore he decided to involve Faustin S/O Thomas (DW2) who is his cousin.

DW1 testified to the effect that he and Faustin already assaulted one woman to death and they were paid Tshs. 500,000/=. DW1 narrated how they made serial killings. The first accused person further stated that Faustin had a dispute with Segenera therefore he wanted to revenge, thus they decided to murder him in consideration of being paid Tshs. 400,000/=. They headed to Kitete village and DW1 entered into the house and assaulted Segenera with a bush knife and his wife was assaulted by Faustine when she went outside the house.

The first accused person continued to narrate that during the night they slept in the bush and in the following day the two of them arrived at Katoro and DW1 headed to Kimumba. Apart from this story, DW1 narrated other serial killings in which they were involved. I have carefully compared the cautioned statement of the first accused and testimony of prosecution witnesses especially, PW2 and PW2 statements, he previously made at the police. Undoubtedly, it is true that DW1 confessed to have murdered Segenera S/O Hunghuru. In short, he did not say something different from what he confessed before PW2.

Ms. Winfrida, learned State Attorney referred this court to the case of **Michael Luhiye v Republic** (1994) TLR 181 and the case of **Mabana**

Masasi Nongwe v Republic, Criminal Appeal No. 61 of 2010 at DSM, whereby the Court of Appeal of Tanzania set aside the appeal and uphold the conviction based on confession. In the case of **Michael Luhiye** (supra), the Court of Appeal of Tanzania held that:-

"Corroboration is not necessary in law and the court may act on confession alone if it is full satisfied after considering all the material points and surroundings circumstances that the confession cannot but be true."

Equally, in the case of **R v Gae Maimba and Another** [1945] the Court of Appeal of Tanzania held that:-

" There is no rule of law or practice making corroboration of a retracted caution statement essential. Corroboration of retracted confession is desirable but if the court is fully satisfied that the confession cannot but be true, there is reason in law why it should not act upon."

Applying, the above authorities, I find that the cautioned statement of the first accused person can be relied upon as single evidence to enter conviction upon the accused person. I am saying so because in the instant case, the first accused person cautioned statement is detailed. I find that the first accused person's story was truthful and he confessed to have killed Segenera after being hired by one Faustin. Therefore, what Juma S/O Mohamed @ Budagara was telling the Police Officers was true.

With the above findings, it is my considered view that the testimony of the first accused person cannot overshadow the evidence of the Republic. DW1 completely denied the charges and he repudiated the said cautioned statement. However, this court after conducting the trial within trial proceeded to admit it and as explained in length above the accused person's confession is believed to be true. He narrated the whole incident, how he went to the deceased house and murdered Segenera S/O Hunghuru and Faustin murdered Sai W/O and DW1 did not end there he narrated how he was hired to commit other murder by using bush knives.

Therefore, I am not in accord with Mr. Liberatus, learned counsel for the first accused who submitted that the cautioned statement of the first accused person was defective and the same cannot be relied upon. After expunging the additional statement of the first accused I found that the cautioned statement of the first accused persons which was recorded on 04/04/2014 was proper and the same render this court to find that the first accused person's confession is true and reliable.

Apart from the first accused person's cautioned statement, as I have mentioned earlier that the rest of the prosecution evidence supports the charges against the first accused person. The arresting Police Officer, D6944 D/CPL Emmanuel (PW2) in his testimony before this court and in his statement which he recorded at the Police, stated that the first accused

person confessed to have committed the said murder, they killed two people a man and his wife; Segenela S/O Hunghuru and Sai W/O Segenela. Therefore, the same corroborates the caution statement of the first accused person.

In the upshot, I have reached the following conclusion. In the light of the shortfalls which I have endeavored to illustrate above, the offence of murder against FIKIRI S/O THOMAS has not been established. I differ with all assessors and find that he is not guilty of the alleged murder because there was no any cogent evidence to link him with the murder case at hand. I am satisfied that the prosecution has failed to prove the case against the second accused beyond reasonable doubt. Therefore, the accused is acquitted. I order FIKIRI S/O THOMAS to be released from the prison unless he is otherwise lawfully held.

On the other hand, I am satisfied that the prosecution's evidence is credible and reliable. I do not think that the positive evidence of PW2 and the cautioned statement of the first accused person is shakable. I am in accord with all assessors that the prosecution has proved their case beyond reasonable doubt against JUMA MOHAMED @ BUDAGARA, the first accused person.

In the event, I find that JUMA MOHAMED @ BUDAGARA is guilty as charged. I, therefore, convict him for murder contrary to sections 196 and 197 of the Penal Code Cap. 16 [R.E 2019].

DATED at GEITA this 30th April, 2021.


A.Z.MGEYEKWA

JUDGE

30.04.2021

SENTENCE

Since JUMA MOHAMED @ BUDAGARA, the accused has been convicted of murder, I hereby sentence him to death by hanging.




A.Z.MGEYEKWA

JUDGE

30.04.2021

Right of appeal under section 323 of the Criminal Procedure Act [Cap. 20 R. E. 2019] is fully explained.