IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT MPANDA

CRIMINAL SESSIONS NO. 51 OF 2018

(C/O PI No. 21 of 2016 Mpanda District Court)

THE REPUBLIC ..... PROSECUTION

VERSUS

KULWA S/O BUNZARI @ BODO ..... ACCUSED PERSON

JUDGMENT

20/09/2021 & 26/10/2021

Nkwabi, J.:

Luhafe hamlet residents, probably except the accused person, were in the evening of 17/09/2016, horrified by what befell their good fellow hamlet resident Edward s/o Kirumba @ Mawani when they found him to have sustained a cut wound on his throat and was bleeding profusely. They gathered to his assistance and sent him to the sub-village office and later was sent to hospital only to succumb of his sustained injuries. At the hamlet office, they inquired him who had inflicted the injury on him. Since he was unable to speak as a result of the cut throat, he signalled to write down the name of the culprit. He did so on pieces of papers which the hamlet members concluded that it was the accused person.

The accused person was arrested and sent to the police station where he is allegedly confessed to be involved in the incidence which led the deceases sustain the fatal injuries. The documents written by the deceased on the fateful day and another were sent to a hand writing expert who opined that the same were written by the same person. PW1 PAUL ,the then chairman of the hamlet, and PW2 Luseko confirmed to see the deceased wrote on the pieces of paper in their presence. After two hours, the suspect was arrested and sent to the Police Station. PW1 went to the Police Station, identified him and questioned him for what he had done? The accused person replied to PW1 it was Satan's fault *"Ni shetani tu aliyenipitia".*

PW1 insisted that the accused person is alone with the name Kulwa Bodo in the sub-village. The deceased and the accused used to live not far apart (neighbours). There were no grudges between the deceased and the accused person which is corroborated by the caution statement of the accused person that he merely involved in the fatal incidence on account of being paid. The testimony of PW1 is confirmed by PW2 LUSEKO.

The documents allegedly, written by the deceased were sent to a hand writing expert PW3 H.3400 Sgt. Stephen who conducted expert

examination using VSC (Video Speculator comparator) 6,000 for handwriting examination. The machine was in good condition and he conducted the handwriting examination without any problem. It is because of those resemblance in the words Kijana and Kipara were written by the same person. It is because of that examination that the person who wrote on exhibit. A1 and A2 as well as B is the same person, PW3 opined. PW4: H. 6181 Sgt. Godbless, investigated the case. He took that piece of papers for investigation. He was convinced by the investigation he did that it is Kulwa Bunzari Bodo who committed the offence.

The accused person was recorded his caution statement by PW5 H. 6013 Sgt. Rwezaura on 17/09/2016 in the very night he recorded the caution statement (exhibit P. 6) of the suspect at that time in which he confessed, they conspired commit the offence, they shared the proceed of the conspiracy and he went to the scene of offence with a bush knife (Panga). The accused was in a good state of health when PW5 interrogated him.

The defence of the accused person is comprised of a denial of committing the offence (He categorically denied committing the offence) and an alibi that on 16/09/2016 he was at home and did not go anywhere. He was

arrested when he was at home on 17/09/2016 during the night. At the police station he was asked of his name and told to sit down. The Policeman wrote down/on paper and when he completed, he forced the accused person to sign on the pieces of paper. He made him to sign by force. He denied knowing Edward Kirumba. The leaders said he is a good civilian. He has no grudge with anyone at Luhafe. He does not know Mwana Bodo. He denied to have confessed the offence.

He further asserted that no one who witnessed the offence being committed. He prayed the court to set him free. In cross-examination he said he was involved in electing the leaders. They are good leaders and persons of good character. He had not known PW4 prior to the incidence. He does not have a grudge with PW4. At their family he is the one who is called Kulwa. Bodo is the name of his grandfather. He does not know Mwana Bodo. He does not know if Mwana Bodo means the son/daughter of Bodo. There are five grandsons of Bodo born of Mwana Bodo.

He claimed, he neither heard the defence counsel ask PW4 that he was forced to sign the document nor his defence counsel cross – examined on an issue and he does not know its effect. He added that he does not know

Mwanabodo. He was not involved in the election of the sub-village leaders, he stressed.

It was due to the above evidence collected by the prosecution, the accused person (Kulwa Bunzali @ Bodo) was charged and prosecuted for the murder of **Edward** s/o **Kirumba @ Mawani** contrary to section 196 and section 197 of the Penal Code Cap. 16 R.E. 2002. The fatal incidence is allegedly happened on the 17/09/2016 at Luhafe – Tpngwa village within Tanganyika District in Katavi Region at around 08:00 pm.

In this trial, the prosecution was ably represented by Mr. Abel Mwandalama, learned Senior State Attorney. The accused person was commendably represented by Mr. Lawrence John, learned advocate. In the course of the trial, the prosecution called five witnesses and tendered six exhibits while the defence called one witness with no any exhibit to tender.

The following are matters admitted and/or disputed by the accused person:

The accused person admits his name.

- That the deceased is Edward Kirumba (was admitted during preliminary hearing).
- He admits that PW1 and PW2 were his good leaders in the village.

However, the accused person briskly disputes that he is the culprit of the offence. He maintains he is innocent. He denied knowing the deceased in his defence. He denied to have confessed before the police officer, he states that he was forced to sign a document (statement) which he did not make.

It is clear, according to witnesses of the prosecution the deceased died an unnatural death as his throat was cut. Further, according to the medical report (exhibit P 1) admitted without objection at preliminary hearing, the cause of death was excessive blood loss and air due to cut off the airway (trachea was cut off anteriorly). So, it is established beyond reasonable doubt and not in dispute that the deceased died an unnatural death. The cause of death in this case therefore is proved in line with the holding in **Julius Michael & 4 Others v Republic, Criminal Appeal No. 264 of 2014** (CAT) (unreported):

The law is established that for a charge of murder to be sustained, the prosecution must prove beyond reasonable doubt that the deceased died an unnatural death.

That being the position, then the main issues in this case that need be addressed and determined by this court are:

i. Whether the accused person is responsible for killing the deceased.

ii. If the first issue is answered in the affirmative, then whether the accused person had malice aforethought for killing of the deceased.

Prior to giving their opinions, I gave directions to the Court Assessors as follows salient points for consideration and determination in this case:

- Whether the prosecution witnesses and evidence are reliable.
- The accused person denied he was involved in the murder in his defence.
- Had to look at the contradictions and or lies on the part of the accused person's defence if any and evaluate its effect.
- Whether the dying declaration in this case can base conviction.

- It is not mandatory that they give reasons for their opinion.
- Whether the prosecution has proved murder offence against the accused person.

After the summing up all three court assessors were of the unanimous opinion that the accused person is guilty of murder and hence should be convicted of the offence.

It is trite law that the burden of proof lies in the prosecution to prove the offence beyond reasonable doubt see **Mohamed Said Mtula v Republic, [1995] TLR 3** (CA) *Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.* Speculation or guesswork is not allowed in criminal justice as per **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006** (C.A.). Further, criminal trails are not like a game of football but a serious business of convicting the guilty and acquitting the innocent in a sensible manner according to the law, which was clearly stated in **Hatibu Gandhi vs. R. [1996] TLR 12** (CA).

The critical evidence on the prosecution that is against the accused person that he is the one responsible of committing the offence the subject of this information is based on confession statement to the police officer (exhibit P.6), the accused person's admission of committing the offence before the sub-village (hamlet) chairman (PW1) and the dying declaration of the deceased which the deceased wrote on piece of papers. Apart from those pieces of evidence there is the expert opinion of hand writing expert which tries to substantiate that indeed the dying declaration was made by the deceased prior to his death.

I will start considering one piece of evidence after the other. I start with the admission before the sub-village chairman. PW1 Paul Mikasi testified in respect of this that he questioned the accused person for what he had done against Edward Kirumba when the accused person was at the police station. The accused person replied to PW1 it was Satan's fault *"Ni shetani tu aliyenipitia"*.

The accused person in his defence did not specifically dispute admitting committing the offence before PW1. In **Criminal Appeal no. 183 of 2005 Sangaru Lugaira Mathias v S.M.Z (CAT)** at DSM the Court of

Appeal of Tanzania had an opportunity to deal with the situation in the following authoritative manner:

> *In ground two, Mr. Uhuru vehemently criticized the trial Chief Justice in basing the conviction on the alleged statement of the appellant to PW1, PW2, PW3 and PW6 at the Police Station that he had cut the deceased with a panga. These witnesses, the counsel further submitted, contradicted each other in their evidence. They were unreliable Mr. Uhuru charged. ...*
>
> *The issue raised in this ground turns on the credibility of the witnesses. ...The learned trial Chief Justice who had the opportunity of seeing, hearing and assessing the credibility of these witnesses, found PW1 and PW3 truthful witnesses. This, we think, he was entitled and we can find no ground for faulting him as Mr. Uhuru urged. This finding, in our view, is in accord with the dying, declaration of the deceased in which she said she was cut by the deceased with a panga.*

In the same vein, I am of the view that PW1 is a credible witness. He had nothing to lie against the accused person. I accept his testimony as truthful. The accused person himself adores PW1 to be his good leader

and actually that he was involved in the election that put PW1 to power, though in rejoinder, dovetails and claimed he did not elect him.

In **Sangaru Lugaira Mathias v S.M.Z** (supra) at page 6, 8 & 9 it was held:

> *The complaint that motive was not proved is also in our view, untenable. In criminal charges, it is not a necessary ingredient to be proved in evidence expressly. In a murder charge for instance, the motive can be inferred from the action and circumstances of the killing if proved. In this case, the dying declaration by the deceased which is subject of the next ground provides the answer. The deceased said she was assaulted by the appellant with a panga because there was a quarrel.*
>
> *... In our view, the issue is whether the deceased made the declaration. The evidence on this is that of PW1, PW3 which admittedly, conflicts with that of PW11, the cart driver. We agree with M/S Fatma, learned State Attorney, that the discrepancy in the evidence on the dying declaration does not go to the root of the matter. Understandably, PW11, the cart driver, very likely was more concerned with the movement of the cart than what the passenger, the deceased, was saying.*

In that case, it is possible that PW11 did not hear the words uttered by the deceased which PW1 and PW3 heard. Therefore, accepting and relying on the evidence of PW1 and PW3 as the learned Chief Justice did as against the evidence of PW11, was proper and justified in the circumstances. ...

This very authority insists on corroboration on the dying declaration. Corroboration can also come from the conduct of the accused himself. The accused person said to PW1 that it was Satan's fault. The admission of the guilty made by the accused person to PW1 is sufficient to corroborate the dying declaration. At page 12 the CAT in the case of **Sangaru** (supra) said:

On the other hand, and for the sake of argument, if it is granted as urged Mr. Uhuru that the dying declaration should not have been admitted in evidence, still, we are firmly of the view that the evidence based on the appellant's admission was sufficient to sustain the conviction.

There are also falsehoods in the defence, which I will show later, of the accused person which advance the prosecution case and he cannot be heard to claim that the case was decided on the weakness of his defence:

The fact that the appellant's defence or some of the witnesses were not found truthful does not mean that the case was decided on the weakness of the defence. (Sangaru's case supra)

So, corroboration is plenty in this case as per **Godson Hemed v Republic, [1993] TLR 241** where the court of Appeal of Tanzania pointed out the need for corroborative evidence to a dying declaration due to the circumstances in which it was made.

In the case of **Posolo Wilson @ Mwalyego v Republic Criminal Appeal No. 613 0f 2015** (CAT) (unreported) the incidence took place at night at around 21.00 hours, it was held:

While PW1 reported the incident that in fateful evening, the appellant was swiftly apprehended on the following morning around 5.00 hours by a group of villagers led by the Hamlet Chairman Kamanda s/o Mwasile (PW3). On being interrogated by PW3 at the Hamlet Office in the presence of PW1, PW2 and a certain local vigilante leader named Lamson s/o Wenera, the appellant confessed to raping PW2 and offered to her mother (PW1) an expected harvest of maize and groundnuts from his farm as compensation so as to compromise the dispute ...

Such words, the Court of Appeal went on to say, were valid confessions and were sufficient in themselves to have founded the appellant's conviction of rape.

I turn next to discuss the caution statement of the accused person. In **Stephen Jason & Others v Republic, Criminal Appeal No 79 of 1999** (unreported) the Court of appeal observed:

> *Where an accused claims that he was tortured and is backed by visible marks of injuries it is incumbent upon the trial court to be more cautious in the evaluation and consideration of the cautioned statement, even if its admissibility had not been objected to; and such caution statement should be given little if not, no weight at all.*

In the present case, the accused person does not claim he was tortured. I will indicate later the value of the caution statement (exhibit P. 6) of the accused person.

I turn to discuss the dying declaration of the deceased in the present case. The incidence happened during the night. The deceased mentioned the accused person by writing his name on the pieces of paper. His health

condition could not allow him to describe the culprit leave alone mentioning the culprit orally. Admittedly, the culprit was known to the deceased. In the circumstances, the dying declaration of the deceased needs corroboration in order to sustain conviction. Though it is supported by **Eva d/o Salingo and 2 Others v. Republic [1995] TLR 220** (CAT)

> *"From the records, at the next earliest opportunity when PW3 saw the 2nd appellant and the 2nd accused at Msafiri Pombe shop, without any delay, she alerted the police (PW6) who arrested them. This, in our considered view is clear testimony of PW3's firm and unmistaken identification of the 2nd appellant and the 3rd accused as the assailants of the deceased. The trial Judge was right in his finding that PW3's identification of the 2nd appellant was conclusive. The complaint is to our minds groundless."*

Luck enough, there is such corroboration in the evidence that was brought by the prosecution. One can find corroboration in the admission of committing the offence to PW1, his leader when the accused person was at the police station. There is corroboration also in the defence of the

accused person where there are glaring falsehoods and inconsistencies. In the defence, the accused person falsely denied knowing the deceased while at the preliminary stage he admitted knowing him, secondly, in his defence especially during re-examination he claimed he did not elect leaders including PW1 while in the cross-examination by the prosecution he said they are good leaders and was involved in electing them. Lies on the part of the accused person corroborates/ advances the prosecution case as per **Pascal Mwita and 2 Others. v. Republic [1993] TLR 295** (CAT)

Quoted with approval the case of R v. Erunasoni Sekoni s/o Eria and Another (1947) 14 EACA 74.

> *"Although lies and evasions on the part of an accused do not in themselves prove the fact alleged against him they may, if on material issue be taken into account along with other matters and the evidence as a whole when considering his guilt.*

I am of the firm view that the prosecution therefore has managed to prove that the accused person killed the deceased one Edward s/o Kirumba. The caution statement too of the accused person lends assurance to the guilty

of the accused person, (corroborates other pieces of evidence of the prosecution). This is because, the accused person did not confess to have murdered the deceased, but confessed that he had in collaboration with another person inflicted wounds to the deceased, only that he made the confession of the offence prior to the death of the deceased. In **Vumilia Sanga & Another v Republic Criminal Appeal No. 84 of 2014** (unreported) the Court of Appeal of Tanzania had these to say where the confession is not in respect of the offence charged:

> *Having said that for a document to be considered as a confession it must admit in terms either an offence or substantially that the person making the statement committed an offence. ...*
>
> *As we have already pointed out, both Exhibits P2 and P5 amounted to a confession because apart from incriminating the second appellant, the first appellant did not make any attempts to exonerate himself, but seriously incriminated himself.*

In the case of Vumilia (supra), the appellant had retracted both statements in his defence, just like in this case, that he was forced to sign a statement they had themselves written, the Court of appeal went on to hold:

We are not convinced that his claims were true. As correctly submitted by Mr. Mwandalama, had it been true that he was forced to make those statements we would have expected the advocate who represented him to raise objections at the time those statements were being tendered in court in terms of section 169(1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA), ...

Based on the above discuss, the 1st issue which is whether the accused person is responsible for killing the deceased has to be answered in the affirmative.

The next question for consideration and determination is whether the accused person had the requisite malice aforethought in killing the deceased. This issue shall not detain me much.

The deceased was cut by a sharp-edged object on the throat, which is a delicate part of the body. That clearly manifests that the accused person had intended to kill the deceased. There is plenty of authority on this matter but just to mention but one **Enock Kipela v Republic, Criminal Appeal No. 150 of 1994** (unreported)

"... usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."

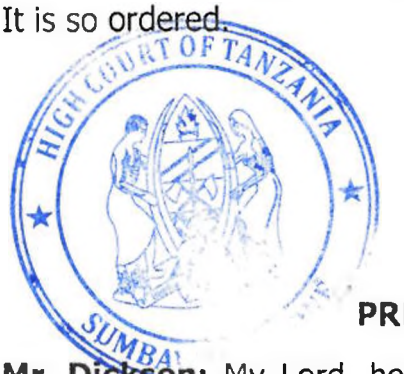
I firmly answer the 2nd issue which is whether the accused person had malice aforethought for killing of the deceased in the affirmative as well.

In this case, the wise court assessors as indicated above were of the unanimous opinion that the accused person is guilty of the offence, he is charged with, that is, murder. Based on the above discussion, I join hands with their respective opinions. I am satisfied that the prosecution proved the charge against the accused person beyond reasonable doubt. His defence that he did not commit the offence is mere fanciful possibility which ought to be rejected. See **Magendo Paul and Another v. Republic [1993] TLR 219** (CAT).

"If the evidence is so strong against an accused person as to leave only a remote possibility in his favour which can easily be dismissed, the case is proved beyond reasonable doubt."

In the end, I am satisfied that the accused person killed Edward Kirumba in cold blood, in that he had intended to take out the deceased's life. The prosecution therefore has managed to prove the information/charge of murder against the accused person beyond reasonable doubt. I find him guilty of murder of Edward s/o Kirumba and I accordingly convict him of murder under sections 196 and 197 of the Penal Code, Cap 16 R.E. 2019.

It is so ordered.



J. F. Nkwabi
JUDGE
26/10/2021

PREVIOUS RECORDS

Mr. Dickson: My Lord, he is the first offender, however, we pray for sentence in accordance with the law.

MITIGATION

Mr. Lawrence: My Lord, the convict is the first offender, he is youthful and a bread winner of his family. We pray for a lenient sentence to him. That is all.

SENTENCE

Court: There is only one punishment for the offence of murder, that is, sentence to suffer death by hanging. As such I sentence the convict one Kulwa s/o Bunzali @ Bodo to death by hanging in terms of section 197 of the Penal Code Cap 16 R.E. 2002.

It is so ordered.

J. F. Nkwabi
JUDGE
26/10/2021

Court: Judgment and sentence delivered this 26th day of October, 2021 in open court in the presence of Mr. Dickson Makoro, learned State Attorney, for the Republic and Mr. Lawrence John, learned advocate for the accused person.

J. F. Nkwabi
JUDGE
26/10/2021

Court: Right of appeal is explained.

J. F. Nkwabi
JUDGE
26/10/2021