

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIBONDO

(Original Murder Case No. 13 of 2021 of the District Court of Kibondo)

CRIMINAL SESSION CASE NO. 12 OF 2022

REPUBLIC

VERSUS

MAJALIWA ERNEST ACCUSED

JUDGMENT

24/6/2022 & 5/7/2022

L.M. Mlacha,J

The accused, Majaliwa Ernest stands charged of murder c/s 196 and 197 of the Penal Code, Cap 16 R.E 2019. It is alleged that he killed his daughter, SARA MAJALIWA on 28/8/2021 at Kakonko village, Kakonko district, Kigoma region. He denied the charge.

The prosecution led by Ms Agnes Hyera principal state attorney and Clement Masua state attorney called 6 witnesses and tendered 3 exhibits to assist them in discharging their burden of proof. PW1 Elizabeth John, the wife of the deceased told the court that she had 4 children namely, Godfrey Majaliwa, Julius Majaliwa, Sara Majaliwa and Jackson Majaliwa.

Sara is now dead. She was born in October 2013. She was disabled completely. She was unable to sit or speak. She could not even feed herself. One had to feed and attend her on everything. PW1 said that her relation with the accused turned worse after getting birth to Sara. He was not happy with the child. He was treating her badly. He refused to send her to hospital for medical treatment. She used to send her to hospital using money from her relatives. A dispute erupted in October 2021 between them based on issues of the child. He did not want her to send the child to hospital. He wanted the child to remain inside. Faced with these difficulties, PW1 decided to return to her mother, PW2 Faustina Saidi in October 2021. PW2 lives nearby. She moved with Jackson and Sara. She left Godfrey and Julius with the accused.

PW1 went on to say that on 28/8/2021 at 2:00 PM she went to hospital to collect food (lishe) for Sara. It is far away in another village. She left all the children at her mother's home where she stayed. All the children had come and were there on that day. She could not meet the hospital attendant who issued foods to disabled. She talked to him over the phone who said that he was away. He advised her to come on Monday. She moved away but when she came at the bus stand she discovered that the bus had gone.

She had to board a lorry. The lorry got a tire puncher on the way. This caused a delay. She came at Kakonko at 10:30 PM. She moved and arrived home at around 11:00 PM. She found the door to her room loose open. She entered and found all the children except Sara. Her room has a door which opens to the outside. The room of her mother is inside the house. She expected Sarah to be with her grandmother. She slept. She woke up on the other day and cross checked in the house but could not see Sara. Her mother had gone to work in the fields. She called her over the phone asking the whereabouts of Sara. She said that she never knew where she had been. She called the accused and asked whether he had picked the child. The accused said no. He decided to report the matter at Kakonko police station. The police advised her to proceed with the search.

PW1 proceed to say that her child was found dead on 1/9/2021 at Kumgate valley. She got the reports from her brother Ibrahim. They moved to the valley where she saw the body of Sara laid on the ground. It was covered with some grasses. It was in a bush land. The doctor examined the body before it was picked by the police and sent home for burial. The witness could not control her senses any more. She was crying throughout.

When she was asked to identify the accused, she moved to the dock to do so while in tears.

During cross examination PW1 said that the accused was seen by one of the children picking Sara that night. She went on to say that the accused agreed that the child was his but he was mistreating her.

PW2 told the court that PW1 is one of her children. She had 10 children but 2 are dead. PW1 is married to the accused and had 4 children. One of them, Sara is dead. She was disabled completely. She was unable to speak. Food was being served on her. She could not eat herself. She said that PW1 came home in early August 2021 to avoid daily beatings from her husband. She received her. She went on to say that one day her daughter went to hospital to collect food for Sara leaving the children at home. Her husband came at 7:00 PM saying he had come for his wife. She told him that she was not present. He left. She prepared food and eat with the children. She gave food to the children to give to Sara. They said that their mother could do so on arrival. The accused came again at 8:30 PM. She asked him the reason as to why she was coming repeatedly during the night. He asked for pardon and left but returned again at 9:30 PM. She told him that she was tired. She closed her door and went to sleep.

On 29/8/2021 she woke up early in the morning and went to her farm to irrigate. She planned to do so early and return go to the church as it was Sunday. While there, she received a call from PW1 who told her that Sara was missing. She advised her to cross check with her husband because he had come there three times during the night. She returned home and met the accused plus two others seated. His young brother in law asked him the reason as to why he wanted to reconcile with his wife while he had stolen the child. They demanded to know the place where he had put the child. There was a discussion. She advised her daughter to report the loss of the child to the police station. The accused followed her to the police station. On 1/9/2021 she work up and went to the market to sell vegetables. While there she was told that her granddaughter had been found Kumuyumbo valley, near the house of Mr. Senzo. She parked her things and went to the scene of crime. She found a lot of people. The police came, examined the body and put it in the car. She added that she identified the accused using lamps. He is also known to her as her son in law.

PW3 Mtondo Andrea told the court that he went to the valley on 1/9/2021 to pick water. While there he saw flies moving over the grass. On coming

closer, he found a dead body of a girl. He left and reported to his brother Senzo. They returned to the valley. They sent a report to police Kakonko. The police came to pick the body.

PW4 E 9284 D/SSGT Stanley and PW6 G 7699 D/CPL Hamisi came at the scene of crime in the company of the OC-CID and PW6 Dr. Prosper Paulo Manega following the reports of PW3. They all said that they found the body of the deceased laid on the ground covered with grass. It had started to decompose. PW6 examined the body of the deceased. PW4 drew the sketch map, exhibit P1. PW5 was the investigator. He questioned the accused and other witnesses. He recorded their statements. The accused confessed to kill the deceased in a cautioned statement, exhibit P2 recorded by PW6. It was received without objection.

It was the evidence of PW6 that the body was hidden in grasses. It had a lot of ants (siafu). He sprayed something to chase them away. He discovered that it was the body of a girl. He conducted examination and filled the Postmortem Examination Report, exhibit P3. He told the court that the child was blocked on the nose and mouth. Her lower lips were black indicating lack of oxygen. She had no external wounds. Her body had already decomposed. A slight touch to the skin could remove it.

PW5 told the court that the accused was already in the lock up on earlier reports that he had caused the loss of the child. On discovery that the girl was dead, a new file for murder was opened and he questioned him on it. He added that the accused made his confession freely saying he blocked air passage and killed her. PW5 went on to say that the body of the deceased was discovered at 4:00 PM and he started to interview him at 6:00 PM.

It was the defence of the accused (42) that he was living with his wife and children happily despite minor quarrels which are usually inevitable. He had four kids, Geoffrey, Julius, Sara and Jackson. On 7th August he arrived home from work and met his wife and children. He worked on the bricks yard. He made bricks for a living. He greeted his wife. Soon her phone called. He suspected the same to come from a guy who was breaking his marriage. He picked the phone and picked the number. He took bath and went to the village center to meet some friends. He returned at 8:00 PM, ate food and went to sleep.

On 8/8/2021 while away, his wife parked her clothes and left. His son Godfrey told him that she had gone to her mother (PW2). She left with

Sara and Jackson. He then heard that Sara had died. He saw her last on 7/8/2021. He is yet to see her to date.

The accused went on to say that he moved to his mother in law to see his wife. He had plans to get her back. That was on 28/8/2021. He was advised by his brother in Law, Ibrahim to come with his parents on the next day but when his wife was called to say her problem she remained silent. He was asked to explain. He said that the cause of the problems was the phone number. She was asked to say something about the phone number. She declined to respond. She said that she was not ready to say anything without her daughter Sara. Her brother Ibrahim called her aside. All of them remained there thinking on what had happened on the previous night. They came back. Ibrahim directed her to go to the police station to report. The people who were there advised him to go also. They arrived at the police station and sat at a bench. His wife was called inside. A police came out later and told him that he was under arrest. He was held and later sent to court accused of killing Sara.

The accused said that he had no witness to call but complained that he could not do so because of his status of being remanded. The court gave him an offer to bring witnesses on government costs. I directed the

defence counsel to talk to the accused on this aspect. When he came back, he said that he had talked to the accused and had the view that the accused could respond himself. When the accused was given leave to address the court he said that the witness cannot come adding that if they do so they cannot have any assistance to him. He instead asked the court to assist him.

I had ample time to examine the evidence and the demeanour of witnesses carefully. There is no dispute that the child Sara went missing in the night of 28/8/2021 and found dead on 1/9/2021 in the valley at the bushes covered with grass. Her body had already started to decompose. She had no eyes. The doctor said that they might have been removed by insects. On the cause of death, the doctor had the opinion that it was due to lack of oxygen. Her nose and mouth appeared to have been blocked leading to lack of oxygen and death. Death, the place where the body was found and the cause of death are not in issue. The issue is whether the accused is the one who killed the deceased and if so, whether he killed her intentionally.

The prosecution case is based on two types of evidence; circumstantial and confession evidence. I will start with an examining of the principles

governing circumstantial and confession evidence. Luckily, this is an area full of authorities both domestic and external.

In **Inspector of Police, Tamil Nadu v. John David** [2011] NSC 418 the Supreme Court of India had this to say on circumstantial evidence:

*"...the law is well-settled that **each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible.***

*... The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as **to rule out a reasonable likelihood of the innocence of the accused.** It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubt".(Emphasis added)*

In **Republic v. Kerstin Cameron** [2003] T.L.R. 84, the Court of Appeal set three principles up on which a conviction based on circumstantial evidence can be based. The court said thus:

(i) The evidence must be incapable of more than one interpretation;

(ii) The fact from which an inference of guilt or adverse to the accused is sought to be drawn, must be proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred;

(iii) In murder cases, evidence should be cogent and compelling as to convince a jury, judge or court that upon no rational hypothesis other than murder can the facts be accounted for.

See also, **Nathaniel Alphonse Mapunda and Another v. R** [2006] TLR 395, **Ilanda Kisongo v. R**, [1960] EA 780 and **Ali Bakari & another v. R** (1992) TLR 10 and **Hosea Francis @ Ngala & Another v. The Republic**.(CAT), Criminal Appeal No. 408 of 2015. In **Hosea Francis** the Court of Appeal said the following at page 13:

*"This Court has always insisted that circumstantial evidence directed against an accused person **must not be capable of more than one interpretation**, and must irresistibly lead to an inference that it was the accused person who is responsible for the death of the deceased."*(Emphasis added)

The word confession is defined in Section 3(1) of The Law of Evidence Act, Cap. 6 R.E. 2019 as follows. 'Confession' means:

- (a) **Words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunctions with other facts proved an inference may be reasonably drawn that the person who said the words or did the act or acts constituting the conduct committed an offence; or**
- (b) A statement which **admits** in terms either an offence or substantially that a person making the statement has committed the offence; or
- (c) A statement containing **an admission** of all the ingredients of the offence with which its maker is charged; or
- (d) A statement containing **affirmative declarations in which incriminating facts are admitted** from which, when taken alone or in conjunction with the other facts proved, an inference may be reasonably be drawn that the person making the statement has committed an offence."(Emphasis added)

Confessional statements may be made during investigation before a police officer or justice of peace. They may also be made orally during trial. Confessional statements made before police officers during investigation

are called cautioned statements. A caution statement is admissible in evidence if it is proved that it was voluntarily made. See **Shija Luyeko vs The Republic**, [2004] T.L.R. 254. See also **Joseph Stephen Kimaro & Another vs The Republic**, Criminal Appeal No. 340 of 2015 at page 21 where the Court of Appeal had this to say:

*"... this Court has on several occasions insisted that a confessional statement must be **both voluntary and must provide a true account.**"* (Emphasis added)

In **Posolo Wilson @ Mwalyego vs. Republic**, Criminal Appeal No. 613 of 2015 the Court of Appeal expanded the principle to cover oral statements made before or in the presence of reliable witnesses. The court had this to say:

*"... it is settled that **an oral confession** made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, **may be sufficient by itself to found a conviction against the suspect.**"* (Emphasis added)

See also **Rasul Amir Kalan v. The Republic**, CAT Criminal Appeal number 368 of 2017 page 24 where it was said that 'Everything being equal, the best evidence in a criminal trial is a voluntary confession from an

accused person'. The court was following its earlier decisions made in **Nyerere Nyangue v. Republic**, Criminal Appeal number 110 of 2007 and **DPP v. Rehema Omary Abdul and 2 others**, Criminal Appeal No. 57 of 2019 (unreported).

Having stated the principles, I will now move to examine the question whether there is evidence showing that the accused is the one who killed the deceased or not. I will examine circumstantial evidence and the confession made before the police officer together. The prosecution brought PW1 who told the court that the accused did not like the child. He used to mistreat her. He did not support the move to send her to hospital for treatment or get food supplements. There were several quarrels caused by the existence of the child in the family. These difficulties reached the peak on 8/8/2021 when the wife picked the child and went back home. She left with Sara and Jackson (the last two) but others soon followed her because it was not far. She stayed with her mother from 8/8/2021 to 28/8/2021. The accused accept this fact adding he did not go there up to 28/8/2021 showing an element of hatred to the child.

We have the evidence of PW1 that on 28/8/2021 she went to hospital to collect food for Sara but when she came back at around 11:00 PM she

could not see her. PW1 said that her room has a separate door opening to the outside. When she came back she found the door loose open. All the children were present except Sara. Thinking that Sara had slept inside with her mother, she slept till the other day. She could not see Sara on the other day. She called her mother who was away on the farms and inquired about the whereabouts of Sara. Her mother said that she was not aware. She advised her to ask the accused because he had come there 3 times earlier during the night. PW1 said that one of her children told her that the accused had picked Sara. She informed the police who put the accused under arrest. He remained in the police lock up from 28th August up to when Sara was found dead. Sara was found dead in the valley on 1/9/2021. PW1, PW2, PW3, PW4, PW5 and PW6 confirmed that she was found in the valley covered with grasses. PW6 says that she suffered air blockage leading to her death. PW2 confirmed that the accused had come there three times in the previous night. PW1 said that Sara and others were in her room which has a door opening to the outside. When she came back, she found the door loose open. The accused agree that he came there on the previous night though for a different purpose.

The accused denied killing Sara. He said that Sara left with her mother on 8/8/2021 following a misunderstanding between him and PW1 on the previous evening and that he is yet to see her to date. He is now informed that she is dead. He agree to have come at the house of PW2 on 28/8/2021 but said that he had come to seek compromise to get her wife back not issues of the child Sara. He denied picking Sara that night. He denied killing her.

Having examined the evidence closely, I have the view that the Republic have managed to prove the following facts. i) That, the accused hated the child who was the source of quarrels between him and his wife. The accused accept that there was a misunderstanding but has brought the defence of suspicious of adultery. I think this defence was just introduced to frustrate the matter. I could not believe it. To the contrary, I believed the evidence of PW1 who said clearly that the accused hated the child. He did not want her to receive medicines or food supplements. Hatred is also found in the fact that the accused could not even bother to visit her during the 20 days of separation or look for her when he was informed that she was missing. ii) That the accused came at the house in the night of 28th August 2021 3 times. PW2 appeared reliable. She was an elderly woman

who did not appear to have reason to cheat against her son in law. The accused accepted this fact but said that he had come there for a different mission. I could not believe his story. He did not appear as speaking the truth but open lies. iii) That the door of the room where the child had been was found loose open by PW1 when she came that night. It was independent opening to the outside making it easy for someone to enter and pick the child. iv) That, PW1 had reliable information the children that the accused came and picked Sara that night. The children did not come to testify because the accused is their father but PW1, unlike the accused, did not appear to speak a lie.

The fact that the accused did not like the child and had several quarrels with his wife on issues of the child, the fact that he was seen at the place where the child had been that night shortly before she disappeared, the fact that the door was found loose open and the fact that he did not bother to trace him before and after disappearing, bring a strong circumstantial evidence that he is the one who picked and killed Sara. He had all the reason because he did not like her. The evidence of PW1, PW2, PW3, PW4, PW5 and PW6 show a strong circumstantial evidence that the accused is

the one who committed the crime. The evidence does not lead to any other person other than the accused.

Apart from the circumstantial evidence, I have his confessional statement; exhibit P3, which was received without objection. Exhibit P3 is reproduced in part in Swahili as under.

*" Nakumbuka mnamo tarehe 28/08/2021 majira ya saa 00:00hrs nikiwa nyumbani mtoto akiwa amelala na wakubwa zake waitwao Geoffrey s/o majaliwa na Julius s/o majaliwa mama yake hakuwepo nyumbani **niliingia chumbani walipokuwa wamelala watoto wale watatu na kisha kumchukua SARAH D/O MAJALIWA na kutoka naye na kuelekea porini huko kumgoti na kuamua kumziba pua pamoja na mdomo na akawa anajaribu kulia lakini hakuweza na baadae alizidiwa na ndipo alifariki dunia, na baada ya kuhakikisha mtoto yule amefariki nilimfunika na **nyasi** na kisha kumwacha palepale nami nilirudi nyumbani na tarehe 29/08/2021 majira ya asubuhi **mtoto aitwaye GEOFREY S/O MAJALIWA kwa kuhisi kuwa huenda aliniona kipindi namchukua nilimwita na kisha kumweleza kuwa asiseme kitu chochote kuhusiana na kupotea kwa mdogo wake*****

SARAH D/O MAJALIWA kwani (nilihi) nilihisi ataulizwa hivyo asimwambie mtu yeyote kuhusu kuhusika kwangu, lakini pia ilikuwa rahisi kumchukua mtoto huyo kwasababu nilivyoenda pale sikumkuta mke wangu hii ilirahisisha uchukuaji na vile vile nilijua asingejua chochote kile kuhusu mtoto, **sababu ya mimi kumwua mtoto wangu SARAH D/O MAJALIWA ni mateso ya muda mrefu tuliyoyapitia juu ya mtoto huyo tumezunguka sehemu mbalimbali kwa ajili ya tiba lakini hakupata kupona pia amesababisha ugomvi kati yangu na mke wangu na kupelekea kuishi kila mtu kivyake, lakini pia mke wangu kutokana na ile hali ya kuishi mbali kwa sababu ya huyu mtoto marehemu ilipelekea kuanza matendo ya umalaya kwani nishawahi kumkamata ndani kwa PAUL S/O MLENGERA. Hivyo kutokana na hali hiyo ilinibidi kumuua SARAH D/O MAJALIWA ili mimi na mke wangu ELIZABETH D/O JOHN tuishi vizuri tarehe 29/8/2021 baada ya kuona maswali yamekuwa mengi kuhusiana na mtoto huyu nilijipeleka kituo cha polisi wilaya ya Kakonko. Na haya ndiyo maelezo yangu yako sahihi kabisa kama nilivyoeleza".**

The cautioned statement speaks it all. It shows that he admitted to commit the crime. He said he blocked the air passage. That is exactly what was seen by the doctor. It is thus clear that the accused is the one who picked the child and killed her.

The next stage is to examine whether he killed her intentionally. Malice aforethought or intention to kill is contained in section 200 of the Penal Code cap 16 R.E.2019. It reads as under:

"200. Malice aforethought shall be deemed to be established be evidence proving any one or more of the following circumstances:

- a) **an intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
- b) **knowledge that the act or omission causing death will probably cause death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- c) **an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;***
- d) an intention by the act or omission **to facilitate the flight or escape** from custody of any person who has committed or attempted to commit an offence."*(Emphasis added)**

This provision was interpreted in various decisions of this court and the Court of Appeal. In **Enock Kipela v. The Republic**, Criminal Appeal No. 150 of 1994 the Court of Appeal had this to say at page 7:

"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 or blows 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 attacker's utterances, if any, made before, during or after the killing; and (7) **the conduct of the attacker before and after the killing.**"(Emphasis added)*

See also, **Mark Kasimiri v. R.** (CAT) Criminal Appeal no. 39 of 2017.

In this case we have evidence showing that the accused picked the child and sent her to the bush. He blocked air by blocking the nose and mouth. After seeing that she was dead, he put her on the ground and covered her with grasses. He then returned in the village and remained silent. When he was asked about the whereabouts of the child he said that he did not know. Looking at the distance and the Place (at the valley, bush land 3

kilometers away), the type of weapon used (the hand palm of an adult), the place where it was applied (the nose and mouth of a disabled child aged 7), the amount of force (tight/big) and number of blows (held tightly) one can see no other intention but the intention to kill. His conduct thereafter said it all. He put her on the ground and covered the body with grasses. He returned to the village to warn his child that he should not say anything. He also kept silence pretending not to know anything. This conduct shows malice on the part of the accused.

The defence of the accused that he did not kill the deceased is baseless in view of what has been shown above. And indeed, even when he was given a chance to call witnesses in his defence at the cost of the government, to give us a different picture or possible doubts, he could not take the offer. He said that they could not be of any assistance to him. The court remained with what he said which was mainly open lies. His defence could not shake the prosecution case. I find it to be baseless and proceed to dismiss it.

All facts measured and weighed carefully, I have the view that the prosecution has proved the case beyond reasonable doubts. I find you the

said Majaliwa Ernest guilty of murder contrary to section 196 and 197 of the Penal Code cap 16 R.E. 2019 as charged and convict accordingly.



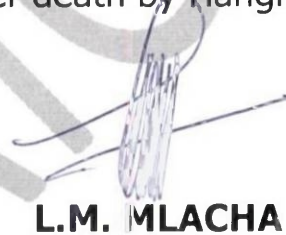
L.M. MLACHA

JUDGE

5/7/2022

SENTENCE

There is only one sentence for murder which is death by hanging. I personally do not want sentence but my hands are tied. I sentence you the said Majaliwa Ernest to suffer death by Hanging.



L.M. MLACHA

JUDGE

5/7/2022

Court: Judgement delivered in open court in the presence of the accused, Ms Agnes Hyera Principle State Attorney and Clement Masua State

Attorney for the Republic and Mr Fortunatus Felix, Advocate for accused.

Right of appeal Explained.



A handwritten signature in blue ink, appearing to read "L.M. Mlacha".

L.M. MLACHA

JUDGE

5/7/2022

ORIGINAL