

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
(ORIGINAL JURISDICTION)
CRIMINAL SESSION CASE NO. 64 OF 2014
THE REPUBLIC

VERSUS

SAMWEL S/O MAYOMBE MWINYISABI @ SAMWEL DAMIAN..... ACCUSED

JUDGMENT

15th March, 2022 & 01st April, 2022.

E.E. KAKOLAKI, J.

Before this court the accused person **Samwel S/O Mayombe Mwinyisabi @ Samwel Damian** is charged with the offence of **Manslaughter**; Contrary to Section 195 of the Penal Code [Cap. 16 R.E 2002 now 2019]. It is alleged by the prosecution that the accused on the 14th January, 2013 at Tabata Segerea Chama area within Ilala District in Dar es salaam Region, unlawfully killed one **Acley Madinda Samwel @ Madinda Samwel**. When the charge was read over to the accused during preliminary hearing, he flatly denied any involvement in commission of the offence except his personal

particulars, thus throwing the ball to the prosecution to prove his guilty. In its urge to prove the charge against him, the prosecution paraded in court six (6) witnesses and tendered four (4) exhibits which are Postmortem Examination Report (Exh.PE I) tendered by Dr. Innocent J. Mosha PW1, Accused's cautioned statement (Exh. PE II) and crime scene sketch map (Exh. PE III) tendered by PW2 and witness statement of one Damian Mdamu (Exh. PE IV) tendered by PW6. The accused was the sole defence witness and tendered no exhibit. Throughout the trial, the Republic was under representation of Ms. Christine Joas, learned Senior State Attorney and Ms. Jacqueline Werema, learned State Attorney whereas the accused person enjoyed the services of Mr. Henry Mwinuka, learned advocate. It is worth noting that, the trial of this case proceeded with aid of three assessors.

As alluded to herein above during the preliminary hearing the accused denied all facts except his personal particulars. It is the law under section 3(2)(a) of the Evidence Act,[Cap. 6 R.E 2019] that, a charge against any person in all criminal matters must be proved beyond reasonable doubt and the duty of so proving lay on the prosecution side as per the requirements of section 110(2) of the Evidence Act. In this case the charge facing the accused person is Manslaughter, which as per section 195 of the Penal Code is the act of

unlawful killing of a human being. Section 195(1) of the Penal Code which creates the offence of Manslaughter reads:

*195.-(1) Any person who by **an unlawful act** or **omission** **causes the death of another person** is guilty of manslaughter.*

In view of the above cited provision, for one to prove the offence of Manslaughter has to establish whether there was unlawful act or omission committed by the accused person and that it is the said act or omission that caused the deceased death. As for this case in order to establish whether or not it is the accused person who committed an offence as charged, three issues were framed by the court. **One**, what was the deceased's cause of death? **Second**, whether it is the accused person who caused the deceased death? **Third**, if the second issue is answered in affirmative, whether the killing was unlawful or not. In responding to them, in this judgment I am not intending to reproduce all prosecution and defence evidence as adduced in court as I will be narrating it in the course of determining the said issues.

To start with the first issue as to what was the deceased's cause of death, there is evidence of PW1, Dr. Innocent J. Mushi who examined the deceased body at Muhimbili National Hospital (MNH), PW3 and PW5 residents of

Tabata who attended the deceased before meeting his ultimate death. When testifying PW1 who is a pathologist informed the court that, on 15/01/2013 at MNH he conducted a post-mortem examination of the deceased (Madinda Samweli) in the presence of Cpl. Mselem and deceased's relatives Bakari Mkenda and Lupembe John who identified it to him. He said, he noted the deceased had a big wound on the front area of his chest measuring 7 by 2 centimeters width that had penetrated into his left lung and injured the veins thus leading profuse bleeding. This witness prepared and tendered in court autopsy report as exhibit PE1, which established deceased cause of death to be due to Hemorrhagic Shock (Massive Hemathorax). PW1's evidence on the wound sustained by deceased which caused his death is corroborated by evidence of PW3 Ally Mohamed and PW5 Abubakar Athuman Nyangu. It was in their testimonies that, on the 15/01/2013 while at Chama Segerea area playing pool table game, heard an alarm coming from the opposite side of the road and one calling close to that area, they found the deceased who identified himself a Madinda laying on the ground with bleeding wound on his left side of the chest. PW3 further informed the court that, together with other people secured as car and rushed the deceased to Amana Hospital but on reaching there they noted he was dead already so had to go to Staki Shari

Police Station for reporting the incident and later on took the body back to the mortuary for storage. PW5 who was in company of PW3 when the deceased was ferried to the hospital said did not accompany him (deceased) as he remained behind with other people searching for perpetrator of the crime (accused) whom they managed to arrest while hiding in the ceiling board part of the house. He added after his arrest they handed him to Staki Shari Police Station. PW5, identified in court the accused person as person he participated in his arrest.

From the above testimony this court is remained without doubt that, the deceased died of unnatural death which resulted from **Hemorrhagic shock** resulting from stab wound on the left part of the chest. Next for determination is the issue as to whether it is the accused person who caused the deceased death. The prosecution case hinges on the accused confession made orally before PW2 which is also contained in his caution statement dully recorded by PW4 CPI. Mselem Issa Mselem and witness statement of Damian Mdamu tendered in court by PW6 under section 34B of Evidence Act, as there is no single eye witness who testified in court to have witnessed the accused stabbing the deceased.

Accounting for the duties he performed on the 14/01/2013 as officer on duty at Staki shari Police Station, PW2 A/Insp. Michael Zebedayo Lukubalo (retired) testified that, at 21.00 hours he received a group of six people led by their leader who had arrested one person who identified himself to him as Samwel Mayombe. He testified upon receiving the accused he interrogated him orally and the later confessed to him to have stabbed his boss after a fight following accusations by him that he was stealing his (deceased) money from the butcher he was working in. This witness stated the case file on the offence of Grievous Harm was open and that, as he was preparing to set out to visit the scene of crime, one Abubakar who was in company of persons that brought the accused person at police informed him that the wounded person had passed away. That is when Corporal Mselem was appointed to record his statement. Another set of confession is the written one which was recorded on 14/01/2013 and tendered in court by PW4 as exhibit PE II. When tendering exhibit PEII PW4 testified that, the accused person was informed of his rights before recording said cautioned statement and consented to record it. That his consent is signified in writing when stated that, what is recorded by him (PW4) is true account of what he stated in the statement. In that cautioned statement the accused gave a

similar story to the one given by PW4 which proves that there was a fight between the deceased and accused at the accused's home and in front of his father before the deceased was stabbed with a knife on the left side of the neck. That, in the course of fight, the accused collected a machete but could not use it as the deceased snatched it from him before he once again picked a knife from his house which he used to stab the deceased with and ran away and later on arrested and taken to police station.

On his side the accused person DW1 in his defence evidence denied to have not only stabbed the deceased but also to have known the deceased whom he was being accused of killing. It was his case that, on the date he could not remember but at 7.00 hours, he was arrested at Segerea mwisho bus stop by police officers and taken to Staki shari Police Station before he was asked to sign statements without being informed any of his rights. He denied to have stayed with his father at his home Tabata kwa bibi as he was living with his wife Eliza Mchiwa. This witness named his father by name of Mayombe Mwinyihabi who is living at Mamkolo Village within Bahi District, Dodoma Region and not Damian Mdamu as alleged by prosecution through exhibit PEIV (witness statement). He said nobody mentioned to have

witnessed him stabbing the deceased thus his case was not proved beyond reasonable doubt.

The law under section 3(1)(a),(b),(c) and (d) of the Evidence Act, [Cap. 06 R.E 2019] defines the term confession as words or conducts or combination of both or a statement containing an admission or affirmative declaration of all or substantial ingredients of the offence with which its maker is charged or from which an inference may reasonably be drawn that it maker has committed an offence. Confession can be in written form or verbal, made before the police officer or justice of peace or orally made before any reliable witness.

In this case, I have taken into consideration the accused oral confession before PW2 and found it to be his true account hence reliable as he never repudiated nor retracted it on any reasons involuntariness inclusive. I also had an opportunity of observing the demeanor of the witness (PW2) when testifying and satisfied that he was a truthful one, thus I have no any doubt in believing his evidence. It is trite law that oral confession by itself can ground conviction. This legal stance was stated by the Court of Appeal in the case of **Osolo Wilson @ Mwalyego Vs. R**, Criminal Appeal No. 613 of 2015 (CAT-unreported), where it observed thus: -

"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 conviction against the suspect."

As alluded to above the only retracted confession by the accused person is the second one contained in exhibit PEII and not the first one made before the PW2. In his defence DW1 said, at the police station was never informed of his rights apart from being asked to sign papers which were brought to him as he was before signing. I reject this defence for three reasons. One, it is an afterthought as the same was not raised during admission of exhibit PEII. Second, DW1 never mentioned as to when the said papers was brought to him and by who before he was asked to sign them. Third, the witness PW4 who tendered it in court was never cross examined on that fact hence admission of the facts stated therein. It is the law that failure to cross examine of important facts is a clear admission of the same. This proposition was settled in the case of **Jaspini s/o Daniel @Sizakwe Vs. DPP, Criminal Appeal No. 519 of 2019**, (CAT-unreported) where the Court of Appeal held that:

"...it is settled law that failure to cross examine a witness on an important matter implies acceptance of the truth of the witness evidence in that respect..."

In view of the above, I have no reason to disbelieve accused retracted confession as reduced down in exhibit PEII after warning myself of the danger of basing conviction on uncorroborated confession for two reasons. **One**, the same was obtained voluntarily as there is no complaint which was raised by the accused concerning that fact. **Second**, the statement is so detailed and elaborate such that, no any other person could have given account of the personal particulars therein the sequence of events leading to stabbing of the deceased except the person who committed the offence. In the circumstances similar to the present one the Court of Appeal in the case of **Flano Alphonse Masalu @ Singu And 4 Others Vs. R**, Criminal Appeal No. 366 of 2018 (CAT-unreported) when dismissing the appellant's complaint on the court's reliance on uncorroborated retracted confession to convict him on the offence of Armed Robbery had this to say:

"...the learned trial magistrate did not have to warn himself of the dangers of basing conviction solely on the uncorroborated retracted confession. All the same, in the circumstances of this case, we are of the firm view that had the learned trial magistrate done so, he would still have proceeded to convict

the first appellant solely on the retracted confession. We so hold as we are mindful that the said confession is so detailed and elaborate; that it gives a narrative of the first appellant's personal facts as well as the sequence of events leading to the armed robbery that no other person except a perpetrator of the crime would have known. We would thus sustain the first appellant's conviction solely on the confession."

In the light of the above cited authority, and having warned myself of the danger of convicting relying on uncorroborated retracted confession and having reasons to believe that both accused oral confession before PW2 and in exhibit PEII contain nothing but the truth, it is the findings of this court that, it is none but the accused person who stabbed the deceased with a knife that caused his death.

The above finding notwithstanding, I am aware of the position of the law that, as a matter of practice generally retracted confession like the one at discussion in exhibit PEII has to be corroborated before conviction is based on. Corroboration can be found both in accused conduct and lies. See the case of **Mboje Mawe and 3 Others v. R**, Criminal Appeal No. 86 of 2010 (CAT-unreported). In this case I find corroboration in accused's conduct in PW5's evidence who stated that, they arrested the accused person hidden in the ceiling board part of the house before he was taken to Staki shari

Police station as well. Further corroborative evidence is found in blatant lie told by the accused in a situation where he could not have to. He said, he was arrested by police officers on unknown date before taken to the Police station contrary to the reliable evidence of PW5 who participated in his arrest as well as PW2 who received him at the Police station after being brought by six civilians. All this evidence is inconsistent to the accused innocence and I so find. Thus the second issue is answered in affirmative that is the accused person who caused deceased's death. As to the statement of Damian Mdamu (exhibit PEIV) who could not be found, I find the same to be unreliable for one good reason that, it contravenes the provisions of section 34B(2)(c) of Evidence Act. The said section provides thus:

(2) A written or electronic statement may only be admissible under this section-

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;

The above cited provision requires the statement to contain a declaration that what the maker is stating is true to the best of his knowledge and belief

and will be used in court as evidence. In this case the maker of exhibit PEIV is aged 80 years old and he signed it by his thumb print which is an indication that he is illiterate who could not write. The declaration is written in English and PW6 who tendered it did not inform the court as to whether its contents were interpreted to the maker before signing by appending his thumb print. It is from that reason I find the document to be unreliable hence refrain to accord it any weight.

I now move to the last issue as to whether the killing was unlawful or not.

The Penal Code does not define the term "unlawful act". According to the Black's Law Dictionary, 8th Edition, page 1574, the term "*unlawful act*" is defined to mean *a conduct that is not authorized by law or violation of civil or criminal law*. The act or omission becomes lawful when it is authorized by the law or performed in compliance or not in contravention of any provision of the law. In this case prosecution evidence as adduced by PW2 and PW4 and exhibited by exhibit PEII proves to the hilt that, it is none other than the accused person who contrary to the law and without any justification stabbed the deceased on the left side of his chest on the 14/01/2013. And it is the said stab wound on the chest as per evidence of PW1, PW3 and PW5 supported by exhibit PEI which caused his death. There is no any explanation

whatsoever from the accused person to justify his act. To that end, I am satisfied that his act of stabbing the deceased with a knife was unlawful, hence the third issue is answered in affirmative.

As alluded to above this court conducted hearing with aid of three assessors who after being taken through the summary of evidence in this case gave their opinion. It was their unanimous opinion that the prosecution case was proved beyond reasonable doubt and that the accused is guilty of the offence he is charged with.

In light of the above evidence and the gentlemen assessors' opinions which I subscribe to, I am satisfied that, the prosecution proved its case beyond reasonable doubt against the accused person. I thus find him guilty and convict him of the offence of Manslaughter; Contrary to section 195 of the Penal Code.

It is so ordered.

DATED at Dar es salaam this 01st day of April, 2022.



E. E. KAKOLAKI
JUDGE
01/04/2022.

