THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT NJOMBE

CRIMINAL SESSION CASE NO. 08 OF 2019.

REPUBLIC

VS.

HEKIMA S/O CHAULA

JUDGMENT

16th & 24th June, 2022

UTAMWA, J:

The accused person, HEKIMA S/O CHAULA stands charged with the offence of murder contrary to Section 196 and 197 of the Penal Code, Cap. 16 R.E 2002 (Now R.E 2019), hereinafter called the Penal Code in short. It was alleged that, on the 17th day of February, 2018 at Mtulingala Village within the District and Region of Njombe, he murdered one Dalia d/o Mgowole (henceforth the deceased). When the charge sheet (the charge) was read over and explained to the accused, he pleaded not guilty thereto, hence a full trial. Nonetheless, during the preliminary hearing conducted under section 192 of the Criminal Procedure Act, Cap. 20 RE. 2019 (the CPA) before another Judge of this court (Kente, J. as he then was), the accused's names and personal particulars were not disputed. It was also

not in controversy that, initially, the accused was charged with assaulting the deceased, but latter, upon her death, this charge of murder was preferred.

During the trial, the Republic was represented by Mr. Andrew Mandwa, learned State Attorney whereas the accused person was represented by Ms. Tunsume Angumbwike, learned advocate.

The trial regarding this case, proceeded without the aid of assessors vide the provisions of section 265(1) of the CPA as repealed and replaced by section 30 of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022. The new provisions of the Act no longer makes it compulsory for a trial of this nature to be conducted with aid of assessors. The provisions guide thus, and I quote them verbatim for a readymade reference:

> "The High Court, where it considers necessary for the interest of justice, sit with not less than two assessors provided that in deciding the matter, the judge shall not be bound by the opinions of the assessors."

During the trial, the prosecution paraded a total of four (4) witnesses whose testimony was supported by two documentary exhibits. The accused person relied upon his own sworn defence and one other defence witness.

The prosecution case was essentially as follows: according to the prosecution witness No. 1 (PW 1) Dr. Kesha Clement Mgunda, a medical officer (Now stationed at Ikeru Hospital in Makambako), on 24th February, 2018 he was stationed at Makambako Town Health Centre. At 10:00 am while at his work station, he was requested by police officers to perform a post-mortem examination of the body of the deceased which was in the mortuary. He examined it and made the post-mortem examination report

(exhibit P. 1). He noted during the examination that, the cause of death of the deceased was *Septicaemia,* i.e. an infection caused by bacteria.

PW.1 further testified that, the body had three point wounds of needle size. They were discharging pass-like fluid especially when the stomach was pressed. When examined by the court, he said that, the infection might have been caused by the dirty sharp object that had been used to inject or puncture the deceased, hence her death.

The evidence by PW. 2, Tegemea d/o Mgowole was that, in 2018 she was living at Matemba area in Makambako. The deceased was her aunt who lived in Mtulingala village. On 18th February, 2018 at 10:00 am she was informed that, the deceased had been invaded the previous night. On 19th February, 2018 she took breakfast to the deceased in the hospital where she had been admitted. The deceased showed her the wounds on her neck and hands. She also informed her that, the attackers injected her on the left side of the ribs, and showed her the wounds caused by the said injection. The deceased also informed her that, the assailants included the accused. Later on, she was informed that the deceased had died.

PW.2 further testified that, the deceased and the accused were not in good terms as they were quarrelling over land. The accused used to intrude into the deceased's land in Mtulingala village.

It was also the prosecution case, according to Oscar Mgowole who testified as PW. 3 that, he (PW.3) is neighbour to the accused at Mtulingala village and they knew each other since childhood. On 18th February, 2018 at 10:00 am he was informed through a hand-phone call that the deceased

had been attacked at her home. When he went to her home, the deceased informed him that, she had been attacked by the accused (Hekima Chaula) and another person whom she did not identify. She also told him that the attackers injected her with a needle on her left side of the ribs. PW. 3 together with others then took the deceased to police station at Makambako from where she was taken to hospital. On 23rd February, 2018 he was informed that the deceased had died. The accused and the deceased were quarrelling over farms. The deceased used to inform him of such quarrels.

When cross-examined, PW 3 informed the court that, the first person who met the deceased after the attack was one Iniki Lusulile. The deceased also informed him (PW.3) that, she was attacked at 9:00 pm. He also named the people who took the deceased to the hospital as Aneth Mgowole, Mawazo and local leaders.

On his part, one No. H. 4735 D/C. Amos, (A police officer and investigator of this case), testified as PW.4. He said that, the accused had been previously charged in court with the offence of causing grievous harm to the deceased. He was thus, put in Njombe remand prison for Criminal Case No. 109 of 2018. Upon the death of the deceased, on 26th February, 2018 at 11:00 am he (PW.4), took the accused from the prison to Makambako Police Station for interrogation by using a court removal order. The accused was physically and mentally fit when he took him from the prison.

In the interrogation room, according to the PW.4, they were only two, i.e. the PW.4 and the accused. He introduced himself to the accused and informed him of the offence of murder he was charged with. He informed the accused that, he was not compelled to give the statement, but, he could do so at his own willingness. He further notified him of his right to call a relative, friend or advocate at the interrogation. The accused opted to make the statement without the presence of any of such persons. The accused then made the cautioned statement to him (PW.4) who recorded it. The PW.4 then gave it to the accused who read it and confirmed that the same was correct and he (accused) had nothing to add in it. He then returned the accused to the police lock up at Makambako Police station. Upon a trial within trial (TWT) being conducted by this court, the statement was admitted as exhibit P.2.

In his cross-examination, the PW.4 further testified that, he also recorded cautioned statements of other prosecution witnesses like the PW.1, 2 and 3. He also inspected the scene of the crime and saw a broken window at the deceased's house. In his cautioned statement, the accused also mentioned other persons like Sauda, Shabani and one person (who was later identified as Kayruni Peter George) as his (accused) co-instigators of the offence. The other suspects of the case were however, released by the National Prosecution Office in Njombe.

Upon this court finding the accused with a case to answer, he made a sworn defence. In his evidence as the Defence Witness No. 1 (DW.1), he basically testified that, on 17th February, 2018 during day and night time he

was at his home place in Mtulingala village. On the next day (18th February, 2018) one Benito informed him that the deceased had been attacked in the previous night. The accused went to the deceased's house and found people gathered there. The deceased was sleeping in her sitting room. She informed him that she had been attacked, but she did not mention the attackers. Nonetheless, in the night of the same day the Village Executive Officer called him (accused) and informed him that the deceased had mentioned him as one of her assailants. He was thus, required to report to Makambako police station and he did so. He was kept in the police lockup and charged with causing grievous harm to the deceased. On the third day he was taken to court where he pleaded not guilty. He was later taken to Njombe remand prison. In the end of February 2018 a police officer took him from the prison to Makambako Police Station where he stayed for two days in the lock up. He was then informed by PW. 4 that, the deceased had died and the charge against him (accused) had changed from causing grievous harm to murder.

It was also the accused's evidence during the TWT and the main trial that, he was shown papers by a police officer asked to sign by thumb. He refused to do so, but he was tortured until he signed it. The torture was effected by more than 5 police officers through the following means: they ordered him remove all his clothes and sit on a tip of a bottle which said act caused his buttocks to get ruptured. His private parts were squeezed by a metal device and he was beaten by sticks and a club. He asked the police officers to take him to a Justice of Peace and to have his relative present at the interrogation. However, his requests were turned down. On

21st March, 2018 he was taken to Njombe District Court for this case. At all the material time he was at the police lockup in Makambako Police Station. He was medically treated at Njombe Health centre, and he had a PF.3 to that effect. However, he entrusted the PF.3 to his wife who put it at their home, but later he was informed that fire had burnt it together with his other properties.

It was also the defence evidence through DW. 2, Monica Kapanga, the accused's wife, that, on 17th February, 2018 she was at her farm in Mtulingala village and returned home at 7:00 pm. At that time her husband (accused) was at home until when they retired to bed at 8:30 pm. The accused did not leave the house the whole night. On 18th February, 2018 (the next day) in the morning one Benito Kihaga informed her (DW.2) that the deceased had been attacked by unknown people. DW.2 then informed her husband (accused) of the incident. The accused went to the deceased's house.

I have considered the charge sheet in the case at hand, the evidence from both sides and the law. The major issue is *whether the accused Hekima s/o chaula is guilty of murder of the deceased, Dalia d/o Mgowole*.

In my view, the following material facts are not disputed: that, the deceased in fact, died. Her body was medically examined by Dr. Kesha Mgunda and the cause of her death was *Septicaemia*.

In law, to prove the offence of murder under section 196 of the Penal Code, the prosecution must establish the following ingredients beyond reasonable doubts:

i. That, the victim of the crime (murder) mentioned into the charge, actually died,
ii. That, it was the accused person who in fact, caused the death of the deceased (or killed him),
iii. That, the accused's killing of the deceased was with malice aforethought,
iv. That, the killing was performed by committing an unlawful act or omission.

It is also trite law that, the prosecution bears the burden of proving a criminal charge against an accused and the standard of proof thereof, is beyond reasonable doubt, unless the law provides otherwise (which is not the case in the matter at hand). This is the spirit underlined under Section 3(2) (a) of the Evidence Act, Cap. 6 R.E 2019 (Evidence Act) and the holding by the Court of Appeal of Tanzania (the CAT) in the case of **Hemed v. Republic [1987] TLR 117**. The law further guides that, an accused person bears no duty to prove his innocence. His/her duty is only to raise reasonable doubts in the mind of the court. It is also a legal principle that, any reasonable doubts left by the prosecution evidence should be resolved in favour of the accused person.

In the matter at hand, I will test each of the ingredients of the offence of murder listed above. I will perform this task seriatim and before I answer the major issue posed above.

On the first ingredient of the offence of murder, the sub-issue is *whether or not the victim of the charge mentioned in the charge sheet*

related to the case at hand (Dalia d/o Mgowole) actually died. As I hinted earlier, the facts related to this issue are not disputed by the parties. The PW.1 (Dr. Kesha) also examined the deceased body and confirmed in his post-mortem report (exhibit P.1) that, the deceased had actually died 14 hours before his examination (see at page 1 of exhibit P.1). I therefore, answer the above posed sub-issue affirmatively that, the victim of the crime mentioned in the charge sheet related to the case at hand (i.e. Dalia d/o Mgowole) actually died. I thus, find that, the prosecution has proved the first ingredient mentioned above.

Regarding the second ingredient of murder mentioned above, the sub-issue is *whether it was the accused person (Hekima s/o Chaula) who actually killed the deceased (or caused his death)*. In fact, no prosecution witness gave direct evidence that he/she saw the accused attacking the deceased. The prosecution case was thus, mainly based on two pieces of evidence namely; The oral statement of the deceased to the PW.2 and PW.3 that it was the accused and another person (unidentified) who had assaulted her. This was done on the next day of the event. The other piece of evidence relied upon by the prosecution was the confession of the accused (exhibit P.1). I will test the two pieces of evidence one after another.

As to the oral statement of the deceased made to PW. 2 and 3, I am of the view that, in law, the same is admissible in evidence under section 34(a) of the Evidence Act as an oral statement of a person who is dead on the cause and circumstances of his/her death. This statement therefore, in

my firm opinion, amounts to what is commonly known as a dying declaration which can also base a conviction is some circumstances. In the case of **Republic v. Mohamed Shedaffa and 3 others [1984] TLR 95,** this court held that, it is possible for a conviction to proceed upon evidence consisting of a dying declaration only, although it is a rule of practice that, a dying declaration requires corroboration before it can be acted upon. In another instance, in the case of **Damian Ferdinand Kiula & Charles v. Republic [1992] TLR 16** in which this court solely based the conviction of murder against the accused on a dying declaration, the CAT held (on appeal) that, the dying declaration was authentic, hence the conviction was proper. It then dismissed the appeal by the convict.

In my view therefore, for the evidence of dying declaration to base a conviction it must be corroborated, but it can stand alone (without corroboration) if it is authentic. In the case at hand, it cannot be said that the dying declaration was authentic because, the assault at issue against the deceased was made at night in the house. It is thus, presumed that there was darkness therein. This court is entitled to presume these facts by virtue of section 122 of the Evidence Act. These provisions guide that, the court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The spirit embodied under these provisions was underscored by the CAT in the case of **Issaya Renatus v. Republic, Criminal Appeal No. 542 of 2015** (unreported).

In the case at hand however, no one is sure of the circumstances and the gears which assisted the deceased to identify the accused as her assailant is such darkness. The PW.2 and PW.3 did not also give details of such identification as per the statement given to them by the deceased. Furthermore, the circumstances under which the statement was made by the deceased to the two witness dents the authenticity of the dying declaration. This is because, the two witnesses went to the deceased house and talked to her when many people had already gathered at her home. The situation cannot thus, overrule the possibility that the deceased had been influenced by other persons to believe that the accused was her assailant. It is more so since according to the evidence of PW.2 and PW.3, the accused and the deceased were in bad blood due to land disputes.

Furthermore according to PW.3 evidence, it was the deceased neighbour one **Iniki Lisulile** (a lady) who had met and talked to the deceased soon after the attack and before any other person could talk to her. Nonetheless, such lady was not called as the prosecution witness though she was listed during the preliminary hearing. No reason was given by the prosecution for the omission. This would have been a proper person to tell the court in evidence on the dying declaration of the deceased, but she did not testify.

Moreover, it cannot be said that the dying declaration by the deceased was corroborated by the evidence of PW.2 and PW. 3 to the effect that it was the accused who had attacked her. This is because, the evidence of the two witnesses could not corroborate each other since they heard the

declaration under the same circumstances discussed above. Such circumstances were not conducive for a dying declaration as I held earlier.

I therefore, find that, the dying declaration under the circumstances of this case, was uncorroborated and unauthentic, hence not reliable evidence on which this court can base a conviction.

Regarding the confession of the accused (exhibit P.1), I am of the view that, the circumstances of the case speak for the prosecution. This view is based on the following reasons: in the first place, since the accused claims that he did not make the confession, but he was only forced to sign it by a thumb, he is in law, repudiating it. Repudiating a confession is different from retracting it. In law, an accused who retracts a confession claims that, he in fact made it, but he did so involuntarily, which is not the case in the matter at hand.

The law on the status of retracted or repudiated confessions is now settled and clear. It has been highlighted by various precedents in our jurisdiction and elsewhere. It guides that, *although it is dangerous to act upon repudiated or retracted confession unless it is corroborated, the court may act upon such confession if it is satisfied that the confession could not, but be true; see* the holding by the CAT in the case of **Kashindye Meli v. Republic [2002] TLR 374.** This was also the position underscored by the same CAT in the case of **Jackson s/o Mwakatoka & 2 Others v. Republic [1990] TLR 17** (at page 22). In deciding the **Jackson Mwakatobe case,** the CAT quoted with approval a passage from the

landmark Ugandan case of **Tuwamoi v. Uganda [1967] EA , at page 91** in which it was held thus:

> ".... We would summarize the position thus a trial Court should accept any confession which has been retracted or repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true...corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surround circumstances that the confession cannot, but be true."

In the case at hand, I am of the settled view that, the confession by the accused (exhibit P.1), as the sole piece of prosecution evidence remaining on the plate upon discarding the dying declaration, was in fact corroborated by independent evidence. This is because, in the confession, it was stated that, in the material night, the accused went to the deceased home accompanied with one Shabani, Sauda and another lady (name not known by the accused). The accused went into the room of the deceased who was asleep through the window. He then opened the door for the others to get in. The accused held the deceased's mouth firmly so that she could not make noise. Shaban held her legs and the other lady punctured the deceased with a needle of injection on her stomach and ribs. One of them kicked the deceased though the accused did not know who among his colleagues did so.

The independent pieces of evidence that corroborated the above narrated statements in the confession were various. The PW.1 (Dr. Kesha) for example, testified that, in examining the deceased body, he noted that she had 3 point-wounds on her left ribs caused by a sharp organ. The deceased had also suffered internal injuries of her left side of the

abdomen. The exhibit P.1 (post-mortem report) also indicates that, the 3 point-wounds were of needle size. In my view, the needle of injection mentioned in the confession may cause such kind of wounds. PW.2 also testified that, the deceased showed her the point-wounds before she died. She (PW.2) further said, she also saw the point-wounds upon the death of the deceased when her body was in the mortuary.

Furthermore, PW.4 (the investigator of the case) told this court that, when he visited the scene of crime, he noted that a window of the deceased room had been broke. This piece of evidence tallies with statement in the confession that the accused got into the deceased room through the window. It is also shown in the confession that, the accused and the deceased were in a quarrel over land. This fact was also stated by the PW.1 and 2 in their respective testimonies.

From the discussion shown above, it is clear that the confession was corroborated by independent evidence as hinted earlier.

In fact, even if it is presumed (without deciding) that the above independent evidence did not sufficiently corroborate the confession, this court would still consider the confession as authentic and true, hence capable of basing a conviction. This view is based on the following grounds: in the first place, the accused narrated in his confession (exhibit P.1) the details pertaining to the sequence of events leading to the attack of the deceased. The said details are such that, no one else other than a participant to the attack could narrate. He stated that, Shabani had involved him (accused) in the killing mission because, he (accused) knew

well the environment of the deceased home. Sauda had promised to pay the accused and Shabani Tanzania shillings (Tshs.) 200, 000/= each upon completing the mission to kill the deceased. This was because, Sauda claimed that, the deceased had killed her father back in 2016. This mission for killing the deceased had failed since 2016, hence the plan to invoive the accused.

It was also the accused's statement in the confession that, at the material night (i.e. at 21: hours), the four conspirators met at a house where a funeral ceremony was going on. They went to the deceased house being led by the accused himself. At the deceased house, the accused got into the room of the deceased through the window. At that time, the deceased was asleep. The accused opened the door for others and they got in. They then made the deceased to lay on her back. The accused held the deceased's mouth firmly so that she could not make noise that would alarm other people. Shaban held her legs and one of the two ladies pierced a needle of injection in her stomach and ribs. The content of the injection however, was not known by the accused.

It was also stated in the confession that, upon assaulting the deceased, the accused went to his home and others went to the funeral ceremony. He (accused) was not paid the promised money instantly because, the said Sauda promised to pay him the next day. The needles used at the event remained with Sauda and the other lady.

Owing to the above details from the confession, I am of the view that, such detailed story could not be recounted by any other person apart

from a participant in the assault of the deceased. In the case of **Kashindye Meli v. Republic [2002] TLR 374** (at page 379), the CAT was of the view that, such kind of detailed recount in a confession of an accused on the way an offence was committed indicates that the confession is true.

Moreover, the confession contains detailed particulars of the accused himself. At its second page for example, the statement shows in Kiswahili thus, and I quote the pertinent passage:

> "Ninaishi na familia yangu ya mke mmoja aitwaye Monica d/o Kapanga pamoja na watoto wetu watano kati yao wakike watatu, huko katika kijiji cha Mtulingala kata ya Kitandililo tarafa ya Makambako wilaya na mkoa wa Njombe. Mimi Hekima Chaula nilizaliwa mnamo tarehe 09/09/1979 huko kijiji cha Mtulingala, na ni mtoto wa tano kati ya watoto tisa kuzaliwa katika familia ya Isaya Chaula na Regina Kidenya @ Mwilongo ambao wanaishi huko kijiji cha Mtulingala. Elimu yangu ni darasa la saba ambapo nilisoma katika shule ya msingi Mtulingala."

The quoted passage basically meant that, the accused lives with his wife (Monica Kabanga), and five children of whom three are daughters. They live in Mtulingala Village within Kitandililo Ward, Makambako district in Njombe region. He was born on 09/09/1979 in Mtulingala village. He is the 5th child among nine children of his father, Isaya s/o Chaula and Regina d/o Kidenya (mother) who also live in Mtulingala village. He studied up to standard seven in Mtulingala Primary School.

During the TWT, the accused admitted that, all such detailed particulars relate to himself and are true. In my view, it could not be possible under the circumstances of the case for the PW.1 (a police officer before whom the confession was made) to know all such detailed

particulars of the accused. He could not also guess them accurately like that. It is more so since it is not disputed according to the evidence that, the accused and PW.1 met for the first time on the date when the confession was made by the accused. This court is entitled to presume the above facts by virtue of section 122 of the Evidence Act and the **Issaya Renatus case** (supra) discussed earlier.

The facts narrated above thus, indicate that, the accused himself had truly informed the PW.1 on such particulars at the time when he (PW.1) was recording the confession and the statement is thus, true. It is more so because, during the trial within trial the accused testified on oath that, when he was taken to the police station he was put in police custody for a while and then taken to a room for interrogation. He did not tell the court that he had given his particulars to any police officer. However, in his defence (in the main trial), he changed mind and claimed that he gave his particulars to a policeman when he was taken into the police lockup. Such contradiction between his statement at the TWT and his defence in the main trial indicates that, his claim that the confession is not true is an unbelievable afterthought to avoid the truth. This particular conduct of the accused thus, enhances the prosecution case that he actually made the confession and the same is true.

Another reason supporting the view that the confession was true is that, in his both defences (in the TWT and the main trial) the accused did not tell this court that he had informed the District Court when he appeared before it that, he had been tortured and forced to sign the

confession. An accused with genuine complaint would have lodged his complaint before that court to show his grievances as long as the story is relevant to his defence case. Nevertheless, he did not do so and no reason was given for the omission. Section 246(3) of the CPA also gives an opportunity to a person charged with a committal offence to make a statement related to his/her case during the conduct of committal proceedings (i.e. before the committal court). Such provisions of law further guide that, the statement made under such circumstances may be used in evidence during the trial. The accused however, did not use that opportunity by telling the District Court (as the committal court), on matters related to the confession which he alleges to be untrue. Had he made a statement showing that he had been subjected to circumstances that led him to sign an untrue confession, the same would have helped him in both the TWT and the main trial. Nonetheless, he did not do so. This particular conduct of the accused thus, enhances the view that the confession was true.

It must be noted here that, in deciding the issue posed above (related to the second ingredient of murder), I have opted to consider the evidence related to the TWT and that related to the main trail. I am settled in mind that, this course is permissible in law for the following reasons: The evidence taken during the TWT was received on oath like the evidence taken during the main trial. Now, if the law, under section 246(3) of the CPA (supra) permits unsworn statements made by an accused during committal proceedings to be used as evidence during the main trial, it cannot be said that the law prohibits statements made on oath during the

TWT to be used as evidence in the same main trial. Besides, a TWT is part and parcel of the main trial. This is because, the major purpose for a TWT is to ascertaining whether or not the cautioned statement (confession) was voluntarily made and made according to law; see the observation by this court in the case of **Charles Simbao @ Msilikwa v. Republic [2013] TLR. 64** (at page 68, by Mwambegele, J. as he then was). Obviously, upon being admitted in evidence a cautioned statement is used as evidence in the main trial.

It follows to me thus, when a confession is admitted in evidence, a trial court (this court in the matter at hand) can smoothly make reference to the evidence adduced during the TWT which said evidence is related to the confession (admitted in evidence) in deciding the truthfulness of the confession in the main trial. I am fortified in this respect by the observation of the CAT in the case of **Ramadhani Salum v. Republic [2007] TLR. 78**. In that case, the CAT observed (at page 85) thus, and I quote the pertinent passage for a swift reference:

> "The trial judge rightly considered that the prosecution case very much depended on the caution statement - Exhibit P5. It further considered the circumstances in which it was given and was satisfied that it was voluntarily given, was true and amounted to a confession. We think the trial court was entitled to come to that conclusion and could rely on it and the other pieces of evidence, such as the post-mortem report as to the cause of the death of the deceased which was consistent with the Appellant's confession, to convict the Appellant as charged."

The above quoted passage suggests that, in deciding the main case the trial High Court had considered the circumstances under which the disputed confessional cautioned statement was recorded together with other evidence (adduced in the main trial) like the post-mortem

report in deciding the main case itself. It is common knowledge that, circumstances under which a contested confession is taken are usually disclosed in the evidence during a TWT. The CAT thus, in the passage quoted above (in the **Ramadhani Salum,** supra) impliedly condoned the practice of making reference to the evidence obtained during a TWT in deciding the main case, where the disputed confessional statement has been admitted in evidence.

Indeed, the practice under discussion is convenient, especially in a case where a trial is conducted without the aid of assessors the way the trial at hand was conducted. In fact, in a trial with assessors, this court usually holds a TWT as a separate proceedings upon retiring assessors. However, in a trial before a subordinate, or where this court sits without assessors, it is not necessary to hold a TWT in that manner, though the court still has the responsibility to ensure that an alleged confession (which is sought to be put in evidence) was made voluntarily before it is admitted as evidence; see the observation by the CAT in the case of **Amiri Ramadhani v. Republic [2009] TLR. 370** (at page 380). In a trial without assessors (like the one at hand) therefore, the process of testing the admissibility of a confession is more connected to the main trial than in a trial with assessors. This fact thus, enhances the applicability of the practice under discussion in the case at hand.

It must be noted here that, in the case at hand, this court held the TWT as shown earlier. It later noted that it was not necessary to

do so under the auspices of the **Amiri Ramadhani case** (supra) at the time of composing this judgment. Nonetheless, I am of the view that, the fact that we held the TWT where it was not necessary was not fatal to the fairness of the trial. This is so because, the guidance by the CAT in the **Amiri Ramadhani case** (supra) was only to the effect that, it is not necessary to hold a TWT under such circumstances. Such guidance did not declare that it is unlawful to hold a TWT under such circumstances. Besides, the TWT we held saved the purposes of testing the admissibility of the confession under discussion, which was an obligatory process in law (as per the **Amiri Ramadhani case,** supra), though it could not be necessarily performed through the TWT.

Admittedly, I did not find any specific provision of the CPA which directly supports the practice just discussed above. However, section 264 of the same CPA permits this court, to regulate its own practice in the exercise of its criminal jurisdiction. I thus, feel entitled to take that course as long as no injustice has been caused to any party. The powers of this court under section 264 of the CPA were also underlined by the CAT in the case of **The Director of Public Prosecution v. Matemane Masamba and another, Criminal Appeal No. 90 of 1991, CAT at Mwanza** (unreported) in which it was held that, under such provisions, this court can acquit an accused where the prosecution unnecessarily delays a criminal case. The CAT held that way though the CPA does not provide so. It follows thus, that, this court can apply the same provisions and take any course, where the CPA is silent, for the sake of justice. This view

constitutes the justification for this court to make reference to the evidence adduced during the TWT in examining the veracity of the confession at issue.

There is yet, another reason cementing the truth of the confession. The defence side has demonstrated no reasons for discrediting the above narrated prosecution witness supporting the veracity of the confession. The law provides that, every witness is entitled to credence in his/her testimony and must be believed unless there are cogent grounds for not believing him or her; see the CAT decision in **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003, CAT at Mbeya** (unreported). In the case at hand, therefore, the evidence of PW.1, 2, 3 and 4 as demonstrated previously remains unchallenged.

The accused defence that he was at home at the material time of assaulting the deceased cannot thus, raise any doubt to the mind of this court amid the truth of the confession discussed above. Indeed, the defence side wanted to rely upon some weaknesses of the confession to show that it was not true. It for example, wanted to show controversies between the statement made by PW.2 and PW.3 on one hand and the confession on the other. The two witnesses said, the deceased had told them that when the accused assaulted her he was with only one other person. On the other side, the confession shows that the accused was with three others. The defence side also wanted to imply that, the fact that the three other assailants mentioned in the confession were arrested, but later

released by the National Prosecution Office as per the testimony of PW.1, created doubts as to the truth of the confession.

Nevertheless, in my opinion, such dents in the prosecution evidence are not fatal to the confession. This is because, as I observed earlier, the statement made by the deceased that the accused and another person had assaulted her was unreliable for the reasons shown previously. Again, though we are not told in evidence as to why such other persons mentioned in the confession were released, that act alone does not necessarily make the confession untrue. In law, there may exist reasons for not charging a person mentioned in a confession together with the person making the confession. Lack of other evidence to corroborate the confession may be one of such reasons. This is because, the law guides that, a confession by a co-accused cannot base a conviction for another accused unless it is corroborated; see the holding of this court in **Asia Iddi v. Republic [1989] TLR 174** and of the **CAT in the case of Thadei Mlomo and Others v. Republic [1995] TLR 187.**

Besides, the dents of the confession discussed above did not affect its substance that the accused was one of instigators of the assault whether they were four or two. This fact thus, does not reduce the status of the statement made by the accused before the PW.1 as a confession. The contemporary definition of the term "confession" under section 3(1) of the Evidence Act is broad. It means:

> "...(a) words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said

the words or did the act or acts constituting the conduct has committed an offence;

(b) a statement which admits in terms either an offence The Evidence Act [CAP. 6 R.E. 2019] 12 or substantially that the person making the statement has committed an offence;

(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 reasonably be drawn that the person making the statement has committed an offence;"

The confession at issue, in my view, fits all the definitions quoted above even if it is taken alone or in combination with other facts which were earlier found to be corroborating it.

The accused defence did not thus, challenge the prosecution case to the extent of raising any reasonable doubts as observed previously.

The accused's confession in the matter at hand also shows that, he participated in assaulting the deceased by only holding her mouth so that she could not make alarm. He did not puncture her by the needle of injection which, according to the PW.1 (Dr. Kesha) caused wounds to her and later the infection which resulted to her death. Nonetheless, the accused cannot avoid liability under the doctrine of common intention under section 23 of the Penal Code. This is because, all the four persons had planned to kill the deceased. These provisions guide that, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable

consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

It was also the testimony by the PW.1 (Dr. Kesha) that, the cause of death of the deceased was *Septicaemia*. Upon being examined by the court he said, the infection might have been caused by the dirty sharp object that had been used to puncture the deceased, hence her death. This piece of evidence shows that, the act committed by the accused and others (of injecting the deceased thrice) was not the immediate cause of the death. The act only caused the infection which led to her death. PW.1 however, did not tell the court if the infection is untreatable. It is thus, believable that, the deceased did not get proper medication for the infection, which led to her death. This fact nonetheless, does not exonerate the accused from any liability in causing her death. This is because, Section 203(a) – (e) of the Penal Code defines various circumstances that fits into the phrase "causing death" which include the circumstances related to the case at hand. Section 203(b) provides that:

> "A person is deemed to have caused the death of another person, although his act is not the immediate or sole cause of death, in any of the following cases:-...(b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;"

Owing to the reasons narrated above, I find the sub-issue posed above (related to the second ingredient of murder) affirmatively that that, it was the accused person (Hekima) who actually killed the deceased (Dalia).

In relation to the fourth ingredient of murder listed above, the sub-issue is whether the accused's act of killing the deceased was with malice aforethought. The provisions of section 200(a) – (d) of the Penal Code sets various circumstances that constitute malice aforethought. The circumstances fitting the case at hand are under section 200(a). The provisions provide that, Malice aforethought shall be deemed to be established by evidence proving an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not. In the case at hand, the confession clearly shows that, the accused and his colleagues had planned to kill the deceased. In the killing, the accused was motivated by the payment of Tshs. 200, 000/= by the payer (Sauda) who had planned to revenge against the deceased who allegedly killed her (Sauda) father. The circumstances of this case thus, fall under the four corners of section 200(a) of the Penal Code. I consequently answer the sub-issue related to the fourth ingredient affirmatively that, the accused's act of killing the deceased in the case at hand was with malice aforethought.

As to the fourth ingredients, the sub-issue is *whether the killing of the deceased was by committing an unlawful act or om*ission. It has been found herein above that, the accused killed the deceased with malice aforethought. He did so by assaulting her, holding her mouth firmly, and his colleagues injected her on the ribs. The puncture caused her infection that killed her. In fact, these acts of the accused and his colleagues were unlawful; see chapter XXV of the Penal Code titled "ASSAULTS" covering sections 240-243(a) – (d). The sub-issue under this heading is thus, also

answered affirmatively that, the killing of the deceased was by committing an unlawful act.

Having answered all the sub-issues posed above affirmatively, I find that, the prosecution has established all the four ingredients of the offence of murder against the accused. I accordingly answer the major issue posed previously affirmatively that, the accused Hekima s/o Chaula is guilty of the murder of the deceased, Dalia d/o Mgowole. I accordingly convict him of murder as charged, contrary to Section 196 and 197 of the Penal Code. It is so ordered.

J. H. K UTAMWA

JUDGE

24/06/2022

Date: 24/06/2022
Coram: J. H. K. Utamwa, Judge
For Republic: Mr. Andrew Mandwa, State Attorney
For Accused: Ms. Tunsume Angumbwike, Advocate
Accused: Present
B/C: Gloria

Court: Judgement delivered in the presence of Mr. Andrew Mandwa, State Attorney for Republic, the accused and Ms. Tunsume Angumbwike, Advocate for the accused, in court, this 24th June, 2022.

J.H.K. Utamwa
JUDGE
24/06/2022