

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
SITTING AT BARIADI**

CRIMINAL SESSION CASE NO. 34 OF 2017

REPUBLIC

VERSUS

SUNGWA MPELWA..... ACCUSED

JUDGMENT

23^d February & 11th March 2022

MKWIZU,J

Accused, Sungwa Mpelwa and the deceased are blood relatives. It is alleged by the prosecution that on 27/3/2016 at around 01.00hrs deceased was at her home sleeping with her daughter Saka Mindwa (PW3) when the accused and his fellow invaded the deceased cutting her with a machete to death . The incident was reported to Bariadi Police station. The cause of death was said to be multiple cut wounds and severe bleeding. Accused was arrested and confessed before the police through his cautioned statement and before a justice of peace to have killed the deceased due to witchcraft beliefs.

At the preliminary hearing, accused admitted the facts that deceased is dead and that he was killed at her home by being murdered by a machete. He however denied any involvement on the said murder.

During trial, the accused had the services of Mr. Martin Sabini learned advocate while the Republic were represented by Mr. Daniel Garaji Masambo learned State Attorney. To establish the offence against the appellant, prosecution called a total of five witnesses and the defence had one witness, the accused himself.

PW1, is Leberata Mhagama, a Primary Court Magistrate at Somanda Primary Court, she explained on how she received accused person who wished to make his volunteered confession. She said, accused was brought to her by a police officer named Idd on 5/4/2016. She ordered Idd to uncuff the accused person and leave the room. She introduced herself as a justice of peace and explained to the accused all his rights including that the extra judicial statement, he is recording may be used in a court of law against him. She requested the accused to tell her if he was forced anyhow to record his statement or if he was promised anything in return. According to this witness, accused said that he had volunteered to make his statement out of his own free will. She inspected the accused to see if he was torture and if he had any wound or not and found him

okey and went ahead to recording the accused's statement where accused Sungwa Mpelwa confessed to have killed Mbula Mpelwa. She lastly read the statement to the accused who signed after accepting that it contains his own narration. PW1 said, she also signed the statement. The extra judicial statement was admitted in court as **exhibit P1**.

PW2 is D5355 D/SSGT JAMES, a Police Officer, Bariadi Police station, investigation department, and an investigator of this case. He was on 27/3/2016, instructed by the OCCID Bariadi to prepare a team to visit the scene of crime at Puga village. They, in compliance thereto, visited the scene, recorded witnesses' statement, and witnessed the postmortem examination on the deceased body by the Doctor. At the scene, stated PW2, Sungwa Mpelwa and Msafiri Sungwa resident of Nzela Village in Geita were named to them as the suspects. They then briefed their boss- OCCID Bariadi who communicated to the OCCID Geita and Nzela. PW2 said, on 5/4/2016 he was chosen among others to go for the accused person in Geita police after he was arrested at Nzela. He said, they arrived at Bariadi at around 9:00am where he was again instructed to record accused's cautioned statement.

Speaking on how he acted upon that instruction, PW2 said, he began by introducing himself to the accused person and informing the accused of his accusation. He also informed the accused that he may also wish to call his relative, a friend or lawyer to be present when giving his statement. After that accused signed the statement by writing his name. PW2 said, he then recorded the accused statement where accused confessed to have killed Mbula Mpelwa. After such a recording, he read the statement to the accused and they both signed at the end.

During cross examination, PW2 said he recorded the accused's statement under Section 58 CPA and that he followed the accused at Geita on 5/4/2016 where they arrived there at 5:00am, started the journey back to Bariadi at 6:00am and arrived Bariadi at 9:00am.

PW3 is, Saka Nindwa, deceased's daughter. Her evidence is essentially on what happened before the incident and on the material date. She told the court that before her death the deceased had visited her brother (the accused) at Nzela in Geita. Deceased had informed her of a misunderstanding between her and her brother, the accused which was once reported at Nzela government offices before she decided to come back home at Pugu Village- Bariadi.

Testifying on the material night, PW3 said, she had on 23/4/2016 visited her mother at Pugu Village. And on the night of 27/4/2016 at around 01.000 the door of the room where she had slept with the deceased was pushed open some people got in instructing her to cover herself. She obeyed. She then heard her mother who was being attacked saying "***Sungwa umeamua kuniua hivi hivi***". She then ran outside after the attackers had left and reported the ordeal to her brother who was staying in a nearby house. She categorically refuted to have identified the assailants saying she saw them wearing long coats at their entry but she could not identify them because they directed the on her face.

PW4, TABU DOTTO, through an interpreter Leonard Masunga Sayi, testified that, she was in 2016 staying with her mother in-law, Mbula Mpelwa and that in January 2016 the deceased visited her brother Sungwa Mpelwa (Accused person) in Geita. On her return from Geita, deceased told her of the misunderstanding she had with the accused. She said deceased had told her that her daughter got married while in Geita and accused borrowed part of the dowry (600,000/=) for building a house which he refused to pay back after the agreed period. PW4 also explained that deceased informed her that one day, she found a letter in

her bedroom with a machete picture drawn on it and reported the matter to the hamlet chairperson.

Speaking of the incident date PW4 said, on 27/3/2016 at around 01:00hrs They while asleep heard an alarm of a person crying. Her husband 's attempt to attend the cries were blocked by the people who were outside their house. They then waited until her sister-in-law PW3 came telling them of the death of the deceased. They together raised an alarm and attended the scene where she found her mother bleeding with cut wounds on her head and hand and that she died before she was taken to the hospital.

PW5, E. 8038 ALOYCE, OCS at Nzela -Geita police station testified that he, in early 2016 received the deceased in his office with two letters one from the hamlet chairperson and a threatening letter (Barua ya Vitisho) complaining of being threatened to death. PW5 said, the second letter was requiring the deceased to leave the place or else she would be killed, and that deceased was suspecting her brother (the accused) Sungwa Mpelwa and his wife named Machine to have written the said letter. He (PW5) summoned the accused and his wife but on the process of handling the complaint, complainant (the deceased) sought for a permission for

attempt to settle the matter at a family level. PW5 said complainant did not come back again.

PW5 narrated further that on 31/3/2016 he heard gossips that deceased has been killed. Having the above background, he arrested the accused who denied any involvement claiming to have attended his sister's burial ceremony in Bariadi. On such a situation, stated PW5, he allowed the accused on bail on condition that he should report to the police station on 4/4/2016. He on 3/4/2016, received a phone call from ASP Kiganja, OCCID Geita asking him of the accused person telling him of the accusations of murder against the accused person reported at Bariadi Police via Bariadi IR 390/2016. He was also instructed to arrest the accused and take him to Geita the task which he completed on 4/4/2016.

In his affirmed defence, SUNGWA MPELWA, denied completely to have committed the offence. DW1 evidence on his arrest is similar to that of PW5 and partly that of PW2. While admitting that he was first arrested by PW5 at Nzela and released on bail and that he was re-arrested again on 4/4/2016 conveyed to Geita and then to Bariadi police where he recorded his cautioned statement before PW2 and before a justice pf

peace at Somanda Primary court, Accused person denied to have confessed the commission of the offence.

On cross examination accused said they were in good terms with the deceased but admitted that deceased had once suspected him an author of a letter containing threats, the issue which was later solved at Nzela police. On why he did not attend his sisters (deceased) burial, he said he was sick.

In his final closing submissions, Mr. Martin Sabini, defence counsel was of the view that prosecution failed to prove his case beyond reasonable doubt. His contention was that the accused was not identified, and the confession evidence is not credible to ground conviction. On the other hand, the learned State Attorney was technically clear that prosecution managed to prove the case to the required standard. She relied on the direct evidence of PW3 and PW4 and the confession evidence by PW1 and PW2 and all the prosecution exhibits.

Two assessors out of three who assisted the court were of the opinion that the prosecution case was proved against the accused while one of the assessors was of a different opinion that prosecution has not proven the alleged offence beyond reasonable doubt.

I have intensely evaluated the evidence on the records and the parties counsel final submissions. Before going further, I think it is pertinent to itemize issues not in dispute. It is clear from parties' evidence that Mbula Mpelwa is dead and that her death was not ordinary death. This was one of the issues agreed upon during the preliminary hearing conducted on 21/02/2019 where one of the issues in the memorandum of matters not in dispute was

"That on 27/06/2016 the deceased was killed at her home by being butchered by a machete"

The particulars of the postmortem examination report (Exhibit P3) tendered in court by PW2 described the cause of death as severe bleedings caused by multiple cut wounds. This was also supported by PW2, PW3 and PW4. It is therefore clear that Mbula Mpelwa is dead and that her death was odd. The issues for court's determination in this case are thus two, whether accused person is responsible and whether the killing was with malice aforethought.

The evidence adduced in support of the charge against the accused is mainly circumstantial. The evidence of the only eyewitness of the

incident of murder, PW3 assist into showing that there was an invasion resulted into the deceased death without more as the identification of the invaders was according to her not possible. In essence, the prosecution's case depends on accused's confession made before the police and justice of the peace, deceased dying declaration and previous misunderstandings between the accused and the deceased.

To start with the dying declarations. In her evidence PW3 informed the court that deceased had mentioned the accused person at the scene. She specifically said, during the attack, deceased was heard saying "***Sungwa umeamua kuniua hivi hivi***". As a rule, a court can only act upon a dying declaration if it is satisfied that the declaration was made, if the circumstances in which it was made gives the assurance to its accuracy and if it is in fact true, this was so stated in **Hemsi Nzunda and two others v. R, Criminal** Appeal No. 34 of 1995 (unreported).

I have with great care evaluated this piece of evidence. As testified, the words above were uttered during the attack which culminated into deceased death. According to PW3, attacker entered the room carrying with them a torch and that apart from seeing them with long coats, she

could not identify their faces or even their voice though one of them had ordered her to cover herself. She disclosed further that, the identification was impaired because the attackers had shone the torches on her face.

There is yet another surprising scenario in on this point. Though PW3 claimed in court that she heard the deceased uttering the above statement, no disclosure of the said vital information to the people who had gathered at the scene after the incident including the police. While PW3 says she informed the police of the deceased's utterances, none of the prosecution evidence supports this assertion. It should be remembered that deceased was in the same room with PW3 and worse enough she was at that time receiving blows of sharp objects on his head and hands and thus, it was not, in my view, a favorable environment for a proper identification of the culprits. It is on that reason I find the dying declarations more suspicious to be acted upon by this court.

This takes me to the rest of the prosecution evidence. PW2, the police officer who visited the scene of crime on the material date said, at the scene, accused was named as one of the suspects. And he confessed the offence after his arrest. Accused's statement (exhibit P2) was repudiated

but admitted after a trial within a trial which ruled out that the statement was made by the accused and it was voluntarily made.

It is a rule of practice that a conviction cannot rest solely upon an uncorroborated confession, especially when retracted or repudiated. Courts will ordinarily only act on such a confession if it is corroborated by independent evidence unless the court is fully satisfied, after considering all the material points and surrounding circumstances, that a confession cannot but be true: See: **Hatibu Gandhi and Others Versus Republic** [1996] TLR 12) where the court said:

“The law regarding the value and weight to be attached to retracted confessions has been settled in East Africa in a number of cases, culminating with the case of Tuwamoi v Uganda. One of the major legal propositions in Tuwamoi's case is that a court can convict the maker of an uncorroborated retracted confession if it warns itself of the danger of acting upon such an uncorroborated retracted confession, and is fully satisfied that the retracted confession cannot but be true. ..”

I have curiously evaluated the evidence on this aspect. There is nothing on the evidence suggesting that the statement was made involuntarily that is, was obtained by torture, inducement or that accused was forced anyhow to sign the same . In fact, in his own evidence, accused admits having made a statement before PW2 freely and that he signed the same. PW2's evidence on when and how he recorded the complained statement remained unchallenged during cross examination and even during accused's defence . In **Godluck Kyando V.R** (2006) TLR 363, the Court of Appeal observed

"It is a trite law that every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons not believing him...."

I do not find any reason why Pw2 should be distrusted.

My findings above are also fortified by the fact that, after he had recorded his cautioned statement before the police, accused was taken to a Justice of peace, PW1, Hon Liberata Mhagama. He again confessed having killed the deceased. There is nothing in the evidence suggesting that the

accused's extra judicial statement was obtained by any sort of inducement or force.

During question by assessors, accused was recorded thus:

"My statement was recorded at the police station. I was then taken to Somanda primary court to record my statement again, I signed the statement before I left to the police and then I was taken to prison. "

Admission of the extra judicial statement (exhibit P1) was without an objection from the defence except for few questions during cross examination directed on the cancellation of dates in the statement. Again, the detail of the extra judicial statement was not put into attack even after it was read in court meaning that the content in that document reflects the accused's own narration. I for that reason find PW1 and PW2 credible witnesses and that they had no reason to falsely implicate the accused person. It follows therefore that the confession by the accused person made before the Police (PW2) and the justice of peace (PW1) is nothing but truth.

Defence counsel contended that the confessions contain contradicting statements and therefore unreliable. He pointed out that while the

cautioned statement made before PW2 (Exhibit P2) states that deceased was staying in his own's rented house at Nzela, the extra judicial statement (exhibit P1) says she was staying with her brother, the accused. To Mr. Martin Sabin, the two-statement given by the same person ought to have contained similar facts.

I have revisited the two exhibits, that is cautioned statement and the extra judicial statement. With due respect to the learned defence counsel, different details as to when and where the deceased was living at Nzela, have no effect on the accused confession which in my view contain not only admission of the offence, but also admission of all incriminating facts which constitute the offence he stands charged with. On what a confession is, I think, section 3 of the evidence Act will be of assistance;

"3. -(1) In this Act, unless context otherwise requires – "confession" 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 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;" (emphasis is mine)

In **R. V Bampamiyki s/o Buhile** (1957) EA 473 it was observed that a statement is regarded as a confession only when it contains the ingredients of the offence. And in **Tuwamoi v.Uganda** [1967] EA 84,91 the court said;

"...And if the confession is the only evidence against an accused, then the court must decide whether the accused has correctly related what happened and whether the statement

establishes his guilt with that degree of certainty required in a criminal case... "

As hinted herein above, accused is charged of Murder under sections 196 and 197 of the penal Code Cap 16 RE 2002. Section 196 provides:

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

Three elements are visible in this section.

- i. Causing death of another,*
- ii. by unlawful act or omission and*
- iii. with malice aforethought.*

The relevant part of the accused confession in relation to the murder charge reads as follows:

In exhibit P1 (Extra judicial statement)

"Mimi sikuridhika na kifo cha mwanangu Sengerema s/o Sungwa, mimi na mke wangu tulienda kwa mganga wa kienyeji na tuliambiwa mtoto wangu alilogwa na dada yangu Mbula Mpelwa. Ndipo nilikuja Bariadi nilitafuta Guest nikakaa

usiku nilikodi pikipiki nikiwa na panga usiku nilienda hadi kwa dada yangu Mbula d/o Mpelwa na kumkata panga hadi akafariki, nayo ilikuwa tarehe 27/3/2016 huko kwake Itubukilo – Bariadi.

Ni kweli kifo cha dada yangu Mbula d/o Mpelwa nilimuua kwa kumkata panga hadi akafariki.”

In exhibit P2(cautioned statement)

"Nakumbuka mnamo tarehe 25/3/2016 mimi pamoja na mtoto wangu Msafiri s/o Sungwa tulisafiri toka huko Nzela hadi Bariadi kijiji cha Pugu ambako tulifikia mjini Bariadi na tarehe 27/3/2016 majira ya usiku tulikodi pikipiki hadi kijiji cha Pugu nyumbani kwa Mbula d/o Mpelwa kwa kuwa tulikuwa tunafahamu nyumba ambayo analala hatukupata shida ya nyumba alipo kuwa amelala na wakati tunaenda hapo tulikuwa tumevaa makoti marefu meusi huku tukiwa na mapanga pamoja na tochi ambazo zilikuwa ba betrii mpya. Baada ya kufika pale tulipiga mlango na kuingia ndipo nilipomulika tochi na kukuta dada yangu huyo wamelala wawili, ndipo yule binti nilipomwambia kwamba lala chini huku kijana wangu Msafiri akimkata mapanga Mbula d/o

*Mpelwa. Alipomaliza kumkata tukaondoka usiku huo hadi
Bariadi mjini na kesho yake mimi nikaondoka kurudi huko
kijijini Nzela*

*31/3/2016 nilikamatwa na askari polisi wa kijiji cha Nzela na
kupelekwa polisi Geita na kusafirishwa hadi Bariadi. ”*

The accused confessions above are nothing but the admission of the ingredients of the offence of murder facing the accused person. In both exhibits, accused admits having killed the deceased on witchcraft believes and that he did so by cutting her with a machete. The inconsistencies pointed out by the defence counsel are, in my view not material and did not twist the accused's acknowledgement of the ingredients of the offence and his explicit admission of the offence. It could have been different if the discrepancy was attached on the participation or otherwise of the accused on the offence that would have affected the admission of his guilty which is not the case here.

Apart from finding that the accused confession statements contain nothing but truth, the two accused's confession statements above are not without corroboration. PW3's evidence on how the deceased was

attacked, the attire of the accused on the material time, Pw4's evidence on the status of the deceased immediately after the incident and the details of the post-mortem report (exhibit P3) supports what is stated by the accused in his confession statements.

I have as well evaluated defence evidence. I do not find anything serious quaking the prosecution case. Accused evidence is littered with lies and contradictions. He initially denied having had any dispute with his own sister, the deceased. His evidence during cross examination was that:

"I was not indebted to my sister; we were just in good terms that is why she stayed with me. I don't know the person she was quarrelling with"

But later he changed his version of the story that:

"She reported me at Nzela police and it was found that it was not me who wrote her Barua ya Vitisho.... She had suspected me... the author"

In addition to that, PW5 told the court that when he first arrested the accused in connection of the said murder on 31/3/2016, accused denied

to had killed his sister and alleged that he had attended the burial ceremony at Bariadi. There was no serious query directed by the defence to discredit this piece of evidence during cross examination. However, in his defence, accused denied having attended his sister's burial on allegation, first that he was sick and later he attached his arrest as a reason for not attend the deceased last respect. When confronted in cross-examination whether his family members had attended, he again gave two diverse answers, he first said

"I don't know if any of my family member attended the burial of my sister Mbula "

He again said, he was sick and was arrested and therefore he was not aware of who among his family members had attended the deceased last respect events and later during question by assessors, accused confirmed to the court that none of his family members had attended deceased's burial. This explanation is purely an afterthought because according to PW5, accused was first arrested and interrogated about the deceased death on 31/3/2016 almost four days after the deceased death. He was released on bail and re arrested again on 4/4/2016 so he was in a position of knowing if any of his family members attended the deceased burial or

not. I am not trying to shift the burden of proof to the accused person, no, my intention here is to divulge the substance or otherwise of the accused's defence in connection to the prosecution case.

I am aware that accused raised in a way, the defence of alibi that he was at Nzela Geita at the material date and time. This defence, to say the least has been invalidated by accused's own confession in which accused had confessed to have been at the deceased home on 27/3/2016 and more so after the conclusion that the confession is nothing but true.

Next for consideration is whether the killing of the deceased was with an ill intention. Malice aforethought under section 200 of the Penal Code is established by proving *inter alia*, the intention by the accused person to cause death of or to do grievous harm to any person. In **Enock Kipela v Republic**, Criminal Appeal No. 13 of 1998, Court of Appeal had said accused conduct before and after the incident, utterances, weapon used, the vulnerable part attacked on the deceased body can be used to substantiate whether the killing was a premeditated issue or not.

It is from evidence that deceased was murdered by a machete. Both prosecution evidence and that of the defence are in support of this

evidence. In fact, apart from indicating the cause of death as multiple cut wound on the body and severe bleeding. The summary of the postmortem report (exhibit P3) tendered in court described the deceased body as having "MULTIPLE DEED CUT WOUND ON HEAD AND LEFT WRIST SEPARATED FROM THE LEFT UPPER LIMB".

As also urged by the learned State Attorney, accused conduct before and after the incident can be of help on this point. PW5's evidence had established that accused and the deceased had grudges before the incident where accused was being suspected author of a threatening letter written to the deceased. The dispute which even the accused person admits that was reported to the police. It is also clear that, after the deceased death, neither the accused, who is the deceased blood brother, nor his family member attended the burial events. This in my view, is nothing but an echo of a malice aforethought.

I for the afore going reasons, find the case against the accused person proved beyond reasonable doubt. My conclusion above is in support of the two court assessors that the prosecution has proved the case against the accused beyond reasonable doubt and therefore find the accused

guilty. Accused **SUNGWA MPELWA** is hereby convicted of the offence of murder contrary to section 196 of the Penal code Cap 16 RE 2019.

Dated at Bariadi, this 11th March 2022


E.Y. MKWIZU
JUDGE
11/3/2022

Court: This judgement is delivered in an open Court this 4th day of March 2022 in the presence of the accused person, Ms. Chema Maswi learned State Attorney for the prosecution, Mr. Martin Sabini defence counsel and lady and gentlemen assessors


E.Y. MKWIZU
JUDGE
11/3/2022

SENTENCE

Having convicted the accused **Sungwa Mpelwa** under section 196 of the Penal Code, I hereby sentence him to suffer **DEATH PENALTY** by hanging under section 197 of the penal Code Cap 16 R:E 2019.


E.Y. MKWIZU
JUDGE
11/3/2022

COURT: Right of appeal explained.


E.Y. MKWIZU
JUDGE
11/3/2022

