

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

(ORIGINAL JURISDICTION)

CRIMINAL SESSION CASE NO. 60 OF 2019

THE REPUBLIC.....PROSECUTOR

VERSUS

JUMA MISALABA.....ACCUSED

JUDGMENT

Date of Last Order: 13/6/2022

Date of Judgment: 24/8/2022

M. MNYUKWA, J.

The accused person JUMA MISALABA, stand charged with two murder counts contrary to section 196 and 197 of the Penal Code Cap 16 R.E 2002 (Now R.E 2022). On the first count, it is alleged that on 16th day of October, 2015 at Nyakasunga Village within Sengerema District in Mwanza Region, the accused did murder one NGAI D/O MACHANYA. On the second count it is alleged that, on 16th day of October 2015 at Nyakasunga Village within Sengerema District in Mwanza Region, the



accused did murder one KAHABI D/O KASHONELE. The accused person denied both counts.

On trial, this court was aided by three assessors who are, Kassim Athuman (56 years), Mariam Chendele (47 years) and Martin Katingizu (56). As the trial was conducted in two different sessions, the prosecution was represented by Mr. Hemed Khalid, Rehema Mbuya and Sabina Choghogwe both learned state attorneys. The accused person was represented by Boniphace Sariro, learned counsel at first and later on he was represented by Steven Kitale, learned counsel. I appreciate both counsels for their services in finalizing this trial. Further, I extend my gratitude to both lady and gentlemen assessors for their valued opinion in which all assessors opined that the accused person is guilty of the offences charged.

The prosecution side, in discharging their duty to prove the case against the accused person, they had 5 witnesses namely; Mabula John (PW1), Adam Sanya (PW2), F 539 DC Mathew (PW3), Suzana Amos (PW4) and Fredy Peter (PW5). On the defence side, only one witness, the accused Juma Misalaba (DW1) testified.



During the hearing, PW1 testified to the effect that; she is a farmer and she lives at Nyakasungwa Village for almost 30 years. That she is a relative of the deceased persons as Ngai Machanya is her mother and Kahabi Kashonele is her sister to whom they share the same mother. That on 16/10/2015 about 19:00 hrs, she left from her business place and went back home. On her way, she heard "yowe" coming from her home. As she was near to home, she received a call from her neighbour one Babuge Kasubi and she was informed that her home was invaded. She rushed home and found her mother and sister were cut by a machete. She reported the matter to the police station. They got PF3 from a police station and took the victims to Sengerema Mission Hospital. When they reached to hospital, they were informed that her mother had already passed away. Her sister got treatment but she also passed away on 17/10/2015 and the hospital allowed them to conduct burial ceremony.

She went on testifying that, after burial ceremony, she received information from her sister called Suzana who met the accused on the day of the incident that the one who killed her mother and sister was her brother-in-law who married the deceased. At this point, PW1 pointed finger to the accused person at the dock. She added that, before the burial, she informed the accused about the death of the deceased persons



and at the time she didn't know where he was, but the accused did not attend the burial ceremony. She also stated that, she thinks the accused is the one who killed the deceased persons because he was demanding his children whom they were blessed with her sister to her mother. She further testified that, they were not living with the accused at their home as the accused and her late sister once lived at Mbalagashi village and later on shifted to Nyakasungwa and they lived there for almost a year. That the accused person left Nyakasungwa village on 2014 due to family misunderstanding between the accused and his mother-in-law as she was demanding dowry before she could give him his children.

When cross-examined by Mr. Sariro, PW1 testified that, she recorded her statement at the police station on 16/10/2015 and she informed the police that she is a pagan and that she was 25 years old. She insisted to be 34 years old as she stated at the police station. She also stated that, in her statement, she said she suspected Sabina Luzaka who is her uncle's wife to have murdered the deceased as she hated them because they were doing good in business.

She went on that; she told a police officer named Stanislaus that she does not know the killer. That, she recorded additional statement and

named the accused after she was convinced by her sister Suzana who was not there when the incident happened but she suspects the accused to be the killer. That she also suspected the accused person due to the misunderstanding that existed between them.

PW1's statement was tendered and admitted as exhibit D1 as there was a contradiction on PW1's statement to her testimony. In re-examination, PW1 stated that in his statement at the police she said she is a Christian and that to some extent she did not state the truth she gave in court as she was in a state of confusion. And she prayed for her both averements to be considered.

PW2 a medical doctor at Sengerema Hospital testified that, on 17/10/2015 he was then requested by DMO to conduct post mortem examination on two bodies. By that time the bodies were at the mortuary. They went to the mortuary with a police officer Detective Coplo Wenceslaus. Before he conducted post mortem, the two bodies were identified by their relatives to be the bodies of Ngai and Kahabi. He conducted post mortem examination and found the deceased persons to be injured on the neck and their clothes were wet with blood. He found out the cause of death to be heavy pain after being cut with a machete



and excessive bleeding which caused their bodies not to be in good condition and hence failure to work properly.

He further testified that, he wrote the reports and hand them over to the police. The two post-mortem reports were tendered and admitted as Exhibit P1 collectively. The post-mortem report of Ngai Machanya shows that the deceased body had multiple cut wounds on the head whereby seven (7) cuts were on the right side of the head and neck which involves the big blood vessels, and three (3) cuts were on the upper part of the head and on the left hand and all cuts involves the bone. That the death of the deceased was due to severe injuries inflicted by using a sharp object which caused them to have excessive bleeding. The injuries were deep about 5 centimetres. On the other hand, the post-mortem report of Kahabi Kashonele shows that the deceased body was found to have multiple deep cut wounds on the face, neck (involving big blood vessels), head and right lumbar region and all cuts associated with massive bleeding.

When cross-examined by the defence counsel, PW2 stated that he used one minute to examine each body. Since he did not witness the type



of instrument used, he cannot state exactly the type of instrument used but it was a sharp object which was 5 centimetres deeper to the injuries.

PW3 testified to be a police officer who investigated the matter. On 17/08/2016, he was informed that the accused was arrested and he was assigned to take the accused caution statement. By that time the accused was in lock up and he took him to the police office. Before he took his statement, he informed the accused person on his rights. He recorded the accused statement from 12:00 to 1:50 in the afternoon. The accused person was arrested on 16/08/2016 by PW5. PW3 tendered accused person's caution statement which was objected but the objection was overruled and the caution statement was admitted as Exhibit P2. PW3 stated that, they got information that the accused is a killer from Susan Amos and Mabula John.

In cross-examination, PW3 testified that he did not find the machete used and the clothes worn by the deceased as there was lapse of time from the death of the deceased up to when the statement was taken. That as an investigator, he did not see the importance of visiting the scene of crime. That he believes that the accused is the one who committed the crime as he was told there was family misunderstanding. Further PW3

testified that he took the statement of PW5 who arrested the accused after he was informed by the Village Executive Officer.

PW4 testified that, previously she was living with her aunt named Minza at Nyakasungwa village. On 16/10/2015 around 18:00 hrs she was on her way home when she met the accused, her brother-in-law whom she knew for a long time, riding a bicycle. His brother-in-law was wearing an overcoat and a cap. He was accompanied by his fellow whom she didn't know. That she was able to identify her brother-in-law as he removed his cap when they greeted each other. PW4 identified the accused on the dock. That when she met the accused, she was going to her other Aunt in Nyakasungu. Later that night around 20:00 hrs she got information that her aunt and sister were killed. She went to the scene of crime the following day and she did not see his brother-in-law. That she was surprised why her brother-in-law was not at the scene of crime because they greeted each other the previous day.

In cross-examination, the defence counsel prayed for PW4's statement to be admitted as exhibit as there was material contradiction to her testimony. PW4's statement was admitted as Exhibit D2. She further testified that, in her statement, she said she was coming from her



grandmother Kahabi Yohana and in court she said she was coming from her aunt Ngaido. And that when she was making her statement she was confused. She further testified that her brother-in-law did not attend burial service and she is not sure who killed the deceased persons.

PW5 testified that, he is a militia man and he arrested the accused person on 16/8/2016 after he was directed by the Village Executive Officer. He was accompanied by Mabula John to the Village of Makarubusi where they did not find the accused person but they met him on their way back. They arrested him and took him to Msasa Village Office. They later on sent the accused to Sengerema Police station where they reached around 19:45 hours at night. PW5 identified the accused at the dock.

After the closure of the prosecution evidence, this Court ruled that the accused person, in terms of section 293(2) of the Criminal Procedure Act (CPA), [Cap. 20 R. E. 2019], had a case to answer and was addressed in terms of section 293(2)(a) and (b), (3) and (4) of the CPA whereas he chose to defend on oath without calling witness.

Juma Misalaba (DW1) testified as a peasant, a father of five children and one wife who is now a deceased, Kahabi Kashonele. That he separated with his wife and he was living at Chato and his wife went to



live at their home. That he got information of the death of his wife through his sister-in-law Mabula John, who asked him where he is and he told him he is at Chato. That he was informed by phone that his wife and his mother-in-law were invaded and cut by machete and they were at Sengerema. He further testified that, he went to Sengerema mission and found his relatives including the deceased uncle, namely Amos. He attended burial at Soboso and went back home after three days. That he was arrested on 16th August 2016, he was sent to the Ward Executive office around 8:00 am in the morning and then he was sent to the police station and stayed there for three days.

He went on that, he was first interviewed and he did not admit to commit the offence and he was later on tortured and he became unconscious. He was sent to the court on 25/8/2016 and then to prison in which he was rejected and he was sent to the hospital and back to prison after treatment. He finalised his testimony by denying killing his wife and his mother-in-law. And that he admitted to the police station because he was tortured.

In cross-examination, DW1 stated that he paid dowry for his wife but his statement said he did not pay dowry for his wife and that Mabula



is his sister-in-law. He further testified that he went to visit his wife at the hospital where she was hospitalized but he did not see her that's why he doesn't know which part was cut. That he attended burial of his wife and he didn't take his children after his wife's death. That marks the end of the evidence on defence side.

From the evidence of both prosecution and defence side, it is undisputed that, Ngaido Machanya and Kahabi Kashonela who are mother and daughter, were invaded at their home on the fateful night of 16/10/2015 and were cut by a sharp object that led to their death due to head injury and excessive bleeding as evidenced by their respective post mortem reports that were collectively admitted as exhibit P1. It is also undisputed that, the accused person was arrested by PW5 on 16/8/2016 and he is now charged with the murder of two deceased persons who were his wife and mother-in-law.

Now, in order for the prosecution to satisfy the court that, the accused is guilty of the offence of murder as charged, they must prove their case beyond reasonable doubt that the accused did kill his mother-in-law and his wife. The duty to prove their case beyond reasonable doubt



is the statutory one as per sections 110 and 112 of the Evidence Act Cap 6 R.E 2002(Now R.E 2022).

This is to say there must be no shadow of doubt that the accused killed the deceased with evil intention, otherwise, the accused has to be declared innocent, as the shadow of doubt will be beneficial to him.

The above is the position of the Court of Appeal in the case of **DPP VS Ngusa Keleja @Mtangi and Another, Criminal Appeal No. 276 of 2017 (Unreported)** where the court said that;

"...the burden of proof in criminal cases lies squarely on the prosecution shoulder, the standard of which is beyond reasonable doubt.... An accused is merely required to raise a reasonable doubt. We must add here that even, the accused person can only be convicted on the strength of the prosecution case and not on the basis of weakness of his defence"

See also the case of **Mohamed Haruna@ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) and **Christian Kaale and Rwekiza Benard v R** [1992] TLR 302.

In discharging this duty, the prosecution has to prove two ingredients of the offence of murder which are the actual killing and the



intention to commit such killing or malice aforethought. (Actus Reus and Mens Rea). These are two basic elements of crime holding the accused criminally liable for the offence charged.

From the evidence adduced and as I have stated earlier, it is not disputed that Ngaido Machanya and Kahabi Kashonela are now deceased persons as testified by PW2, a medical doctor who conducted a post-mortem examination on the two deceased bodies. PW2 also tendered Exhibit P1 which showed that the two persons were dead. Also, PW1 who was the deceased persons' relative testified to have seen the deceased persons being cut by machete and later on died. PW3 also testified to have seen the deceased bodies the next day she went to the scene of crime. Therefore, it is undisputed that Ngaido Machanya and Kahabi Kashonela are now deceased persons. Thus, the first ingredient of actual killing or actus reus is proved.

In the second ingredient, that the killing was intentional, I am of the firm view that, the deceased persons were intentionally killed. My view is being persuaded by the circumstances of the killing. In the case of **Semburi Musa vs Republic**, Criminal appeal No. 236 of 2020, the Court of appeal at Kigoma, when citing with approval the case of **Charles Bode**



vs Republic, Criminal Appeal No. 46 of 2016 had listed some of the factors that the court has to take into account for the malice aforethought to be established, which include;

- (i) *The type of weapon used in the attack leading to the death of the deceased;*
- (ii) *The amount of force which was used by the attacker in assaulting the deceased;*
- (iii) *The part of the body of the deceased where the blows of the attacker were directed or inflicted;*
- (iv) *The number of blows which were made by the attacker, although one blow may be enough depending on the nature and circumstances of each particular case;*
- (v) *The kind of injuries inflicted on the deceased's body;*
- (vi) *The utterance made by the attacker if any, during, before or after the attack; or*
- (vii) *The conduct of the attacker before or after the incident of attack.*

From the adduced evidence, specifically, the evidence of PW2 shows that the killing was intentional based on the wounds found on deceased bodies. Further, Exhibit P1 shows that, the killing involved wounds that targeted at the sensitive parts of the body which shows that the perpetrator intended to kill. Looking at the post-mortem reports of

both deceased persons, it shows that the deceased bodies had multiple wounds on vulnerable and sensitive parts of the body such as the head and neck. Ngai Machanya body had more than 7 cuts on the head, neck and the hand likewise Kahabi Kashonele body also had multiple wounds on the face, neck, head and right lumber. This alerts that the person inflicting such wounds had more than one blow with excessive force when he inflicted such wounds to the deceased persons which aimed at causing severe damage to the victims.

Apart from that, after the assailant had inflicted the wounds to the victims, he disappeared to left them to die. And therefore, the circumstances of the killing fit within the prescribed factors as stated in the above **Semburi Musa** (supra) case, sparing the factor of utterance as there was no eye witness to that effect. This forms an opinion that the killing was intentional.

Up to this point, the two key elements are established. Now, this court has to determine, whether the prosecution has proved that it is the accused person Juma Misalaba who is before this court is the one that has intentionally killed the deceased persons.



The prosecution relies entirely on the circumstantial evidence and the caution statement which was admitted as exhibit P2 during the hearing, as there is no eye witness to the killing. It is an established principle of the law that, an accused person can be convicted based on purely circumstantial evidence without even other evidence to corroborate. (See the case of **Julius Justine & 4 others vs R**, Criminal Appeal No. 155 of 2005 and **Hilda Innocent vs R**, Criminal Appeal No. 288 of 2019 (both unreported)). However, for the court to rely on circumstantial evidence, the evidence must irresistibly point to the accused's guilty and exclude any other person as it was also held in the case of **Sikujua Iddi vs Republic**, Criminal Appeal No. 484 of 2019. Therefore, the adduced evidence in our case at hand, must point out that, it is the accused who actually killed the deceased persons.

From the prosecution evidence, PW1 evidence carries no weight as her testimony is just hearsay, as she testified that, she received information that, it is the accused who killed the deceased persons. Section 62 of the Evidence Act Cap 6 R.E 2002 (now R.E 2022), requires oral evidence to be direct from the person perceiving the same. PW1 testified that she got information from PW4. Therefore, PW1 evidence lacks credence.



On PW4 evidence, she testified that she met the accused person riding the bicycle with his fellow whom she didn't know. That the accused was wearing an overcoat and a cap at it was around 18:00 hrs as she was going to her other Aunt. PW4 clarified that she identified the accused person as he removed his cap when they greeted each other. She further testified that, the accused was going toward the deceased home. From this testimony, we should pose a question that, are we in a position to say that this circumstantial evidence leaves no other explanation as to the guilt of the accused person? My answer to this is No, the reason being, the evidence cast a shadow of doubts as to the end of the story. This is because, there is no evidence that the accused reached to the deceased persons' house, as PW4 met the accused on 18:00 hrs while the incident happened around 20:00 hrs. Apart from that, PW4 evidence is contradictory as she once stated that she met the accused person riding a bicycle, and when clarifying to court assessors PW4 stated that, she met the accused walking on foot. At this point, we are confused if PW4 real met the accused person, as if she met him then why would she contradict herself on how she met the accused person. Indeed, there were several contradictions on PW4 testimony and statements. For example, PW4 told the court that she is a pagan, while in his statement she said that she was



Christian, and she did not state if she changed her religion. She also testified that she met the accused when she was coming from her aunt Ngaido and at the police she stated that she met the accused when she was coming from her grandmother Kahabi Yohana. In my view, these are some of the contradictions which vitiate the credibility of PW4 and the merit of the case and therefore resolved in favour of the accused.

Apart from that, prosecution evidence which reflects that, the deceased persons also lived with the accused children, whom he was demanding, PW4's evidence, when cross-examined, she answered that, when she left her aunt's house, accused daughter aged 15 years was present. However, the prosecution side did not bring her to testify and no reason whatsoever was given as to why she did not testify. My perception is that her testimony could at least back up PW4 evidence as to whether her father reached the deceased persons house or not. In the case of **Siaba s/o Mswaki v R**, Criminal Appeal No 401 of 2019, CAT at Dar es Salaam, among other things pointed out that:

"... it is upon the prosecution to call material witnesses to prove a case beyond reasonable doubt and in exercising this noble task they are not limited in terms of number of witnesses whom they should call. Section 143 of the Law of

Evidence Act, Cap 6 R.E 2019 provides in clear terms that there is no particular number of witnesses that is required in proving a case. What is important is the credibility of a witness and weight of evidence."

That being the case, I am of the view that, there is still a gap to be filled as there is a lapse of time from when the accused met PW4 and this gap cast a shadow as to whether the accused reached the deceased persons house, as may be calling accused's daughter who was alleged to be at home with the deceased persons on the material day perhaps may fill the gap.

From this finding I find PW4 evidence to be valueless as there are unanswered questions which cast a shadow to prosecution evidence. And this led to a conclusion that PW4 evidence remains to be a suspicion toward the accused guilt. It is a trite position in criminal cases that, suspicion however strong cannot form a base of conviction. This principle can be seen in the case of **Lidumula Luhusa @ Kagusa vs republic**, Criminal Appeal No. 352 of 2020 and **Adinard Iddi Salumu & Another vs Republic**, Criminal Appeal No. 298 of 2018. Short of these factors, I discredit PW4's evidence.



From the evidence adduced, it is the accused person's caution statement which remained in determining if the accused person is guilty or not. PW3 testified to the effect that, he was the one who recorded the accused's caution statement after he was arrested. That, he took the accused's statement on 17/08/2016 from 12:00 to 1:50 in the afternoon. Although the caution statement was objected to by defence counsel, I overruled it considering that it was not repudiated, the procedural irregularity did not affect the weight of the statement and the accused was not prejudiced by such irregularity. It is a principle of law that the best evidence is that of the accused person admitting his guilt and the best witness in a criminal charge is the accused who confesses. In the case of **Republic vs. Khamis Said Bakari**, Criminal Sessions Case No. 119 of 2016 (unreported) where this Court, Hon. Korosso, J. as she then was, held as follows: -

"It is trite law that the best evidence in a criminal trial, is that of an accused person who confesses to have committed the crime."

From our case at hand, the accused person admitted to have killed the deceased persons, with his brother-in-law Mdimi Charles, who was not found. The accused person while defending himself, attempted to retract



that he made that statement after he was being tortured. It is my opinion that, his retraction is misplaced as he was supposed to raise it during the admission stage. Furthermore, there is no any other evidence to prove that he made that statement after he was being tortured, therefore, his defence lacks basis.

From the caution statement taken which is Exhibit P2, although the accused has admitted to the charge, still the caution statement has to be tested its weight before it could be used to convict or acquit the accused person. (See the case of **Nzwelele Lugaila vs R**, Criminal Appeal No. 140 of 2020) From the accused's caution statement, the accused was able to admit to the killing and he specified that he stabbed his mother-in-law twice on the head, stomach and on the ribs. However, looking at the post-mortem report of the deceased person, Ngai Machanya, it shows that the deceased body had multiple cuts, 7 cuts on the head, 3 cuts on the upper part of the head and on the left hand.

The story given in the caution statement does not match the cuts founds on the deceased person alleged to be killed by the accused person. For the caution statement to convict the accused person, the court must satisfy itself that the caution statement states the truth. To know that,



what is stated is nothing but the truth, the explanation given must be consistence with other evidence. But in our case at hand, the accused person explanation does not match with what is stated in the post-mortem report. This brings a flick of doubts as to whether the cautioned statement taken was the truth. I reiterate my position that, the prosecution side has a duty to prove beyond reasonable doubt that the accused killed the deceased person as it was stated in the case of **Mohamed Matula v R** (1995) TLR 3 the Court had the following observation:

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."

Also, in the case of **Paschal Yoya @Mganga VS Republic, Criminal Appeal No. 248 of 2017(Unreported)** The court had this to say

" it is a cardinal principle in our jurisdiction that, in cases such as one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not to prove his innocence"



From the above principles, it is my considered view that, the prosecution has failed to discharge this duty, as the prosecution evidence still have a shadow of doubt as to whether the accused person indeed killed the deceased persons.

In fine, the accused person JUMA MISALABA is hereby acquitted to the charge of murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E 2019 as the prosecution failed to prove its case beyond reasonable doubt.

Consequently, I order the accused person to immediately be released from custody unless lawful held.

It is so ordered

DATED at Mwanza this 24th day of August, 2022.




M. MNYUKWA.

JUDGE

24/8/2022

Right to appeal fully explained.


M. MNYUKWA.

JUDGE

24/8/2022