

IN THE HIGH COURT OF TANZANIA
AT SHINYANGA
CRIMINAL SESSION CASE NO. 69 OF 2017
REPUBLIC
VERSUS
1. MACHAMA JIJI
2. CHAGUA MANGABILI
JUDGMENT

14th & 30th March, 2022.

S. M. KULITA, J.:

The accused persons Machama Jiji and Chagua Mangabili stand charged with the offence of murder contrary to section 196 and 197 of the Penal Code Cap. 16 R: E 2002. They pleaded not guilty to the charge.

It is alleged that, the accused persons on 25th day of March, 2017 at Ng'alita area, within Bariadi District in Simiyu Region, did murder one, Hollo Sanane.

In this case the prosecution was led by Daniel Masambu learned State Attorney, whereas Mr. Frank Samwel Advocate, represented the first accused person and Mr. Shabani Mvungi Advocate, represented the second accused person.

In a bid to prove the case against the accused persons, the prosecution side summoned six witnesses to testify in court. They are Sayi Mabula, Kezia Gerald Manyama, Mabusi Sanda, A/Insp Joseph Gervas Haule, Dr. Jumanne Lugata Manyama and A/Insp Benson. They all testified as PW1, PW2, PW3, PW4, PW5 and PW6 respectively.

A summary of the evidence adduced herein is that, PW1 one Sayi Mabula had two wives and mentioned their names as Holo Sanane and Nsiya Jiji. He went on stating that, he was living with Holo at Igegu village for administering their business and that Nsiya was helping her mother at Ng'alita village.

PW1 went on stating that, one day they decided to go with his wives for medical check-up. The result showed that Nsiya Jiji was HIV positive. He said that, he decided to hold a meeting at home on how they are going to live. As the meeting was not successful, he decided to take Nsiya Jiji to their home. PW1 further stated that, he one day met with Machama Jiji, the brother of Nsiya Jiji. He said that, Machama forced him to go and take back his wife, Nsiya. PW1 repeated the words Machama used to be, Nsiya has given birth to him and that he together with his second wife have deserted her. He added that, Machama promised to do something bad to him if he would not take Nsiya back. PW1 stated that, on 23/3/2017, he

sent the victim to Ng'alita for farming purposes. He stated further that, at Ng'alita the victim was living with his mother, Milembe Maduhu, Masunga Mabula and Mabusu Sanda. He added that, the compound had three houses, one for his mother, the other was of Masunga Mabula and the last one was shared by Mabusu at the sitting room and the victim in the bedroom.

He went on stating that, on 26/3/2017 while sleeping he was called by his brother Nyambulida Mabula through a phone and that he was informed that his wife Holo Sanane had been butchered to death. He told the court that, he decided to go where the incident took place. He said that, the victim had been wounded at the neck. He contended further that, Mabusu and Masunga told him that Machama Jiji and Chagua Mangabhili are the ones who invaded and killed the victim. The witness stated further that both accused persons live at Ng'alita. He then pointed successfully to the accused persons in the dock.

When cross examined by Mr. Frank Advocate, PW1 stated that, Masunga was present by the time Mabusu was disclosing the names of the killers. Masunga knew the killers through information he got from Mabusu Sanda. PW1 stated further that, Mabusu Sanda told the same story to the village chairman. The victim's body was in the same bedroom when PW1

reached at the scene. The witness admitted to have testified on hearsay evidence. He said further that, he was called to the scene on 25/3/2017 around 00:00 hours.

When cross examined by Mvungi Advocate the witness stated that, the words Machama used to intimidate him were bad but he did not report it. He explained further that, the killing happened after three months have passed since Machama said those bad words. He went further stating that, Machama attended at the scene at 0900 hours on the following day.

PW2 one Kezia Manyama testified that, on 2017 she was a Magistrate and a Justice of Peace at Somanda Primary Court, Bariadi District. He added that, on 27/3/2017 while at Somanda Primary Court, she recorded extra judicial statement of one Machama Jiji. She told the court that, Machama Jiji confessed that he participated in killing one Hollo Sanane. PW2 prayed to tender the extra judicial as an exhibit. The same was admitted as an exhibit P1. She went on stating that, on 31/3/2017 she was again at Somanda primary court and that Chagua Mangabhili wanted to confess. She went on testifying that, in his confession the second accused told her that, he was paid to murder the victim and actually participated in the killing of the victim. She prayed to tender extra

judicial statement as an exhibit in court. The same was admitted as exhibit P2.

When cross examined by Mr. Frank Advocate PW2 stated that, she does not remember the date and duration she used when she went to record her statements at the police station. She added that, she does not remember the statements taken on 5/4/2017 at the police station. She said that, she did not lie to court as she did not tell the court that she recorded her statement at police station before she recorded the extra judicial statement of the second accused. She also stated that, she was not told what the first accused had said at the police station before he was brought to her for recording extra judicial statement. Even when she was referred to her statement she made at the police station yet, she maintained her position.

When she was cross examined by Mr. Shabani Mvungi Advocate the witness stated that, the accused before recording his extra judicial statement, if he asks may be given a right to call a friend to observe the recording of the statement.

PW3 one Mabusi Sanda testified that, he is 19 years old and that he started living at Mwadobani before he went to Ng'alita. He went on stating that, at Ng'alita he was living in the house of Hollo, the wife of Sayi Mabula

even when Holo Sanane went to Ng'alita for farming. He explained that, the house had one bedroom where Hollo was staying and the sitting room where he was staying.

He further said that, on 25/3/2017 they were invaded by three people. He stated that, he identified two of them through a torch as Machama Jiji and Chagua Mangabhili. When the door was broken, he was inside. He said that, he used a torch of salata solar. PW3 successfully pointed to the accused persons at the dock. The witness stated that, he was two steps away from the invaders when he was flushing lights to them. He explained that, the accused persons had worn black coats and covered their heads but not faces. He said that, Chagua told him to put off his torch, cover himself and sleep. PW3 went on saying that, the accused persons then went to the room of Holo Sanane. He added that, the victim made noise seeking for help after which the accused persons got out while running. He said, Machama Jiji lives at Ng'alita, Lutuya. He added that, he knows him for 10 years. He stated to have met with Machama on the same day at 11:00 hours before the incident, when he, together with Masunga, Minza and Hollo, were cultivating in their farm. He said further that, he knew Chagua for 4 years. He said that, after the invaders had ran away, he went out to Masunga Mabula and told him that,

they have been invaded by Machama and Chagua. He added that, they made an alarm after which people went to the scene and that he told them what transpired. He added that, the invaders used only five minutes doing the whole act.

When cross examined by Mr. Frank, he stated that, the five minutes are the approximation. He said he did not tell the village chairman what he had witnessed. When cross examined by Mr. Shabani Mvungi he stated that, on that day they slept at 20:00 hours. He was not in deep sleep when the invaders arrived. He added that, he did not run away when invaders were inside as he was afraid. It was 0800 hours in the morning when Machama joined people who attended the incident. When cross examined, PW3 stated that, the police went at the scene at 1200 hours and the accused persons had not yet been arrested.

PW4 one A/Insp Joseph Haule testified that, he is a Police Officer working at Simiyu. He further stated that, in 2017 he was a Police Constable, working as an Investigator at Bariadi. He went further stating that, on 26/3/2017 he together with other police officers were ordered to go and investigate murder incident that had happened at Ng'alita village. He told the court that, they went to the scene. He went on stating that, they were guided by Sayi Mabula. He testified that; they witnessed the

victim's body lying at the scene of crime. He testified to have started recording statements of the witnesses of which Mabusi Sanda was among them. He added that, Mabusi Sanda told them, the killers are Machama and Chagua. He went on stating that, Sayi Mabula told them that Machama was present in the morning of 26/3/2017 as among the people who went to the incident following an alarm. He said that, they managed to arrest him at the evening of the same day. He stated that, he recorded the first accused's statement at about 1830 hours when they returned at their office. He told the court to have given him his rights before he started making his statement. He testified further that, from his statement, the first accused confessed to have killed Hollo in revenge for his sister's being deserted by Sayi Mabula. He added that, the accused mentioned John Musa and Chagua Mangabhili as his accompanies. He went on stating that, they managed to arrest the second accused at Dutwa. He informed the court that, the third suspect is still at large. PW4 prayed to tender the accused caution statement to the court. The same was admitted as exhibit P3.

When cross examined PW4 stated that, the first accused had worn black coat, with "Mzula" that covered his head and other parts but excludes mouth, nose and eyes. He went ahead saying that, he was told

by Mabusi how the accused wore. As to why he did not take the accused's clothes for DNA test, PW4 in the first place replied that, the accused was not cooperative and in the second time he stated that, his relatives hidden those clothes. He added further that, Mabusi Sanda told him that, he saw only two people, Machama and Chagua.

PW5 one Jumanne Lugata Manyama testified that, he is a Medical Officer by professional. He went on stating that, in 2017 he was working at Bariadi District Hospital. He added that, on 26/3/2017 he was needed to go for post mortem examination at Ng'alita. He said that, the victim was a female, with a jugular vein cut wound, covered with blood. He mentioned her name as Hollo Sanane. He prayed to tender the post mortem report and the same was admitted as an exhibit P4. When cross examined by Frank Samuel, he stated that he never produced any identity proving that he is the one who made the post mortem report.

PW6 one ASP Benson testified that, in 2017 he was a Police Constable. He added that, on 30/3/2017 he was ordered to record the statement of Chagua Mangabili. He stated that, the accused confessed to have involved himself in the killing of Hollo Sanane while accompanied with Machama Jiji and John Musa. He prayed to tender the caution

statement of Chagua Mangabili as an exhibit in court. The same was admitted in court as an exhibit P5.

On these six witnesses as I said earlier, the prosecution case got closed. In terms of the provisions of section 293(2) of the Criminal Procedure Act, Cap. 20, the accused persons were found to have a case to answer. After being addressed in terms of section 293(3) of the CPA, Cap 20 the accused persons opted to testify alone on oath as **DW1** and **DW2**.

DW1 one Machama Jiji, testified that, he is not involved in the killing of Hollo Sanane. On 25/3/2017 he was at their family home at Ng'alita. On that day he said, after his normal works of the day he arrived at their house at 1900 hours. He went ahead stating that, he waited for the food of which they ate at 2100 hours and soon thereafter they slept. He added that, at 0000 hours his door was knocked by his mother. He said that, his mother wanted him to go to collect their cows that had escaped from their hut to the neighbours' farms. He stated that, he together with her mother found the cows and returned them. He said, that was at 0400 hours to 0500 hours. He added that, on 0600 hours he heard an alarm. He told the court that, he went for the alarm and met many people together with Police Officers. He said that, they were waiting up to 1100 hours when he

was called by Police nearby the fence where he met with his mother and sister. He stated that, he was then ordered to get seated.

He said later on, they were all taken with a car to Bariadi police station. At the police station, he said that he was interrogated on the murder of Hollo Sanane, the allegation which he said that he denied. He said that, he was tortured to confess the offence. After the other police had interfered, he was returned to the table where he was ordered to sign some papers. He said that, a policeman known as Joseph who had tortured him, refused to take him to hospital. He went on stating that, after ten days he was taken to court then to prison where the prison officers rejected to receive him as he was in bad condition. He again stated that, he too was taken to Justice of Peace. He said that, before Justice of Peace, he was interrogated while Joseph the one who had tortured him was beside her. He said that, as he denied to have committed the offence, the police slapped him and thereby was forced by Justice of Peace to sign by name. He said that he was forced to sign the words that they were not even read to him.

When cross examined, he stated that the alarm normally is raised on un natural incidents. He denied that his sister was returned home by

his husband for being HIV positive. He added that, the duo were living together.

DW2 one Chagua Mangabili testified that, he was arrested at Dutwa on 30/3/2017 when he was attending the auction(mnada). He went on stating that, he was then taken to Bariadi Police Station where he met with Machama Jiji, Milembe Nthobi and Nsiya Jiji. He testified further that; on the second day he was taken to the investigation room where he was informed that he is being held for the murder of Hollo Sanane. He said that, he denied to have committed the offence. He went further stating that, he was tortured so that he could admit to have committed the offence. He added that, through torture and force he signed the papers which he did not know the words inside them. He went ahead stating that, he was taken to Justice of Peace. He added that, even when he denied the allegations yet he was beaten again and forced to sign the sheets thereat. He said that, his investigator did not take him to hospital. He insisted that, he is not involved in the killing of Hollo Sanane.

That marked the end of both parties' evidence. In view of the above evidence, the following issues call for determination: -

1. Whether the victim was met with unnatural death (if yes)

2. Whether the accused persons are responsible for that death of the victim (if yes)
3. Whether the accused persons with intention/ malice aforethought killed the victim.

According to the first issue, PW5 a Medical Officer testified to have found jugular vein around the neck of the victim was cut by a sharp object. He said that, the same caused severe bleeding which caused death of the victim, Hollo Sanane. This testimony is verified by the post mortem report that has been admitted in court as Exhibit P4. Further, the testimonies of PW1 and PW3 who witnessed the victim's body, shows that the victim was covered with a lot of blood. This evidence shows that, the victim was met with un natural death. As there is no testimony from the defense side that goes contrary to this finding, I see no need of dwelling much on dealing with this issue.

Concerning the second issue, as to whether the accused persons are responsible for the death of the victim, the prosecution side have endeavored into convincing this court through different evidence they produced in court. I am going to discuss them below, one after the other.

First, the prosecution brought in court PW3 who testified as an eye witness. As we have seen above, PW3 told the court that, on the material day he was asleep since 20:00 hours. He testified further that, he slept at

the sitting room in the same house with the victim. He added that, at about 23:00 hours their entrance door was broken. He told the court that, he took his torch made of salata with bright light and flashed a light towards the accused persons and identified them. In his testimony PW3, he was told by Chagua Mangabili to turn off the light, cover himself and sleep. He told the court further that, he obeyed that order. PW3 testified to have identified the accused persons as he was within two steps distance from them. The same witness told the court that, the accused persons had worn black coats and covered their heads with hats only leaving their faces open. To convince this court that he actually identified the accused persons, he told the court that, he has been knowing Machama Jiji for ten years and Chagua Mangabili for 4 years by then. Lastly, PW3 told the court that, the accused persons used only five minutes for the whole act.

This is the evidence that the prosecution side calls for this court to find that the accused persons have been properly identified. The question is, is it reliable?

I find it crucial to direct my mind into answering that question even if PW3 testified to have recognized the accused persons. In the case of **Issa Mgara @ Shuka v. Republic, Criminal Appeal No. 37 of 2005 Court of Appeal, Mwanza** it was held that; -

“This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made”

With the above observation, it is thus important for this court to inquire as to whether there are no possible mistakes as far as the testimony of PW3 on identification is concerned. As far as the testimony of PW3 is concerned, I am of the settled mind that the same raises some doubts. The first doubt is made on the duration that PW3 used to observe the invaders. PW3 did not tell the court the duration he used to observe the invaders. Only what he said is that the act in general took about five minutes. This means; first, the five minutes covers the time the invaders broke the door, secondly, the time PW3 told the court that he used to flash light on the invaders and thirdly, the time PW3 obeyed the order of sleeping while covering himself when the invaders went to kill the victim. Had PW3 told the court, the specific duration he used to observe the invaders, it could help this court figure out whether he properly identified the invaders.

Even if it is taken that the whole of 5 minutes PW3 used for observing the invaders which is not true, yet in such a terrifying situation, could PW3 who was at the age of 14 years, properly and without hesitation

flash a light onto the invaders within all those five minutes? The answer is more convincing that, PW3 would not use such duration of time in observing the invaders. With that situation, possibility of mistaken identity is obvious.

PW3 told the court that, he was asleep since 2000 hours while the invaders came at 2300 hours. That is three hours later. He also told us that, he slept at the sitting room where the entrance door was. Can it be possible for PW3 to wake up, find his torch and flash the light onto the invaders as soon as the door was broken? Taking into consideration that it was night, PW3 was asleep before and that his door was broken, it is less convincing that, a boy of 14 years managed to wake up, find his torch and flash light onto the invaders for observation.

On those premises, I find it that the circumstances for mistaken identity for PW3 on the invaders were much higher than proper identification. It follows that PW3 did not properly identify the accused persons. This stand is strengthened with the fact that PW3 never told people who ran for the incident except his relatives if at all it happened. When cross examined PW3 agreed that he did not mention the accused persons to the village chairman when he attended the incident.

Again, the evidence shows from PW1 and PW3 that, the 1st accused attended the alarm for the incident and he was not arrested immediately

till some hours later when the police officers arrived. This presupposes that, if PW3 identified properly the accused persons, he could have communicated to the people who went to attend the incident and the same could have arrested the accused persons immediately. The act of not arresting immediately the accused persons till when the police officers arrived convinces much that, PW3 did not identify the accused persons.

The situation convinces one to conclude that, these accused persons, were arrested following the interrogation the police officers did with PW1, the husband of the victim who told them as to whom he suspects to be the murderer. It follows therefore that, the first accused person was mentioned, as the testimony of PW1 goes that, the first accused person promised bad things against him if his sister Nsiya could not be taken back by him. But be it that, it is truly the first accused promised something bad to the husband of the victim, in absence of a proper identification, that testimony of PW1 remains as suspicion only and the same cannot form the basis for conviction. See, **Mt. 60330 Pte Nassoro Mohamed Ally V. The Republic, Criminal Appeal No. 73 of 2002, Court of Appeal, Dar es Salaam** (unreported)

At this point, the prosecution side remains with only the confessions that the accused persons are said to have made them; first, Extra judicial statement alleged to have been recorded by the Justice of Peace (PW2).

Secondly, the confessions made before PW4 and PW6, the police officers who recorded the caution statements.

To those confessions, the accused persons denied to have made them and that they were tortured to accept and sign the statements. The question is, can this court convict the accused persons solely with these retracted/repudiated confessions?

I am aware with the position of the law that, it is dangerous to convict while relying solely on the retracted/repudiated confession without corroboration. See, **Dickson Elia Nsamba Shapwata and Another v. Republic, Criminal Appeal No. 92 of 2007, Court of Appeal, Mbeya.**

“With respect, we agree with Mr. Mkumbe that, it is always desirable to look for corroboration in support of a confession which has been retracted/repudiated before acting on it to the detriment of the appellant.”

However, I am also alive with the position of the law that, a court may convict on retracted/repudiated confession even without corroboration. See, **Tuwamoi v. Uganda (1967) EA 84** in which it was held;

“The present rule then as applied in East Africa, is regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself

*that it is dangerous to act upon a statement that has been retracted in the absence of corroboration in some material particular, but that the court might do so **if it is fully satisfied that in some circumstances of the case that the confession must be true***" See also *Hemed Abdallah v. Republic (1995) TLR 172*" (Emphasis supplied.)

With the above reasoning, it follows therefore that, to act on the retracted/repudiated confession of the accused persons in Exhibits P1, P2, P3 and P5, this court must be fully satisfied, while basing on some circumstances of the case that, those confessions must be true. The question is, are there some circumstances in this case that make this court to have been fully satisfied that the confessions are nothing but the truth? Here I must admit that, in this case, there are no circumstances to convince this court that the confessions are true. More so, the failure to arrest both accused persons at the earliest time while there is no evidence that the accused persons had ran away after the act and the presence of grudges between the husband of the victim and the first accused person, cast much doubts that this case is a result of a guess work.

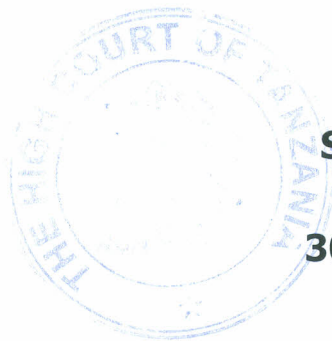
On that account, I am of the settled mind that, this issue is answered in the negative that, the accused persons herein are not the ones

responsible for the murder of the victim Hollo Sanane. I thus proceed to find them not guilty of murder, hence acquitted. They should be released forthwith, unless held for some other lawful course.

It is so ordered.

S.M. Kulita
JUDGE
30/3/2022

DATED at **Shinyanga** this 30th day of March, 2022.



S.M. Kulita
JUDGE
30/03/2022