

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

CRIMINAL SESSION NO. 98 OF 2020

THE REPUBLIC-----PROSECUTOR

VERSUS

JOSEPH LUGAILA @ MASOMI-----ACCUSED

JUDGMENT

Date of Last Order: 07/09/2022

Date of Judgment: 14/09/2022

M. MNYUKWA, J.

Joseph Lugaila @Masomi (herein to be referred to as the "accused person"), is accused of murdering one Mbula Charles (herein to be referred to as the "deceased") contrary to sections 196 and 197 of the Penal Code Cap 16 R.E 2019 (Now 2022). It is alleged by the prosecution that, on the 15th day of November 2018, at Mahingila Hamlet within Isangijo Village in Magu District within Mwanza Region, the accused person with malice aforethought did kill one Mbula Charles.

The brief facts that gave rise to this trial reveal that, on the fateful night of the 15th day of November 2018, the accused person who is a



resident of Kasamwa, Geita together with his colleagues who are at large, invaded the deceased's house and stole a sum of Tshs. 50,000/= and a mattress valued at Tshs. 80,000/= the properties of the deceased. It was further alleged that in the course of theft, the accused together with other persons beat the deceased with a stick and left the scene of the crime. After the crime incident, neighbours gathered at the scene of the crime, and it was alleged that the deceased named the accused to be one of the assailants she had identified. When the charge sheet was read over to the accused, he denied the commission of the offence hence the full trial

During the hearing, the prosecution was represented by Sabina Chogogwe, Morris Mtoi, Martha Mwadenya and Fortunata Guvette both learned state Attorneys. On the defence side, the accused was represented by Masoud Mwanaupanga, learned counsel. I extend my gratitude to both counsels for their dedication in finalising this trial.

After a brief description of the offence committed, I will now give a detailed account of what was tabled before the court. In proving the offence of murder contrary to sections 196 and 197 of the Penal Code Cap. 16 R.E 2020 (Now 2022), the prosecution presented six witnesses who were; Balekele Balele (PW1), Rose Mashalla (PW2), Inspector Makwasa Mjarifu Makwasa (PW3), E 9442 D/SGT Nyongeza (PW4),

Assistant Inspector Goodluck Shoo (PW5) and Dr. Iddi Shabani (PW6). On the defence side, the accused person stood as a sole witness, Joseph Lugaila (DW1).

In their testimony, Balekele Balele (PW1), testified to be a farmer and a chairman of a small village of Mahingila at Isangijo in Bukandwe Ward. On the fateful night of 15th November 2018, he received a call around 4:00 hrs at night that informed him of the deceased's home was invaded by thieves. He informed the village peace committee and went to the scene of the crime. He found the deceased person laying on the floor who complained to have been invaded and beaten on different parts of her body. The deceased person named the accused person to be among the invaders as she identified him through a light powered by solar energy that was available in the area and the accused person was her neighbour who grew up there. He further testified that, the deceased narrated that apart from beating her, they also stole money and a mattress which was thrown on the way.

He further testified that, they found PF3 and took the deceased to Kisesa Healthy Center for treatment. He was then informed that the deceased died around 19:45 hrs. Through an informer, they were told that the accused was at Lunda Guest house. They went to the police



station and informed the Officer Commanding Station (OCS) of the same and they accompanied the police officers to Lunda guest house for the accused arrest. They surrounded Lunda guest house and after a search, the accused was not found, but he suddenly appeared from White lodge and was arrested. That after the arrest the security situation was not good as people wanted to beat the accused person.

In cross-examination, PW1 testified that he did not find the accused person when he reached the deceased house and when the incident happened the deceased person was together with his mother. In re-examination, PW1 testified that, he was informed that the accused person was the one who invaded the victim (now the deceased) when they reached there since she was able to speak.

Rose Mashalla (PW2), a Primary Court Magistrate currently stationed at Kabila Primary Court in Magu District, testified that, the accused person was brought to her at her work station in Magu Urban Primary Court by then, by the police officer named Nyongeza around 15:00 hrs. She went on that, the police officer informed her that they went to her as a Justice of Peace for the accused Extra Judicial statement to be taken. She testified further that she recorded the accused person's extra-judicial statement.

Inspector Makwasa Mjarifu Makwasa who testified as PW3, narrated that, on 15th November 2018, he was OCS at Kisesa Police station. He received a call around 4:00 hrs, that there are thieves that invaded one of the dwellers at Isangijo Village. He could not go to the scene of crime at the time, as there was no fuel in the police cars. He went further that, around 7:00 am, his police station was surrounded by villagers carrying traditional weapons including machetes and arrows. The villagers informed them that one of the assailants was hiding in one of the guest houses in Kisesa. They went to the guest house called Lunda, they surrounded it and started searching. While searching they didn't manage to find the accused as he was in the neighbouring guest house known as White lodge which was a distance of 2 or 3 metres from Lunda guest house. They arrested the accused and took him to Kisesa police station, but later on, transferred him to Nyakato due to civil unrest as the villagers surrounded the police station carrying traditional weapons. He went on that, he was informed that the deceased person died while she was receiving treatment at Kisesa Health station. PW3 identified the accused at the dock.

In cross-examination, PW3 testified that, they went to Lunda guest house at 9:00 hrs in the morning and they arrived at Kisesa police station



with the accused at 11:00 hrs in the morning. He further testified that the accused was shifted to Nyakato police as there was civil unrest at Kisesa. He went on that, he does not know at what time the accused arrived at Nyakato police station but the distance from Kisesa police station to Nyakato police station is approximately 30 minutes, and the accused person was not returned to Kisesa police station but he was informed that, he was taken to Magu police station.

A police officer with No. E 9442 D/SGT Nyongeza testified as PW4. In his testimony, he narrated that, on 15/11/2018 around 14:00 hrs he was at Isangijo Village within Mahingila Ward in District investigating the offence of armed robbery. The offence was concerning the deceased person as she was invaded on the night of 15/11/2018. He testified that, in the course of his investigation he drew a sketch map of the scene of crime led by Shinje Yamala. PW4 tendered the drawn sketch map that was admitted and marked as exhibit P1.

He went on that, during the investigation he received information that, one of the accused persons was arrested at Kisesa Village. They went to Kisesa Police station around 19: 45 hrs and they were informed that the accused person was taken to Nyakato police station for his safety due to civil unrest at Kisesa. He further testified that, he was informed



that the deceased person passed away around 19:00 hrs when she was receiving treatment at Kisesa Health Center.

PW4 went on to testify that, he went to Nyakato Police station together with other police officers including the head of investigation of Magu District. They took the accused person to Magu where his criminal case was opened and it was around 21:00 hrs at night. That, when the accused person was interrogated by the head of investigation, he admitted to have been involved in the commission of the armed robbery and injured the deceased person which resulted in her death. PW4 testified further that, he recorded the accused caution statement.

Assistant Inspector Goodluck Shoo, testified as PW5. In his testimony, he testified to be a police officer who received the victim (now a deceased) person while in his duty station on 15/11/2018 around 6:30 hrs in the morning. That the deceased reported that she was invaded by three people at her house around 2:30 hrs in the morning while she was sleeping. That she heard a bang noise "*kishindo*" at the door and three people carrying machete and club entered her house. She identified them as there was solar power and they started to beat her as they forced her to give them money. She gave them Tshs. 50,000/= that was under her mattress and they left.



PW5 further testified that, the deceased told him that she identified one of the invaders as he was her neighbour living at Isangijo village, but he shifted to another area about four years and came back two weeks before the invasion, as he was living at his grandmother at Isangijo Village. PW5 testified to have recorded the deceased statement at a police station and he gave her PF3 for medical treatment.

The last prosecution witness was Dr. Iddy Shabani who testified as PW6. He testified to be a human doctor working at Bugando Referral Hospital holding a degree of Doctor of Medicine. He testified that, on 18/11/2018 he accompanied by a police officer with No. D 6041 SGNT Jumanne, he examined the deceased body which was at the mortuary. The deceased body was identified by her relative to be the body of Mbula Charles, a body of female by sex. PW6 went on that he did an internal and external examination. On external examination he found the body to be of a woman aged 60 years, and the body was bled on the right nose and there were bruises on her legs and there was internal bleeding in the head, and blood clothed in the brain of the deceased in a layer part known as sub-dura. The presence of the blood was not normal and it was unnatural. He went on that according to his examination the brain injury



was caused by beating with a heavy object in the head. Other part of the body was just normal and so the cause of death was a brain injury.

PW6 testified further that, after examination, he filled the post-mortem examination report which bears number 187/BMC/2018 and handed it over to the police officer. The post-mortem report was tendered and admitted as exhibit P2. And that marked the end of the prosecution testimony.

The prosecution case was marked closed and this Court ruled that the accused person, Joseph Lugaila @ Masomi, in terms of section 293(2) of the Criminal Procedure Act (CPA), Cap. 20 R. E. 2019[Now R.E 2022], has a case to answer and was addressed in terms of section 293(2)(a) and (b), (3) and (4) of the CPA, Cap. 20 R. E. 2019 [Now R.E 2022] whereas the accused person chose to defend on oath without calling witnesses.

Joseph Lugaila who testified as DW1 stated testified that he was born at Isangijo Village in 1984, and he is currently residing at Kasamwa Geita. He went on that, on 15/11/2018 around 5:00 hrs in the morning when he was still sleeping, he received a call from his cousin's brother and asked about whereabouts of his in-law (DW1's wife) and he told him he slept at the guest house near Lunda guest house. They did not speak



further and as he tried to call him, he was not available. He continued to sleep until 6:00 hrs in the morning as he heard people has surrounded Lunda guest house. He went outside to see what was happening and found "wananzengo" together with the village chairman and the small village chairman who knew him. He went to greet the village chairman by shaking his hand but he arrested him and pushed him in Lunda guest house and asked him for his colleague. He said he slept alone in the nearby guest house. He was arrested by the police officer who took him to the guest he slept and he showed them room No. 105 where he slept. They searched the room and asked the guest house attendant at what time did he rent the room and she replied it was 21:00 hrs. The guest house attendant was arrested and she called the owner, and after the register was inspected, they saw his name and at what time he rented the room. That, he was sent to Nyamagana police station and he was interviewed around 21:00 hrs at night and he denied to have committed the offence.

DW1 testified further that, he stayed at the lockup until 20/11/2018 when he was transferred to Magu police station by Magu police officers. While there he stayed at the lock-up until 23/11/2018 when he was taken to court.



DW1 finalised his testimony by testifying that, he went to Kisesa to greet his grandfather who is living at Kanami, Bukandwe at Kisesa which is a distance of 30 minutes' walk from the deceased house. He pleaded for the court to consider his defence.

In cross-examination, DW1 testified that he was born at Isangijo Village and shifted from Isangijo when he was an adult in 2009. He further admitted to knowing the deceased and where she resided. He also admitted to have been arrested at Lunda guest house. He further testified that he did not ask why he was arrested. That, his grandmother has three houses but he did not sleep there as he left around 15:00 hrs but he did not go to his home. In re-examination, DW1 testified that he went to the pombe shop that's why he was late to go to his home. That mark the end of evidence on both sides.

After we have seen what transpired at the hearing of this trial, I am now facing one issue as to whether, the prosecution has successfully proved beyond reasonable doubt that, the accused person Joseph Lugaila @ Masomi has in deed with malice aforethought killed the deceased person one Mbula Charles.



It is apparent from the evidence that, there is no eye witness in prosecution testimony and before the court is a shred of circumstantial evidence which is built up by PW1, PW3, PW4 and PW5.

It is long established principle of law that, the court can rely on circumstantial evidence to convict an accused person, however, there are conditions to be met before the court can rely on circumstantial evidence. The conditions were given out in the case of **Majuto Lungwa vs R**, Criminal Appeal No. 269 of 2015 CAT Dodoma, when citing with authority the case of **John Magula Ndongo v R**, Criminal Appeal No. 18 of 2004 CAT, Dar es Salaam(unreported), where the court held that;

“That in a case depending entirely on circumstantial evidence before an accused person can be convicted the court must find that, the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. And it is necessary before drawing the inference of guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference...”

(See the case of **Julius Justine & 4 others vs R**, Criminal Appeal No. 155 of 2005, **Hilda Innocent vs R**, Criminal Appeal No. 288 of 2019 and



Sikujua Iddi vs Republic, Criminal Appeal No. 484 of 2019 (both unreported)).

In our case at hand, the chain of circumstances is to the effect that, PW1 testified to have reached the deceased house around 4:00 hrs and found the deceased laying down injured. PW1 evidence is also on the effect that, by the time he found the deceased person she was able to speak, and she said she identified the accused to be one of her invaders whom she recognised by the aid of light powered by solar energy and she knew the accused as he was her neighbour. PW1 also testified to have taken the deceased to the police station, where she made her statement that was written down by PW5.

PW5, in his testimony maintained to have written the deceased statement in which she insisted to have identified the accused person who invaded her home, steal her money and beat her up.

The testimony of PW1 and PW5, is considered under the law as hearsay evidence, as it is not direct evidence from the maker of the statement who was a deceased person contrary to Section 62 of the Evidence Act Cap 6 R.E 2019 (Now R.E 2022), which requires oral evidence to be direct from the person perceiving the same. The evidence of PW1 and PW5 was narrated to them by the deceased herself. It is a

settled principle of law that, hearsay evidence is inadmissible unless it is corroborated by other pieces of evidence. (See the case of **Daimu Daimu Rashid (@) Double D vs Republic**, Criminal Appeal No.5 of 2018). In our case at hand, PW1 and PW5 evidence lacks corroboration. PW5 testified that he wrote the deceased statement which implicates the accused but the statement could not make a way to form part of the court records for it to be considered. In the final result, the evidence of PW1 and PW5 lacks corroboration and therefore has no value.

Turning, to the evidence of PW2 that the accused person made an extra-judicial statement confessing to have committed the offence, still I hold the view that PW2 evidence has no value as the Extra judicial statement to confirm her evidence that, indeed the accused person made an extra-judicial statement before her is not part of the evidence. Therefore, PW2 testimony that, the accused confessed to have killed the deceased person, remains to be hearsay evidence which is inadmissible before the court.

Going to PW3 testimony that, he was the OCS of Kisesa police station and he went to Lunda guest house to arrest the accused after he was informed that the accused was involved in the commission of an offence. There is no doubt that the accused was arrested at Lunda guest



house as the accused himself admit to have been arrested at Lunda Guest House after he went outside from White lodge to see what was happening. PW3 evidence proves that, the accused was arrested the fact which is not in dispute and therefore his testimony adds no value to the prosecution case.

Going to the evidence of PW4, he testified to be the investigator of the case as he went to the scene of crime and drew a sketch map which was admitted as exhibit P1. His testimony further reveals that, after the accused was taken to Nyakato police station, PW4 was the one who recorded the accused caution statement which did not form part of the prosecution evidence. PW4 testified that, the accused person admitted to have confessed before him as he recorded the caution statement, nevertheless PW4 testimony is also just a piece of hearsay evidence which was supposed to be corroborated by the recorded caution statement. In fine and on the absence of the recorded caution statement in the record renders PW4's evidence toothless.

Lastly, the testimony of PW6, his evidence targeted to prove that the deceased death was unnatural, as he testified that, the examination he conducted showed that, the deceased death was caused by brain injury that was caused by beat with a heavy object on the head. PW6 tendered



post mortem report that he filled out after he had conducted an examination which was admitted as Exhibit P2. There is no doubt that, Mbula d/o Charles died and her death was unnaturally caused by inflicted injury on her brain and no doubt that the assailant had malice and contemplated to kill, but the evidence of PW6 did not by any chance implicated the accused.

On the defence side, the accused has no duty to prove his innocence to the standard required on the prosecution side. He only needs to cast a shadow on the prosecution evidence. From DW1's testimony, I take into consideration the fact that, the accused person admitted to know the deceased person as he was born and grew up at the same village where the deceased resided. Far from that, the accused coincidence of being present to the village after he had moved to Kasamwa Geita, and on the same night of the incident, he was found sleeping in the guest house.

The coincidence stood unanswered but still DW1 has no duty to prove his innocence for the principle is clear that the accused is convicted on the strength of the prosecution evidence and not the weakness of the defence side as it was rightly held in the case of **DPP VS Ngusa Keleja @Mtangi and Another**, Criminal Appeal No. 276 of 2017, where the Court of Appeal 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"

Also, in the case of **Paschal Yoya @Mganga vs Republic**, Criminal Appeal No. 248 of 2017, the Court of Appeal 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"

Therefore, I must not press the burden of proving innocence to the accused but to the prosecution as it is a statutory burden.

Now, I would like to go back and reflect on the prosecution evidence evaluated above as a whole, to see if the prosecution has managed to prove the case against the accused person. First of all, the prosecution has managed to prove that, Mbula Charles (the deceased person) met her demise on 15/11/2008 as testified by PW1, PW3, PW4 and PW6 as well as Exhibit P2 which was the post-mortem report. The prosecution has also

proved that the cause of death was the brain injury caused by a strike on the head by a heavy object as testified by PW6 and Exhibit P2.

As stated before, the prosecution evidence is based on the chain of circumstances that implicate the accused person. The Court of Appeal in **Sadiki Ally Mkindi vs The D. P. P**, Criminal Appeal No. 207 of 2009, set out the general rules regarding circumstantial evidence in criminal cases as elucidated in **SARKAR ON EVIDENCE**, Fifteenth Edition, Reprint 2004 at pages 66 to 68 that among of the rules includes: -

"That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt."

The Court of Appeal severally restated that in a criminal case based purely on circumstantial evidence, that evidence must irresistibly point to the accused's guilt and exclude any other person (see the case of **Sikujua Idd vs The Republic** Criminal Appeal No. 484 of 2019, also **Shaban Mpunzu @ Elisha Mpunzu vs R**, Criminal Appeal No. 12 of 2002 (unreported)).



Therefore, in proving that the accused Joseph Lugaila @ Masomi was the one who killed the deceased, as I stated above, the circumstantial evidence by the prosecution must be able to wipe all possible loopholes in holding that all circumstances point to the guiltiness of the accused and no other explanation to the innocence of the accused.

The Court of Appeal in **Saidi Bakari vs R**, Criminal Appeal No. 422 of 2013 (unreported), gives its remarks in regards to circumstantial evidence that: -

"It is established law that a charge of murder can be fully proved by circumstantial evidence. In determining a case centred on circumstantial evidence, the proper approach by a trial court and an appellate court is to critically consider and weigh all the circumstances established by the evidence in their totality, and not to dissect and consider it piecemeal or in cubicles of evidence or circumstances.

Guided by the above-cited case, it is my finding that the prosecution did not establish a chain of circumstances that implicates the accused person to the murder of the deceased. As I have evaluated above, the chain of events as from the invasion of the deceased's house to the accused arrest does not fill the gaps for this court to draw an inference of the accused guilt. PW1 and PW5 evidence could not help the prosecution to link the accused person with the incident of murder. Likewise, PW2 and



PW4 could not as well link the accused person to the committed murder and the evidence of PW3 could not be of much help to the prosecution as there was no dispute that the accused was arrested at Lunda guest house.

From this analysis, the prosecution has failed miserably to prove that the accused person Joseph Lugaila @Masomi did kill Mbula Charles, the deceased.

In the upshot, the prosecution's evidence is not sufficient to convict the accused person and therefore, the accused person Joseph Lugaila @Masomi is hereby acquitted on the charge of Murder contrary to sections 196 and 197 of the Penal Code Cap 16 R.E 2019 (Now R.E 2022).

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

It is so ordered

DATED at Mwanza this 14th day of September, 2022.



Right to appeal fully explained.


M. Mnyukwa.

Judge


M. Mnyukwa.

Judge

14/9/2022