

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DISTRICT REGISTRY MUSOMA**

AT TARIME

CRIMINAL SESSIONS CASE NO. 109 OF 2021

THE REPUBLIC

VERSUS

GHATI w/o MUHAGACHI

JUDGMENT

13th July & 3^d August, 2022.

A. A. MBAGWA J.:

In this case, the accused, Ghati w/o Muhagachi stands charged with murder contrary to sections 196 and 197 of the Penal Code.

The particulars of offence in the information allege that the accused Ghati w/o Muhagachi on 10th March, 2021 at Genturu village within Tarime district in Mara region murdered her husband one Muhagachi s/o Makonge. Upon arraignment before the Court, the accused pleaded not guilty to the charge hence a full trial.

In a bid to prove the charge, the prosecution side marshaled four witnesses namely, Wegesa d/o Muhagachi (PW1), Paulo Mwita Muhagachi (PW2), G9677 D/CPL Katyali (PW3) and Dr. Zabron Wintmore Singiri

(PW4). PW1 and PW2 are the deceased's children whereas PW3 is the investigator of the case and PW4 is a medical doctor who conducted an autopsy. In addition, the prosecution tendered in evidence, during preliminary hearing, a post mortem examination report (exhibit P1).

It was the prosecution account that the deceased was staying at his home with his daughter Wegesa Muhagachi (PW1) and his wife Ghati w/o Muhagachi, the accused at Genkuru village. According to PW1 and PW2, on the fateful date i.e., 10th March, 2021 the deceased was not feeling well as he had stomachache and diarrhea. The deceased used to sleep at the sitting room (sebuleni) whereas PW1 and the accused were sleeping in the bedroom. The house had only one exit door located at the sitting room and was locked by nail. On the material night, as per PW1, the door was closed and locked by the accused before they went to sleep. All the trio slept at home.

In the morning of the fateful day, PW1 was the first to wake up. When she got up, she went straight to open the door and as she was passing in the sitting room, she observed that her father was laying on the ground in the sitting room while dead. She also noticed that the door was closed from inside. As such, PW1 raised an alarm which awakened her mother, the

accused. PW1 then went to call her grandmother, Mkami Makonge who was living in the nearby house. On being informed, Mkami Makonge and Paulo Mwita Muhagachi (PW2) came to the deceased house and found Muhagachi dead.

The information on the unusual death was conveyed to Nyamwaga Police Station. Consequently, PW3 under the superintendence of the Officer Commanding Criminal Investigation Department (OCCID) together with Dr. Zabron Wintmore Singiri (PW4) and other police officers went to Genkuru village at the deceased home. It was the testimony of PW3 and PW4 that, upon arrival at the scene, they found the deceased body laying on the ground in the sitting room while covered with a blanket. PW4 examined the dead body and observed that the deceased body had several injuries. He said, the nose was removed, the right eye was perforated by a sharp instrument, there were bruises on the left ear, the top part of his penis was removed by an instrument like a prize and below the tongue there was blue colour. Despite all these injuries, PW4 did not see blood around the deceased body. He thus concluded that the death was caused by suffocation and injuries sustained.

PW3 told the court that upon inspecting the crime scene he did not observe any signs of fighting within the premises. He also examined the house but did not see the possibility for someone from outside to open the door nor was the door broken. Given the circumstances in which the death occurred, he suspected the deceased wife, the accused on the ground that, in normal circumstances, she ought to have heard at least the fracas which resulted into the deceased death. As such, PW3 concluded that the accused was responsible for the murder hence her arrest and arraignment. In defence, the accused stood a solo witness and did not produce any exhibit. She vehemently denied her involvement in the death of her husband, the deceased. The accused told the court that a day before the incident, the deceased fell sick of stomachache and diarrhea. She prepared him lunch (potatoes) but the deceased could not eat. Similarly, in the evening, the deceased mother, Mkami Makonge prepared and brought him ugali but he still did not eat it. They thus went to sleep while the deceased was still complaining of stomachache.

DW1 said that their clay house was roofed with iron sheet and had two rooms with one exit door located at the sitting room. Whereas the deceased used to sleep in the sitting room, the accused and her three

children namely, Wegesa, Rhobi Mkohi and Tamahe were sleeping in the bedroom. She said that before they went to sleep, she locked the door by fastening with a nail.

In the following morning, Wegesa Muhagachi (PW1) got up first and went to open the door. As Wegesa (PW1) was passing through the sitting room she observed that her father was dead as he was laying on the ground and some of his organs were either stabbed or cut and removed. Wegesa thus rushed back to the bedroom and told the accused of the freak. DW1 continued to tell the Court that she quickly got up and went in the sitting room only to find the deceased laying dead on the ground. DW1 further said that although the door was not broken, it was loose in the sense that it was not locked and the nail which they used to fasten it was removed. She therefore sent PW1 to call the deceased's mother Mkami Makonge who was living nearby. DW1 testified that she did not hear anything happening at night nor does she know people who killed her husband, the deceased.

At the close of the case for both sides, counsel for the parties had an opportunity to make their oral submissions.

Ms. Makaya, learned defence counsel was opined that the prosecution case was not proved to the hilt. She said that the prosecution had a duty to

prove, beyond reasonable doubt, that one, the person died, two, he died unnatural death, three, the accused is the one who caused death and four, the accused caused death with malice aforethought. In support of his averment, the counsel relied on the authority of the decision in the case of **Emmanuel Mrefu Bilinje vs Republic**, Criminal Appeal No. 271 of 2006, CAT at Dodoma

It was the counsel's submission that that the Republic failed to prove the 3rd and 4th ingredients. The counsel lamented that the Republic called four witnesses and brought one exhibit but throughout their evidence there is no scintilla of evidence which can warrant conviction because no witness saw the accused committing the alleged offence. Further, Makaya contended that there are contradictions in the prosecution evidence. She pinpointed that PW1 said that she did not see any injury on the deceased body and went to tell the accused whereas PW2, PW3 and PW4 testified that they saw injuries on the deceased body. Besides, the defence counsel criticized that the evidence of PW4 was self-contradictory in that he said that he did not see any blood nor did he observe any injury on the mouth whilst the Postmortem Examination Report indicated that the lower lip was cut.

Owing to the weaknesses mapped out, the defence counsel prayed the Court to disregard the prosecution evidence and consequently acquit the accused. The counsel rested her submission by citing the case of **Mathayo Mwalimu vs Republic**, Criminal Appeal No. 147 of 2008, CAT at Dodoma. In contrast, the prosecution counsel, Mr. Peter Iole, learned State Attorney, was of the firm view that the case against the accused was proved beyond reasonable doubt through four witnesses and one exhibit, post mortem examination report (P1). He said that although the prosecution case was based on circumstantial evidence, the circumstances irresistibly point an accusing finger at the accused. Mr. Iole cited the case of **Bakari Yusuph Harid @ Mkojo vs the Republic**, Criminal Appeal No. 290 of 2021, CAT at Mtwara at page 17 and submitted that for circumstantial evidence to ground conviction, the evidence should meet three tests namely;

- a) the circumstances must be cogent and firmly established
- b) the circumstances should be of definite tendency unerringly pointing toward the guilt of the accused
- c) the circumstances taken cumulatively should form a chain that the crime has been committed by the accused and no one else.

On the strength of the above authority, the learned State Attorney was opined that the circumstances in the instant case form a chain which leads to an inference that it is the accused who committed the offence.

Further, Mr. Ilole assailed the demenour of the accused. He said that her testimony was contradictory and during cross examination she deliberately hesitated to answer some of the questions. The counsel expounded that DW1 said that she heard Paulo Mwita (PW2) calling her but the child was crying. In another instance, she said that she did not hear Paulo. The State Attorney concluded that the defence evidence was not worth of credit.

Responding on the alleged contradictions in the prosecution evidence, the learned State Attorney submits that the inconsistencies pointed out by the defence counsel do not go to the root of the case. He said that it is the position of law that where there is documentary evidence, oral testimony cannot outweigh the documentary evidence. As such, he implored the Court to ignore minor contradictions in the testimony of PW4 and consider what is contained in the post mortem examination (P1). Mr. Ilole said that given the length of time since the incident occurred, it was likely for the witness to forget some of the issues.

Finally, Mr. Iole submitted that the prosecution has proved the case beyond reasonable doubt. As such, he prayed the court to find the accused guilty of the offence and consequently convict her accordingly.

I have keenly scanned the evidence presented by both parties and carefully canvassed the submissions by the learned counsel. Without much ado, I commend both counsels for their good job in the conduct of this case.

The central issue therefore for determination is whether the prosecution side has managed to prove the case beyond reasonable doubt against the accused. It is a trite law that the duty to prove the case lies on the prosecution and the accused has no duty to prove his innocence. See the cases of **Hamis Mbwana Suya vs the Republic**, Criminal Appeal No. 73 of 2016, CAT at Arusha and **Mohamed Said Matumla vs Republic** [1993] TLR.

As rightly submitted by both counsel, the prosecution case is wholly anchored on circumstantial evidence. Whereas circumstantial evidence is, in law, capable of grounding conviction, it has been held several times that such circumstantial evidence must be irresistibly leading no other inference than that it is the accused who committed the offence. In the case of **Awadhi Gaitani @ Mboma vs the Republic**, Criminal Appeal No. 288 of

2017, CAT at Dar es Salaam, the Court recapitulated the following conditions for basing conviction on circumstantial evidence;

- i. *That the circumstances from which an inference of guilty is sought to be drawn must to be cogently firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else (See **Justine Julius and Others vs Republic**, Criminal Appeal No. 155 of 2005 (unreported))*
- ii. *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 that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no existing circumstances which would weaken or destroy the inference [See, **Simon Msoke vs Republic** (1958) EA 715A and **John Magula Ndonga vs Republic**, Criminal Appeal No.18 of 2004(unreported)].*
- iii. *That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be*

*presumed to be the killer. (See **Mathayo Mwalimu and Masai Rengwa vs Republic** (supra).*

- iv. *That each link in the chain must be carefully tested and, if in the end it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. (See **Samson Daniel vs Republic** (1934) E.A.C. A 154).*
- v. *That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person (See **Shaban Mpunzu @Elisha Mpunzu vs Republic**, Criminal Appeal No. 12 of 2002 (unreported).*
- vi. *That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See **Ally Bakari vs Republic** (1992) TLR 10 and **Aneth Kapazya vs Republic**, Criminal Appeal No. 69 of 2012 (unreported).*

In this case, there are two witnesses who slept with the deceased in his house on the fateful night namely, Wegesa Muhagachi (PW1) and the accused (DW1). It is undisputed that the accused is the one who closed the door before they went to sleep. It is further uncontested that the deceased was inside when the accused closed the door. According to PW1, throughout the night, there is no point in time she heard any squabbles either between the accused and the deceased or the deceased with

strangers. Similarly, the accused person told the court that she did not hear anything happening to her husband. Besides, DW1 testified that when she woke up, she found the door loose and the nail that was used to tighten the door had been removed. DW1 was not contradicted on this aspect. This piece of evidence suggests that there was a possibility for strangers to enter the house and commit the alleged offence. As testified by the investigator, G9677 D/CPL Katyali (PW3), the solo reason for accusing the accused was that she ought to have heard the fatal incident. However, this hypothesis is far from the reality. We have experienced a number of incidents where thugs break, enter the house, steal therein and finally leave the premises undetected. Thus, it cannot be conclusively said whenever a criminal act takes place in the house, like in the present case, without the family members noticing it, it necessarily follows that they are privy to the offence. Furthermore, apart from the contention that the accused ought to have heard the deadly incident, which contention I find it weak, there is no other piece of evidence which suggests that the accused was involved in the killing of the deceased let alone malice aforethought. To cap it all, there is no scintilla of evidence to the effect that there was any misunderstanding between the deceased and accused. Indeed, the

prosecution evidence establishes a possibility for other person than the accused to have committed the offence.

In view of the foregoing, it is my considered findings that circumstantial evidence in this case did not irresistibly establish that it is no other person than the accused who caused the death the deceased. As such, the case was not proved against the accused beyond reasonable doubt.

That said and done, I find the accused not guilty of the offence she stands charged and consequently I acquit the accused Ghati w/o Muhagachi.

It is so ordered.

Right of appeal is explained.




A. A. Mbagwa

JUDGE

03/08/2022