

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY
AT MWANZA**

CRIMINAL SESSIONS CASE NO. 114 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JUMA NKILIJWA..... ACCUSED

JUDGMENT

27th & 29th September, 2022

Kahyoza, J.:

Hoja Bandeke met her demise untimely on 21st day of February, 2016. She died a violent death. According to the postmortem report her death was due to severe blood loss as result of multiple cut wounds inflicted to various parts of her body, which exposed the fractured skull extending to the occipital bone, cutting the right upper shoulder exposing the head of the *humerous* bone and almost amputated the left hand on wrist joint remaining the skin.

The prosecution arraigned **Juma Nkilijiwa** with the information of Murder contrary to **Section 196 and 197 of the Penal Code, Cap. 16 [R.E. 2002 now, 2022]**. It alleged that on 21st day of February, 2016 at

Kasaka- Lumasa village within Chato District in Geita Region, **Juma Nkilijiwa**, the accused person murdered Hoja Bendeke. **Juma Nkilijiwa** pleaded not guilty to the offence of murder.

The prosecution had a duty to prove not only that Hoja Bendeke is dead but also that **Juma Nkilijiwa**, the accused person is the one who killed her and did so with malice aforethought. To discharge its duty, the prosecution summoned four witnesses and tendered three exhibits, the sketch map (exh.P.1), cautioned statement of the accused person (exh.P.2), and a post mortem examination report (exh.P.3).

On 21st day of February, 2016 at around 20: 00hrs Hoja Bendeke, the deceased was assaulted. Hoja Bendeke's assailants grievously injured her. She raised an alarm. People responded. They took her to police where they obtained a PF.3 and rushed her to hospital. Unfortunately, she denied on her way to hospital.

Indisputably, Hoja Bendeke died a violent death. Even if, the defence had disputed, I would have held that Dr. Mayenga (**Pw4**) proved that Hoja Bendeke is dead and that she died a violent death. Dr. Mayenga (**Pw4**) examined the dead body identified as Hoja Bendeke's body. He prepared a post mortem report, exhibit P.3, showing that Hoja Bendeke died due to

excessive bleeding caused by cut wounds. The cut wounds inflicted exposed the fractured skull extending to the occipital bone, cutting the right upper shoulder exposing the head of the *humerous* bone and almost amputated the left hand on wrist joint remaining the skin.

The disputed issue is who killed Hoja Bendeke. There is no eyewitness. The prosecution seeks to rely on the accused person's cautioned statement. According to No. F. 2513 Nimludi (**Pw2**) on the 2/2/2016 got information that a person had been injured. Later, that night people brought that person at the police to obtain a PF.3. They took the person to hospital. She died that night. He went to the scene of crime with other policemen and drew a sketch map, which he tendered as Exh.P.1. No.F. 2513 Nimludi (**Pw2**) told the court during cross-examination that the deceased mentioned that she was attacked by Ruben who was accompanied by another person she could not identify. He suspected that the accused person to accompany Ruben to attack the deceased.

Shilinde Rupamija (**Pw1**) deposed that he came from safari on 12/3/2016 when he got news that Hoja was attacked and killed. Whilst at his home place his neighbour's wife went to him to borrow money. He mentioned his neighbor's wife as Felister and that Felister's husband was

called Ruben. He asked her why she needed money. She narrated to him that Juma, the accused person went to her demanding money as compensation for burial expenses of the late Hoja. She told him that Juma threatened her that if she will not give him money he will kill her. He advised her not to give money to Juma. They laid a trap. On the day Juma went to collect money, Shilinde Rupamija (**Pw1**) arrested Juma and raised an alarm. People came at that place and started beating Juma. Assisted by the hamlet chairman they managed to prevent angry people from killing Juma, the accused person. He notified the police. Police went to the place the following morning.

During cross-examination, Shilinde Rupamija (**Pw1**) deposed that Ruben disappeared from the day Hoja was killed because Hoja, the deceased declared before her death that Ruben attacked her.

Police went to Ruben's wife met Shilinde Rupamija (**Pw1**) and arrested the accused person. They took him to police station. Later, at 07:30 am No. G 206 D/Cpl Matete (**Pw3**) recorded the accused person's cautioned statement. No. G 206 D/Cpl Matete (**Pw3**) deposed that the accused person admitted to kill Hoja. He tendered the cautioned statement as exhibit P.2.

Juma Nkilijiwa gave his defence on oath, denying to kill Hoja or to have admitted to police to kill her. He deposed that people seriously attacked him while at Ruben's house. They labelled him a conman. He told the court that he went to Ruben's home to find out if he was back as the family planned to hold a meeting to settle their differences. He deposed that No. G 206 D/Cpl Matete (**Pw3**) took advantage of his being in agony to false him to endorse a finger print on the document he did not know its contents. he refuted to have voluntarily admitted to kill Hoja. He deposed that he had no reason to kill Hoja as they were friends. He deposed that Hoja was his stepsister. She was a daughter of stepmother.

Having found that Hoja Bendeke died a violent death, the issues are who killed her and whether he did so with malice aforethought. I commence with the issue whether the killer had malice aforethought. In **Mosses Michael alias Tall V R.** [1994] TLR. 195 the Court of Appeal held that-

- (1) *malice may be inferred from the amount of force which an offender employs in inflicting fatal injury; and further that*
- (2) *the conduct of the accused may be indicative of the malice aforethought as it was in this case where the appellant was*

persistent in beating the deceased for long time and prevented intervention by persons who wanted to help the deceased.

The fact that Hoja Bendeke's death was due to severe blood loss as result of multiple cut wounds inflicted to various parts of her body, which exposed the fractured skull extending to the occipital bone, cutting the right upper shoulder exposing the head of the *humerous* bone and almost amputated the left hand on wrist joint remaining the skin prove beyond reasonable doubt that the killer applied excessive force to inflict injury onto the deceased's head. Not only that but also the targeted part of the body, which is the head, is a sensitive part, the attacker must have intended to kill or cause grievous harm to the deceased. Thus, I have no doubt in my mind that the attacker intended to kill Hoja Bendeke, the deceased.

The remaining issue is who killed the deceased. The prosecution summoned no eye witnesses. It seeks to rely on a cautioned statement. No. G 206 D/Cpl Matete (**Pw3**) deposed that the accused person admitted to kill the deceased. The accused person's cautioned statement was admitted without objection from the defence. The accused person deposed that he did not admit to kill Hoja and he added that he was forced to endorse his thumb print on the document.

It is trite law that if an accused person intends to object to the admissibility of a statement or confession he must do so before it is admitted and not during cross-examination or during defence. See the case of **Shihoze Semi and Another v. Republic** (1992) TLR 330.

The accused person tried to disown the cautioned statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before the cautioned statement was admitted in evidence.

There is another piece of evidence that the deceased mentioned that it was Ruben who attacked her. Hoja Bendeke declared that she was attacked by Ruben and another person she could not identify. This evidence was from Shilinde Rupamija (**Pw1**) and No. F. 2513 Nimludi (**Pw2**). No.F. 2513 Nimludi (**Pw2**) deposed that he believed the accused person was the person who accompanied the Ruben to assault the deceased. However, the accused person's cautioned statement demonstrated that the accused admitted to kill Hoja with the assistance of his brother-in-law Leke. There is evidence from Shilinde Rupamija (**Pw1**) that Ruben disappeared from the day Hoja Bendeke was killed to date. One wonders if Ruben had not committed the offence why disappear.

I am alive of the position of the Court of Appeal in the case of **Nyerere Nyague Criminal Appeal No. 67 of 2010** (CAT-Unreported) s where it held that: -

"...a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground either it was involuntarily made or not made at all."

I am aware also of the settled principle of law that an accused person who confesses to a crime is the best witness. The said principle was pronounced in the cases of **Jacob Asegelle Kakune v, The Director of Public Prosecutions**, Criminal Appeal No, 178 of 2017 and **Emmanuel Stephano v. Republic**, Criminal Appeal No. 413 of 2018 (both unreported). Specifically, in **Emmanuel Stephano** (supra) the Court while reiterating the above principle stated that: -

*"We may as well say it right here, that we have no problem with that principle because in a deserving situation, **no witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess.**"*

The accused person not only denounced his confession while defending himself but also he raised a defence of *alibi*. He contended that he left his home place at 07:30 pm was at the centre passing time and he

had his coffee. The law on this subject is well settled. First, the law requires a person who intends to rely on the defence of *alibi* to give notice of that intention before the hearing of the case. See section 194(4) of the CPA. If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with the particulars of the *alibi* at any time before the prosecution closes its case s. 194(5) of CPA. Should the accused person raise the defence of *alibi* much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence (s.194 (6) of the CPA).

It is also well established that the court will consider the *alibi* even if the accused has not adduced any evidence in support of the *alibi*. It is enough for the accused to raise the *alibi* and to leave it to the prosecution to prove his guilty. Thus, when an accused person puts forward an *alibi* as an answer to the charge or information, he does not thereby assume a burden of proving the defence throughout on the prosecution. This position of the law was pronounced in the case of **Jumanne Juma Bosco & Mohammed Jumanne v.R**, Criminal Appeal No. 206/2012 CAT

(Unreported) and **DPP v. Chibago Mazengo & Another**; Criminal Appeal No. 109 of 2019 (CAT Unreported).

It should be noted that if the accused raises a defence of *alibi* belatedly it casts doubts on its authenticity. In **Kibale v. U** (1969) Vol. 1 E.A 148, the erstwhile the East African Court held **that a genuine *alibi* is expected to be revealed to the police investigating the case or to the prosecution during trial. When it so given, the prosecution has an opportunity to investigate its genuineness. The defence of *alibi* given for the first time during the defence, there is a likelihood that it is an afterthought.** In **Masoud Amina v. R** [1989] TLR 25 the Court denied the accused's defence of *alibi* on account that the accused did not issue a notice and that he did not call the witness who was with him. I find his defence of *alibi* an afterthought. I accord it no weight.

Even after according no weight to the accused person's defence of *alibi* and disregarding his attempt to denounce the cautioned statement, I am still in doubt if the accused person killed the accused. The doubts is based on the prosecution's evidence which shows that there is possibility that Ruben killed Hoja Bendeke. There is evidence that Hoja Bendeke declared that she identified one of her assailants as Ruben. On hearing that

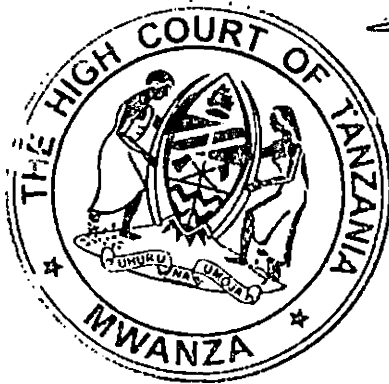
the deceased mentioned that she identified her, Ruben took to his heels from 2016 to date. If Ruben is innocent why did he escape for such a long time. I am not saying he is guilty. Another possible explanation is that the accused person admitted to kill Hoja while accompanied by Leke, his brother in law. The prosecution alleged that the accused person first admitted to kill Hoja at the time he was arrested by villagers. To my dismay the prosecution did not tender evidence to testify that.

It is part of the evidence of the prosecution that the accused person was seriously beaten by the angry person for trying to con Ruben's wife, arrested, taken to police, and interrogated before he had time to recover from the beating. The accused person admitted or confessed to commit the offence but I am in doubt if was a free agent. The accused person's health status at the time he was interrogated together the fact there is another possible hypothesis that Ruben may have killed Hoja Bendeke create a reasonable doubt in my mind.

It is an established principle that in case of doubt in criminal case that doubt must be resolved in favour of the accused person. See the case of **Abuhi Omary Abdallah & 3 Others V Republic**, Criminal Appeal No. 28 of 2010, CAT Dar es Salaam, where it was held *inter alia* that: -

"...Where there is any doubt, the settled law is to the effect that in such a situation an accused person is entitled as a matter of right to the benefit of doubt or doubts."

I give **Juma Nkilijiwa**, the benefit of doubt. I, therefore, find **Juma Nkilijiwa**, the accused person, not guilty of the offence of murder of one **Hoja Bendeke** and acquit him of the offence of murder under sections 196 and 197 of the Penal Code [Cap. 16 R.E. 2002 now 2022].



John R. Kahyoza.

Judge.

29/9/2022

Court: Judgment delivered in the presence of the accused person, **Ms. Monica Matwe**, State attorney assisted by Agnes Ndaki S/A for the Republic and **Mr. Paul John Hombo**, the defence advocate.

John.R.Kahyoza.

Judge.

29/9/2022