

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL JURISDICTION

CRIMINAL SESSION NO. 24 OF 2021

REPUBLIC

VERSUS

JAMES S/O KAPYELA

10/10/2022 & 25/10/2022

JUDGMENT

MWENEMPAZI, J.

The accused person is arraigned in this Court where he is charged with two counts of the offence of Murder contrary to section 196 of Penal Code, Cap 16 R.E 2019. The prosecution are alleging that on the 23rd March, 2019 at Kizwite area within Sumbawanga Municipality in Rukwa Region did murder EMMANUEL S/O JUMA @ NGELESHA and NICOLAUS S/P MWAMBAGE.

When the information was read over to the accused person during plea taking and preliminary hearing, the accused denied to have committed the offence. The case had to be set for a full trial whereby the prosecution called eleven (11) witnesses and the defendant testified himself. He did not call witnesses.

At the hearing the prosecution was being led by Mr. John Kabengula, learned State Attorney being assisted by Mr. Kulwa Ngunga, State Attorney Trainee. The defence was by Ms. Tunu Mahundi, learned Advocate. Both sides did a great job on their assignment to assist this court in finalizing this case. Their effort is highly appreciated.

Basically when faced with the charges of murder, in order to prove the offence, the prosecution must prove that the person is the one who acted to inflict the harm and that he had malice aforethought to cause that harm.

According to prosecution witnesses the deceased two children during their lifetime and to be particular, on the material date, together with the child who survived, Brighton s/o Masumbuko Kapufi, went missing while in their child plays around the streets they live with their parents. PW6, Brighton s/o Masumbuko, who is the surviving child, testified that they were

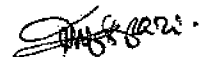
Signature
PW6

taken by a certain man (baba) into his house. The children stayed there until during the night when he took a knife used it to burn his colleague and then took them into the car which is outside the house within the fence. He explained the incident on the incident day as follows:

"Tulienda kumtafuta Kayemba. Tulikuwa mimi, Niko na Imma. Kuna mbaba akaja akatushika mkono akatuingiza ndani mwake. Tulipoingia ndani mwake hakutupa kitu. Alifunga mlango ikafika usiku. Akachukua kitambaa akamziba Imma mdomo akawachoma kisu akatuchukua akatuingiza kwenye gari akasema bado zamu yako. Alituingiza kwenye gari mchana ilifika asubuhi, kaka akaja akanifungulia. Aliniambia alisema kimbiba".

It is in the evidence of PW3, Maria Exavary Mwezimpya, that while she was coming from Sabasaba, going back to her home, she met Brighton Masumbuko (PW6) near his home. She had information that the child, and other two are missing. She took him to her home and called a relative to come and take the child to his mother.

Later, the child, PW6 was interviewed, he told them the direction and guided them and showed them where they were sleeping for the three days

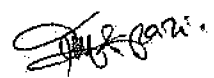


they went missing. In the evidence of PW3 Shukrani Madulu and PW5 Christina Gido Funga, PW5 Modesta Ngeresha and PW8 Kipara Nswile Mwambage the two children were found in the unfinished house (pagala) already dead. However, they were able to find them through guidance of PW6 Brighton Masumbuko who led them to where he left the other children. PW5 Christina Gido Funga testified that after the child PW6 had been found, he told her that the other children are dead. When asked how he knew of the facts he said, his brother told him. In testimony of PW5 she said:

"We asked him where are your colleagues, the child said they have already died. It was Imma and Nicolaus. I continued to ask him how did he know he said my brother told me. My colleagues have died. He said it is the brother at the said house he said;

"Ni kaka wa palepale nilipokuwa kwenye hilo gari".

As the result of PW6 people went to the scene where they were able to find the two bodies of EMMANUEL S/O JUMA @ NGELESHA and NICOLAUS S/O MWAMBAGE. The bodies were in the unfinished house as earlier on stated. In the evidence of the Doctor who performed post Mortem



Examination, PW11 the cause of death of the two children was suffocation after being placed in a closed area. He testified as follows; I quote: -

"At the scene in the front side of the house there was a motor vehicle and adjacent to it there was an unfinished house 'pagala'. The car was black/dark blue. First, we went into the house to inspect the house, then we went out. The door was broken. From the car came a foul smell, there were human faces and urine. Then we went into the unfinished house (pagala). We found two children's bodies. They were dead. The environment we were there was also one child who was weak and very tired but still alive. That child was the youngest. We advised that the child be taken to hospital so that he is given a treatment by diet. So that his condition is recovered.

On the dead bodies, their trousers were undressed, the upper body had clothes but smeared with faeces. The mission of the doctor is to know the cause of death. The children were dead. According to their position, showed that the place they were, was not the first place. They died somewhere else.

PW 8 para 1

In my examination, I discovered that the children were not strangled they were hit with a heavy blunt object. One had marks on the back and the other on the stomach. Their tongues were out and blue. Even their nails were blue. It shows they had suffocated due to lack of air. They were deprived of air. The eyes protruded out.

When I checked the sphincters on their annals. The sphincters had expanded and there were remains of sperms. They were sodomized. After that the bodies were carried and taken to the Regional Referral Hospital it was afternoon around 14:00 hours.

Within the evidence at hand and as referred herein above, it is clear the death of two children was due to unnatural cause.

The next question is who is the perpetrator of the death of the two children. The discovery of the bodies was made possible when PW6 was found. This is the child who was saved by PW10, Michael James; the son of the accused in this case. According to PW6 Brighton s/o Masumbuko, his brother is the one who told him to go home as he may die as well. That was when PW10 was sent to wash the car outside and found the children in the car. PW10 in his testimony says he saw his father throwing the two children

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to an unfinished house. He testified as follows when he was being cross examined by Ms. Tunu Mahundi, Learned Counsel for the accused.

*"I said my father took children and threw them into a "pagala"
... when my father was taking children to throw them into a
'pagala' I was in the house. But I saw him taking them".*

I think it will also enlighten if we revisit the story which was uncovered after Brighton s/o Masumbuko was found. PW3 Maria Exavery Mwezimpya, PW5 Christina Gido Funga, PW7 Modesta Ngedesha, PW8 Kapera Aswite Mwibage are material witnesses on the facts. They interviewed the child PW6 who was able to show them where they were sleeping. Basically, what they were told is contained in their testimonies. The most important thing is that they were able to reach the place and later found the bodies of the children. The child showed them the house they were taken in by the 'mbaba'. In the child's words he testified as follows:

"Tulienda kumfuata Kayemba. Tulikuwa mimi, Niko na Imma. Kuna mbaba akaja akatushika mikono akatuingiza ndani mwake. Tulipoingia ndani mwake hakutupa kitu. Alifunga mlango ikafika usiku. Akachukua kitambaa akamziba Imma Mdomo akawachoma

kisu akatuchukua akatuingiza kwenye gari akasema bado zamu yako. Alituingiza kwenye gari mchana ilifika asubuhi, kaka akaja akanifungulia. Aliniambia akasema kimbia. Nilienda Mgahawani. Aliye tuchukuwa nilikuwa simfahamu. Naweza nikamfahamu na kumuonyesha Babu. Kaka aliponifungulia akina Imma na Niko niliwaacha kwenye gari. Walikuwepo wamedondoka."

It is said that people when arrived at the scene did not find the owner of the house. However, they continued with the search and later the police came at the scene to contain the situation; it is reported that a kind of turmoil erupted which posed a threat to peace and order.

At this juncture we need to follow on what was the situation on the part of the accused who is the owner of the house. PW4 Rosta Emmanuel Mofuga is a witness to assist that. He testified as follow; I quote: -

"On 23/3/2019 at around 10:00 to 11:00 hours it was not a working day. I left home and at the time I was at Chanji areas heading for Sumbawanga Urban (downtown). As I was on the way my colleague, Yusto Kagoye called me. He told me that at James Kapyela's home there is a dispute with one person they had a case. I told him I don't

know anything about what he has told me. I told him that I will call James Kapyela to ask for details. I called just James Kapyela, he said he doesn't know anything. He told me he will complain to the police what a bad luck Rosta!! I asked "what is the problem?" he said at my home, in the nearby pagala they have found bodies of two children. He is wondering those people are attacking his house.

I asked him where is he. He said he is at Mazwi Secondary School. He said he left home in the morning heading for work. I told him go to the police and report. He agreed by saying "sawa nakwenda". After sometime, when I called him, he said: "Rosta hii ni mikosi"

He asked: "Nikienda polisi hawawezi kuniletea shida?"

I told him: "Hawatokuletea shida"

Later on, I was heading for sabasaba for servicing my car. I went straight to see Eze workshop at sabasaba. When I was there, Kapyela called me. I asked him, "Uko wapi?" He said again "hawatoniletea shida?"



I said again "Hapana" he said "au nitoroke" then I asked him "Kwani wewe unahusikaje na hilo jambo?"

After the conversation. I was worried, I called Afande Kilila Ag. OCS, then I asked him what event has happened here in town. He said; "kuna miili ya watoto wadogo imepatikana Chanji".

I told him that: "Nina mawasiliano na mtuhumiwa"

He advised me to go to the Police Station for assistance in order to arrest the suspect. I did not see any need to go and collect the police. We have a close relationship with James. I called James and asked him where he is. He said "Nipo kwa kanyau". I told him "Nakuja hapo ulipo". I then left accompanying Eze. We were using my motor vehicle. When I arrived at kwa kanyau, I called him. He did not pick up the call, but he came and we met. I insisted him to go to the police. He told me I should take him to RPC. I continued to calm him; I advised him that we should go to see the OCS. I told him that I am acquainted to him he agreed.

Thus, from "kwa Kanyau" I went at the police station I left James in the motor vehicle. I went to see the OCS and he told me to take

James to him. Then I went back to the car and took James Kapyela with me to the OCS. Then other procedures continued."

With all these in record, the accused testified in defence that on the date he left home in the morning, it was revealed to him later that two children have been found at the unfinished house close to his house. The most part of his testimony is how the police were sympathizing with him on what has happened.

In final submission the Defence Counsel Ms. Tunu Mahundi, submitted that the prosecution has failed to prove the charges levelled against the accused person. In her submission, she submitted that the prosecution witnesses have not testified to show that they saw the accused commit the offence. Instead, they testified that they found the dead bodies in the unfinished house 'pagala'. They have not shown whether the accused had any malice aforethought.

Although PW6 Brighton s/o Masumbuko testified as the only eye witness, still his evidence is not that much straight. He testified that the deceased were stabbed with a knife before being taken to the car outside




the house. He did not say who did the act and whether he was known to him.

In the submission, the Learned Advocate for the defendant submitted that all the witnesses have failed to show that there was any test made to show the accused committed the offence and therefore is linked to the commission of the offence.

Prosecution witness, PW4, Rosta Mafuga, testified that he took the accused to the police but he did not say he took him as a suspect. He took him for the purpose for reporting to Court that there are people invading his house.

The Learned Counsel for the defence, attacked the evidence by PW1, PW2 and PW5. These witnesses in her view, were testifying on hearsay evidence. They were informed by Brighton s/o Masumbuko, PW6. The latter said they were sleeping in the car which was found at the compound belonging to the accused. Instead of testifying that they found the bodies in the said car, the bodies were found in the unfinished house 'pagala'. They also testified that the said car was not roadworthy. That fact was also testified by PW10.



The defence counsel in her submission said the witnesses for the prosecution tendered contradicting evidence. PW11 testified on the examination of bodies of the children found in the 'pagala'. He says he found three things which in the opinion of the Counsel, they were supposed to be verified scientifically whereas, in this case they were not verified. One, he testified that he saw the children were beaten with heavy object on the stomach, head and back (mgongoni). Two, he testified that their annal sphincters were loose with remains of sperm showing the children were sodomized; and three, he said that the cause of death is suffocation. As a doctor he failed to show that a test was made to link the accused with the death of the children. Brighton s/o Masumbuko testified that the children were stabbed with the knife and the appellant did nothing further to that.

On the issue of identification of the accused the defence counsel submitted that the accused was identified on the dock save for PW2, PW4 and PW5 who knew the accused before.

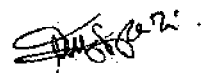
The identification by the child PW6 was done while in the Court. This witness failed to explained the circumstances on the night alleged the children were in the house. There was no prior description of the circumstances before. Though the child testified that they were in the motor

vehicle still no evidence was led to show the accused took the children into the car. The whole prosecution evidence did not show there is anyone of them who saw the accused taking the children and locking them in the car.

The Counsel for defence cited the case of **Paulo Machandi Vs. Republic, Criminal Appeal No. 244 of 2019**, Court of Appeal of Tanzania at Mwanza(tanzlii). The Court observed that:

"For a conviction to be based circumstantial evidence, the circumstances must be fully proved. All facts must be consistent with the hypothesis of the guilty of the accused person. Circumstances should exclude every reasonable hypothesis except the one sought to be proved; they must be conclusive in nature. Circumstantial evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence".

In this case the prosecution has failed to prove the case against the accused and thus they have failed to link the accused person with the offence. The Counsel prayed that the Court finds the accused not guilty.



The prosecution counsel filed a written submission as part of their final submission. In it they submitted that the duty to prove charge is cast to the prosecution side as stated in various cases including that of **JONAS NKIZE VS. REPUBLIC (1992) TLR, 213.**

'The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case, no duty is cast to the accused person to prove his innocence'.

What the prosecution ought to prove is that there was death, that the death of the deceased resulted from the unlawful act or omission of the accused and that the accused person did that act or omission with malice aforethought.

The evidence adduced by the prosecution witness confirmed that the deceased died on the material date of **23/03/2019** and the cause of death was established by **PW11** as to both deceased bodies were due to suffocation after been placed in a closed area which was also proved by the production of the Post Mortem Examination Report as prosecution exhibits to which was the Post Mortem Examination Report of EMMANUEL S/O JUMA @ NGELESHA (**exhibit P1A**) and the Post Mortem Examination Report of NICOLAUS S/O MWAMBAGE (**exhibit P1B**).

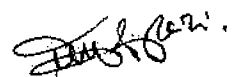
The death of the deceased persons was established as not be a usual death but was caused by the unlawful act of the accused person as he places the deceased person and another child who luckily survived (**PW6**) in the car which belonged to him and placed at his compound. The fact was



established by (PW6) six who survived. It was also established clearly by PW10 son of the accused the two bodies and one survived child were found in their parked car.

The accused person is connected with the offence of murder basing on the direct evidence from an eye witness and of the circumstantial evidence. The direct evidence is from the survived child (**PW6**) after escaping from the car to which they were placed informed **PW2** who found him first also **PW1, PW5, PW7, PW8**, and later **PW9**. Also explained to them that his friends (deceased) are dead and went further showing the place they were taken by the accused person also showing the car to which they were kept and later the bodies of the deceased being found in the unfinished house (pagala) three paces from the accused person's house.

This case being direct and also circumstantial as there is eye witness who was among the victim of the actions of the accused person **PW6** which led to the death of the two innocent children **EMMANUEL S/O JUMA @ NGELESHA** and **NICOLAUS S/O MWAMBAGE**. The evidence of **PW6** was collaborated by the evidence of the accused person's son who was **PW10** who testified on oath that on 23/03/2019 they found three children in the car to which was on their compound. The car was found parked to the house of the accused person with human dungs and urine with pungent smell of decay. Two children were dead and one was alive. The accused took the deceased and threw them to unfinished house (pagala) to which is three meters from the accused person's house. The dead bodies had human dungs on their bodies.



The accused left to his working place after throwing the dead bodies in a pagala without reporting to police even raising an alarm to neighbours who could establish his innocence. This circumstantial evidence in law is strong evidence. In the case of **Tumuheire V. Uganda (1967) ECA 328 at 331** it was held that;

'It should be observed that there is nothing derogatory in referring to evidence against an accused person as circumstantial, indeed circumstantial evidence in a criminal case is often the best evidence I establishing the commission of a crime by a person.'

Also, the evidence from the accused person's friend **PW4** who took the accused person to police, the whole process of getting the accused person showing the conducts of the accused person being connected with the murder of innocent children. **PW4** testified in court that he fetched the accused person at kanyau area at around 14hours, after missing him at **EZZE WORK SHOP** situated Sabasaba to which the accused told him that is fearing and wanted to escape, to which he has to convince him to take him to police. Therefore, to this conduct shows nothing than his guiltiness to his offence. An innocent and prudent man could not act in the manner the accused acted if he was not responsible. Failure to report to police and even to neighbours proves his guilty mind.

The chronological evidence from the prosecution witnesses **PW1, PW2, PW3, PW5, PW6, PW7, PW8, PW9, PW10, and PW11** oral

evidence is credible and sufficient to prove the offence the accused stand charged. In **SHANI D/O CHAMWELA SULEIMAN VS THE REPUBLIC Criminal Appeal No. 481 of 2021** it was held that.

'The law as regards the credibility of witnesses is settled that every witness is entitled to credence unless there are cogent reasons not to believe a witness.'

It is common ground the legal fraternity that in any criminal trial the onus of proving the case beyond reasonable doubt is the responsibility which is led to prosecution side, however according to Lord Denning in **MILLER V. MINISTERS OF PENSIONS (1972)- ALL ER 372** that:

'Proof beyond reasonable doubt doesn't mean proof beyond the shadow of doubt and the law would fail to protect the community if it admitted fanciful probabilities or possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence 'of course it is possible but not in the least possible' then the case is proved beyond reasonable doubt.'

Actually, the prosecution has proved the case beyond reasonable doubt against the accused person basing on the adduced evidence of 11 prosecution witnesses who testified in his Court and two exhibits **P1A** and **P1B**.



I had an opportunity to hear and record proceedings as well as the submissions made by learned Counsels for the defence and the prosecution. It is true that this case is not straight one.

The only direct evidence linking the accused with the mishandling of the children is that Brighton s/o Masumbuko, PW6 and that of PW10 Michael James who is a son of the accused. Brighton s/o Masumbuko is the surviving child among the three children who went missing on the 21st March, 2019 and

According to PW6, on the material date they went missing, they left the place they were playing to follow a person by the name Kayemba. They were three of them, Brighton, Nicolaus and Immanuel. Then a certain man came, held their hands took them into the house. He closed the door, during the night he took a piece of cloth put into the mouth of Emanuel then took the knife and used it to applied the same to him. It is not clear if he stabbed or struck with the knife. In his account, the child used to word "choma". Possibly the knife was used to burn the child on the back, as PW1 Agness Kapufi, testified that one of the children had been ironed on the back with an iron. According to the witness PW6 that man, then took them to the car which is on the compound of the said house, locked them inside. The

windows were closed. He was released in the morning by his brother who told him to run away and go back home.

In the account of Dr. Joachim Michael Kisaka, PW11, the children's back (those found in the unfinished house) seemed to be hit by something blunt. These children were found after PW6 had led people to the car they were sleeping. That car is at the compound of the accused house. In the car, they were not found but found in the unfinished house (pagala) close to the accused person. Witnesses were inconsistent as to the distance from the accused house and the said 'pagala'. However, what is important is that the children went missing on 21/3/2019, a search was launched by parents, they were not found until on 23/3/2019 when PW2 Maria Mwezimpya found Brighton s/o Masumbuko(PW6), who upon interrogation, he showed the place. Again, a search around made it possible to see the bodies of the other two missing children in the unfinished house.

According to Michael James, PW10 he testified that he saw his father throw the bodies into the unfinished house. This is also the brother, mentioned by PW6. The latter told her aunt, PW5 Christina Gido Funga, whose testimony quoted PW6 saying "*ni kaka wa palepale nilipokuwa*



kwenye gari". And PW10 testified that in 2019 he was staying with his father at Kizwite within Sumbawanga Municipality.


Under normal circumstances and for a law-abiding citizen, after finding the bodies of dead children in the scraper car, he would have sought the assistance of the local leadership, neighbours and the police and leave the law to take its course, not to take bodies and throw into the unfinished house. In my view, that is incompatible with a guilty free mind. He must have been avoiding disclosure to the neighbours lest he be linked to the death of the two children.

Again, when we read the evidence by Rosta Emmanuel Mafuga, PW4 the accused, if truly the accused did not know of the incident, and that he was informed by PW4 at 10:00 hours, then he would have reported immediately to the police. Under normal circumstances, the news must have shocked anyone fearful of the law and the best reaction would be shock and later report to the relevant authorities as soon as possible. The accused lingered around the town, even at some time, contemplated to escape in fear of the reaction by the police. He later reported to the police, after being taken there by the friend, PW4. That conduct is questionable and has a negative interpretation to anyone conversant with the dictates of law.

The circumstances as they are shows that the accused is responsible for the acts, whatever they were, to the death of the two children. In my view, it is immaterial whether he may have sodomized and or that there was no test to link him up with the act. The act of taking the dead bodies silently and throwing them into the unfinished house, refraining from telling neighbours or reporting to the local leadership and also not reporting to the police despite being reminded by a friend, shows he was apprehensive of possible arrest and being linked to the offence.

The Counsel for defence has raised concern on the failure to testify that the accused was seen locking in, those children, in the car, that he was not positively identified at the scene and that there are contradictions. I think those are just speculations which would have mattered if we had direct evidence to prove. But the circumstances are not that much open. As I have analyzed herein above, even if he was not positively identified locking up children, but his own son saw him throw the bodies into the unfinished house, no report to neighbours, local leadership nor the police.

The accused in my view, he is responsible for causing the death of the two children and that evidence has been led by the prosecution to that effect. No evidence is there to exonerate him from being culpable.



The other question is whether malice aforethought has been proved. The act of locking children into the car with all windows closed must have been known by the accused that they will be deprived of air. It was testified by PW11 that the doctor who examined the bodies that "*the motor vehicle was not road worthy, dark blue. When we opened the door there was foul smell. The glasses on the door were intact*". In any case, it must have been reasonably known by the accused that the children will be deprived of air. The same doctor testified that the children's tongues were out and blue even their nails were blue. This is the symptom of lack of air. Under Section 200 (c) of the Penal Code, Cap 16 R.E 2019

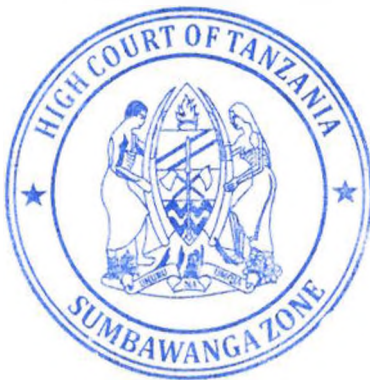
"Malice aforethought shall be deemed to be established by evidence proving any one or more of the circumstances – (c) and intent to commit an offence punishable with a penalty which is graver than imprisonment for three years."

The accused in this case had intent to do harm which now has caused death. Thus, malice aforethought has been proved.



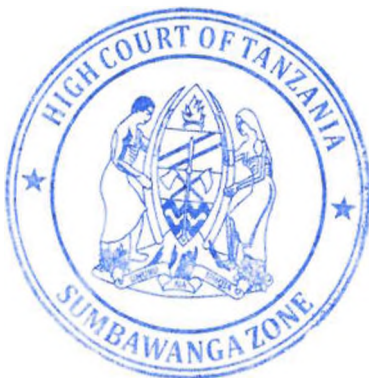
Therefore, I find the accused guilty of the offence murder and proceed to convict the accused with the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2019.

It is ordered accordingly.




T.M. MWENEMPAZI
JUDGE
25/10/2022.

SENTENCE: Accused is sentenced to suffer death by hanging.




T.M. MWENEMPAZI
JUDGE
25/10/2022.