

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

SITTING AT BARIADI

CRIMINAL SESSION CASE NO. 21 OF 2017

THE REPUBLIC

VERSUS

HERMAN S/O BABU @ YESU

JUDGMENT

Date of last order; 22/09/2022

Date of Judgment; 10/10/2022

S.M. KULITA, J.

The accused person herein, Herman Babu @ Yesu stands charged with Murder, contrary to section 196 and 197 of the Penal Code [Cap 16 RE 2002].

It is alleged that on the 30th day of August, 2016, at Bariadi Town within the District of Bariadi in Simiyu Region, the accused person did murder one Steven s/o Malimi.

When the information was read over and properly explained to him, the accused person pleaded not guilty and disputed the facts which implicated him with the murder of Steven s/o Malimi.

The Prosecution side is represented by three Counsels namely Ms. Rachel Tuli, Mr. Paul Mwashitete and Mr. Godfrey Songoro, State Attorneys while the Accused person enjoys the legal service of Mr. Samwel Lugundiga, Advocate. The Prosecution called four witnesses while the Defense side had one witness, the Accused himself.

The 1st witness for the Prosecution one **Mariam d/o Steven (PW1)** testified that she is the mother of the deceased residing at Nyamatare area, within Musoma District in Mara Region. She said that the deceased who was not the biological child of the Accused was born on 15/12/2010 and died at the age of 6 years on 30/08/2016. She further alleged that the Accused was her lover for over four years before their relationship was later on demolished.

The witness narrated that on 26/08/2016 at about 0730 hours the deceased left home for school where he was studying as a nursery pupil at Nyamatare Primary School there in Musoma. She said that at about 0830 hours, while she was at her business premises she received a call from a person who identified himself as Herman, her ex-lover (Accused). She actually noticed him being Herman, the Accused, as they were lovers for over four years, she is familiar with his voice. PW1 stated that having received the said call the

Accused told her that he was in possession of the child, Steven and by that time they were in a hotel having a meal. PW1 was shocked with that information as by that time the child was supposed to be at school and her relationship with the Accused had collapsed with enmity.

PW1 went to school but she was told that Steven had not yet arrived there. She informed her relatives about the matter and started to trace the Accused. She tried to call the number that Herman Babu (Accused) had used to call her, but the receiver told her that the said person (accused) had just borrowed the phone from him. Having failed to trace the child nor the Accused, on the next day, 27/08/2016 they reported the matter at Musoma Central Police Station. On that 27/08/2016 at the daytime PW1 received a call from the Accused through another number, telling her that he was going to kill the child and she would follow after him.

PW1 further stated that on 01/09/2016 at 1000 hours while she was at home she received another call from the Accused. She said that the Accused told her that he had already killed the child, she should go to take the body at Bariadi. The witness said that she left Musoma with her young sister namely Zawadi d/o Steven for Bariadi. They reported the matter at Bariadi Police Station. She said that Police at Bariadi already had the information about the

matter involving murder of the child and they had partly attended it. She was told that the deceased's body was at the District Hospital. The Police asked the witness and her sister to go to hospital to identify the body. Having seen it in the Mortuary, PW1 and her sister identified the body being that of Steven Malimi. She said that the deceased's neck was broken, as it was flexible, which is an indication that he was strangled.

PW1 went back to the Police Station and reported that the deceased is her son whom she was looking for. She said that on 02/09/2016 they went to hospital with the Police Officers including one Veda (Vedastus) and witnessed the autopsy done by the Doctor who then filled the Post Mortem Report. Thereafter the deceased's body was handled to them for burial.

While testifying in the dock the witness successfully identified the Accused in the dock as Herman Babu.

The 2nd witness for prosecution, **Maghembe Azizi Ndamu (PW2)** testified that by 2016 he was the Guest House Attendant for Safari Guest House located in Bariadi. Among the duties he had by then was to receive the guests, register them and provide rooms for accommodation upon paying the charges. He said that on 29/08/2016 in the evening, at about 1900 hours

while he was on duty at Safari Guest House one person arrived with a male child aged about 5-6 years. PW2 said that he provided a room for them to stay, it was Room No. 2. The said tenant registered himself as "Yesu" being the last name, he doesn't remember the other names. He was from Meatu and his destination was Bariadi.

PW2 said that for the safety of their guests the Guest House is surrounded with the fence (yard) whose gates, numbered two are used to be closed at most 2300 hours and opened at 0600 hours. He said that on 29/08/2016 they closed the gates at about 2200 hours as all the guests were already in the lodge. In case of any emergence which needs the guest to go outside after closure of the gate he had to consult him at the reception room. The witness stated that during that night nobody had requested to go outside the lodge premises.

PW2 further stated that on 30/08/2016 at about 0600 hours he opened the gates as usual and some guests started to leave. While he was opening the gate, guests in room No. 2 were still sleeping. At about 0700 hours while sweeping the lodge premises, PW1 saw the elder person who slept in that room going to take birth and went back into his room. He said that at about

0800 hours that person, being himself without a child, came out of the room and left the lodge premises through the gate.

He went into the room that he had slept with the child and found the door open. He entered inside and found a child still on the bed. PW2 said that he presumed that the child was still sleeping. He had been covered with the lodge's bed sheet. However, he had suspicious and tried to awaken the said child in vain. PW1 said that he decided to consult his fellow servants. They unveiled the bedsheet from the child's body and noticed that the child was dead. They found some blood stains on the bedsheet. He further narrated that they consulted the Street Chairman who then arrived at the scene. The said Chairman made a call to Police. At about 0900 hours the Police Officers arrived and started the investigation. In doing so the police interrogated them and his statements were noted down.

PW2 successfully identified the Accused person in the dock as the one who had gone to the Guest House with the child who was then found dead in room No. 2. The witness further stated that the Police officers also took the Guest House's Register and left with the deceased's body.

He concluded by stating that the Accused person never came back to the guest house after he had left at that 0800 hours on the 30/09/2016.

In the cross examination PW2 stated that he allowed the accused to stay in the same room with the victim as the said victim was still young to sleep in a separate room.

Dr. Jumanne Lugata Manyama who testified as **PW3** stated that he is a Medical Doctor by occupation since 1992. His working station is Nkoma Health Centre. The witness said that by September, 2016 his duty station was Bariadi Town Council Hospital located at Somanda. According to him on 02/09/2016 at the morning hours while on duty at Bariadi Town Council Hospital, he attended the autopsy for the deceased who was a boy aged 6 years old whose name was Steven Malimi. The witness stated that in his examination he observed that the deceased's neck was strangled as it was flexible to move on any side which is abnormal for a person who passed away through a natural death.

The said witness tried to tender to court the Post-Mortem Report that he had filled but the receipt was rejected regarding the objection by the Defense Counsel that it is read to have been filled on 01/09/2016 while the Doctor

(PW3) who alleged to have filled it testified that the autopsy (Post-Mortem) was conducted on 02/09/2016 and filled it on that same date. Thus, the said Post-Mortem Report was not admitted as exhibit for lack of authenticity.

The 4th and last witness for prosecution was **A/Insp. Vedastus** who testified as **PW4**. This witness who is a Police Officer at Dutwa Police Station in Bariadi stated that by 2016 he had the rank of Corporal and his working station was Bariadi Police Station. He said that on 30/08/2016 he and other Police Officers were ordered by the Head of Criminal Investigation Department for Bariadi District (OC-CID) to visit and inspect the scene of crime which is Safari Guest House located at Viwandani area where there was an information of the dead body being found thereat.

PW4 said that they went thereto and found people gathered at the scene. He said that the Street Chairman and the Guest House Servants are among the people who were there. The witness said that the Guest Attendant namely Maghembe Azizi (PW2), the one who was on duty during the incident showed them the room in which the deceased was. They entered therein, and unveiled the bedsheet which covered the deceased's body. He said that the person had already died as alleged. He said that while other parts of his body was strained the neck was flexible which indicates that it was strangled.

They took the deceased's body to the District Hospital at Somanda for storage pending other legal processes.

PW4 further testified that on 01/09/2016 at about 17-1800 hours two women, one of them being Mariam Steven (PW1) arrived at Bariadi Police Station claiming for the loss of Mariam's child, namely Steven Murimi who was 6 years old. PW4 narrated that those persons told him that the information that they had was that the person who had hijacked the child at Musoma killed him when he arrived with him at Bariadi. He said that Mariam was so told by Herman Babu (Accused), her former lover and the one who had hijacked the said child.

It is the testimony of PW4 that they actually attended such murder incident one day before at Safari Guest House. He asked Mariam to go to Mortuary at Somanda Hospital to identify the body. She actually went thereto and came back to police with the information that the deceased was her son, Steven Murimi. The witness said that he noted down Mariam's statements and ordered her to go back at the Police Station on the next day, 02/09/2016. On that said day Mariam and her relative arrived at the Police Station as ordered. He said that the Police Officers including him and the

said relatives of the deceased went to Somanda Hospital to witness the autopsy of the deceased's body.

PW4 further stated that the autopsy was actually conducted in the presence of the deceased's relative and him. He said that thereafter the Doctor filled the Post-Mortem Report. PW4 stated that the report transpires that the source of death was strangulation of the deceased's neck. Thereafter the Doctor allowed the deceased's relative to take the body for burial.

PW4 continued to state that on that same date, 02/09/2016 he and WP Noelia were assigned the duty to investigate the case by the OC-CID. They started by planning on how to arrest the Accused. Fortunately, at about 1500 hours they were informed by the OC-CID that the accused person had been arrested and he was under the Police custody at Bunda Police Station. They intended to go there at Bunda on the same day but it was impossible as by that evening hours the police vehicle was somewhere else for other duties. He added that the distance between Bariadi and Bunda is about 100 Km.

According to PW4 they left Bariadi for Bunda on the next day, 03/09/2016 at the evening hours. They arrived there at about 1730 hours. They took the Accused person to Bariadi where they arrived at 1900 hours. The witness

further stated that once they arrived at Bariadi Police Station the OC-CID ordered him to interrogate the Accused and note down his caution statements. He complied with the order. He prepared the writing materials and the room which is the Investigation office, for that purposes. Thereafter, he took the Accused person to the said room and started to write the Accused's statements. The witness said that in the interrogation all legal procedures were complied with and the Accused person confessed to have killed the deceased. The statements were recorded from 1905 hours to 2030 hours. Upon the objection on the receipt of the Accused's caution statement the matter was determined through trial within a trial in which the said document was received and admitted as Exhibit P1.

The witness identified the Accused person in the dock as Herman Babu, the one whom he has been testifying against.

That was the end of prosecution case which comprises a total number of four witnesses. The Accused Person was found to have a case to answer on Murder as charged. He was therefore asked to defend his case.

In his defense the Accused person, **Herman Babu (DW1)** testified that he is a resident of Bunda in Mara Region. He said that he was arrested by Police

on 01/09/2016 at Bunda by a Police Officer namely Juma who took him to Bunda Police Station. He further alleged that from Bunda Police Station he was taken to Bariadi Police Station by the Police Officers from Bariadi. They left Bunda on 02/09/2016 at 1900 hours. On the way to Bariadi they stopped at Lamadi. They arrived at Bariadi Police Station at about 2100 hours and locked up. He said that among the Police Officers who had arrested him, is Veda (Vedastus – PW4). DW1 alleged that within all that time he had not eaten anything apart from a cup of tea that he had taken on that 02/09/2016 at 2100 hours, he was hungry.

DW1 stated that on 03/09/2016 at about 2030 hours Vedastus (PW4) took him from the lock up for interrogation and writing his statements. The Accused further stated that by that time the prescribed period of four hours for that purpose had already lapsed. He said that during the said interrogation PW4 and other Police Officers tortured him by beating him while his legs and hands are tied. He alleged that the said police compelled him to confess that he had committed murder of Steven Malimi. They then released the ropes and ordered him to sign the statement sheet. He said that the said statements were not made by him and he was not given any right for producing the caution statement.

DW1 challenged the testimony of prosecution witnesses by saying that the Guests Register was not tendered to court as exhibit to prove that the Accused actually slept in Safari Guest House on that material night of 29th-30th August, 2016. He said that PW2 and PW4 mentioned different names and not Accused's as the name of a person who had slept in room no. 2 on that material date. The Accused person totally denied to have slept at Safari Guest House on the night of 29th – 30th August, 2016 nor killing the deceased. He said that on that date he was at Bunda.

He further challenged that as the prosecution side has not tendered to court the Post-Mortem Report, thus, there is no proof of the alleged death. He said that the testimony of the Doctor (PW3) was that he had conducted the autopsy on the 02/09/2016 while the Post Mortem Report he had intended to tender was dated 01/09/2016.

The Accused person concluded by praying the court to find him not guilty and acquit him as he didn't kill the deceased, and that was the end of the defense case.

In view of the above evidence, the following issues call for determination: -

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

2. Whether the accused person is responsible for the death of the victim (if yes),
3. Whether the accused person, with intention (malice aforethought) killed the victim.

The 1st issue, "whether the victim met unnatural death" is hereby analyzed as follows; this issue was somehow disputed during trial, it is in the sense that the Accused alleged that the prosecution side had not tendered to court the Post-Mortem Report, hence, there was no proof of the alleged death. According to the proceedings, the Post-Mortem Report which was intended to be tendered to court by the Doctor (PW3) who is alleged to have conducted autopsy was not admitted for the authenticity reasons. It was said to have been filled on the 02/9/2016 according to the author (PW3) while the same is read to have been filled on the 01/9/2016. But, the Post-Mortem Report is not the only proof that a particular human being is dead.

According to PW1 who is the deceased's mother, she was notified by the Accused through a mobile phone that he had hijacked her child, and later on, the said Accused told her that he had killed the said child at Bariadi. Further, upon arriving at Bariadi she actually saw her child's body at Bariadi District Hospital being dead. That piece of evidence reveals the fact that

Steven Malimi is dead. Not only that but also the testimony of Guest Attendant (PW2) and the Police Investigation Officer (PW4) that they witnessed the deceased's body being dead in room no. 2 Safari Guest House is also a proof that the said Steven Malimi is actually dead.

As for the issue of nature of death, the evidence of all prosecution witnesses transpire that the Accused met unnatural death. All of them stated that the victim's neck was strangled to death as it was looked flexible while the other parts of the body were strain. It means, had the death been natural, the neck could have not been flexible. Thus, the 1st issue whether the victim met unnatural death, has been proved in affirmative.

The 2nd issue is "whether the accused person is responsible for the death of the deceased". It was alleged by the defense side that the Guests Register was not tendered to court as exhibit to prove that the Accused actually slept in Safari Guest House for the material night of 29th-30th August, 2016. But that is not the only proof that the Accused slept in the said lodge on that material night. The Guest House (Lodge's) Attendant namely Maghembe (PW2) testified to have received the Accused and the deceased who was a child and accommodated them into room no. 2. The said witness also identified the Accused person before the court.

The Accused also challenged that the two male persons could have not slept in the same bedroom, but that argument has no legal weight, as rightly stated by PW2, the Guest House (Lodge's) Attendant, that he allowed the accused to stay in the same room with the victim as the said victim had gone there with the accused, and that the said victim was still young to sleep in a separate room.

The Accused also said that PW2 and PW4 mentioned different name and not Accused's name, as a person who had slept in room no. 2 on that material date. The evidence transpire that, PW1 mentioned the accused in the name of **Yesu**, he said that he doesn't remember the other names. However PW4 informed this court that though the Accused registered different names in the Guests Register, he told him while recording his caution statement that his name is Herman Babu @ **Yesu**. During his testimony the Accused also identified himself as Herman Babu. I therefore believe that the court is dealing with the same and right person who is the accused in this matter. The only discrepancy according to PW4 is the name of the guest whom PW2 registered in the register, that is Award Idrissa which is the name that the Accused had himself identified to PW2 when he was seeking for the room to sleep in the lodge.

It is my view that, in the local lodges like the one in dispute, for lack of control, it is possible for the guest to register the wrong name. Under that situation the criminals may use it as a loophole to hide the truth. It means, if one intends to hide something or to commit any wrong he/she may register himself in the wrong address including the name. Thus, in making analysis on this issue of a suspect for the commission of the crime, the court cannot solely rely on the register, even if it is tendered to court as exhibit. The prosecution side was therefore right for not tendering it to court as exhibit as it has no name of the accused, Herman Babu @ Yesu in the list of the guests who had slept in the lodge on that material date.

According to the Guest House Attendant (PW2), while sweeping the lodge's premise during the morning, he went around the entrance of room No. 2 in which the accused had slept with the child and found the door open. By that time the Accused had already left. He entered inside and found a child still on the bed. PW2 said that he presumed that the child was still sleeping. The child had been covered with the lodge's bed sheet. As he had the suspicious with the situation, PW2 tried to awaken him in vain. Having unveiled the bedsheet from the child's body in the presence of his fellow servants who were there at that morning hours, they noticed that the child was dead.

Therefore, in answering the question as to who killed the deceased, it is clearly evidenced by the prosecution evidence that Steven Malimi is dead though the Accused person disputes to have killed him. Actually, nobody had seen the Accused killing the deceased, but the evidence in record reveals that the Accused person was the last person to be seen with the Deceased. According to the evidence of PW2, the Guest Attendant, the Accused person never came back to the guest house after he had left the lodge at 0800 hours on the 30/09/2016. That is nothing but an element of evil mind by the Accused, that he is the one who had killed the deceased.

In the case of **Mathayo Mwalimu and Masai Rwengwa V. R. Criminal Appeal No. 147 of 2004** the Court of Appeal held that if an 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 the death, he or she shall be presumed to be the killer. As well in the case of **Robert Edward Moringe @ Kadogoo V. Republic Criminal Appeal No. 196 of 2004, CAT at Arusha (Unreported)**, the Court stated that where the accused is the last person to be seen with the deceased under circumstances which could not easily be explained away, he has a duty to give an explanation of how they parted.

The Accused person came up with a total denial that he has not committed the crime and his defense was that on the material dates he was at Bunda. He was neither at Musoma where the child was taken/hijacked nor Bariadi where he was killed. He denied to have slept at Safari Guest House on the night of 29th – 30th August, 2016 nor killing the deceased, but the evidence transpire that he was together with the said child until he was found dead at Safari Guest House in Bariadi on the 30/09/2016.

Regarding the defence of *alibi* that he had raised, the accused person alleged that he was not at the place when and where the offence was committed. Under **section 194(4) of the Criminal Procedure Act [Cap 20 RE 2019]** the accused person ought to have given a notice to the court and the prosecution of his intention to rely on such kind of defense before the hearing of the case. Under **sub section (5)** if he fails to give such a notice before the hearing of the case, he shall furnish the prosecution with the particulars of the *alibi* at any time before the case for the prosecution is closed. These provisions have been interpreted in the case of **Hamis Bakari Lambani vs. The Republic, Criminal Appeal No. 108 of 2012 (unreported)**.

"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, section 194(4) of the Criminal Procedure Act, Cap 20. If the said notice cannot be given at that early stage, the said person is under obligation, then, under subsection 5, to furnish the prosecution with the particulars of alibi at any time before the prosecutions doses its case. Should the accused person raise the 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, section 194 (6)."

Ordinarily, the principle governing the defence of alibi was designed to enhance the rule of disclosure. It intended to disclose the defence to the investigator and the prosecutor, for them to investigate on the truthfulness of the defence and take appropriate action or prepare to counter it. Failure to give notice at the appropriate stage denies the prosecution the opportunity to prepare to challenge it.

Thus, the defense of *alibi* by the Accused person has no legal weight as there was no notice issued prior by the Defense side under **section 194(4) of**

the Criminal Procedure Act [Cap 20 RE 2019] that the accused would rely on such kind of evidence in his defense.

Thus, the evidence is ample that the Accused person is the one who has killed the deceased.

As for the third issue, "whether the accused person killed the victim with malice aforethought" I have the following to say; almost all the prosecution witnesses who saw the victim, testified that, the victim's neck was strangled to death as it was looked flexible while the other parts of the body were strain. Be it noted that a neck is among the vulnerable parts of the human body. Further, the Accused's act of disappearing from the Guest House, leaving the child (deceased) inside the room is nothing but an indication for intentional killing which is among the elements of malice aforethought as per **section 200 of the Penal Code [Cap 16 RE 2019]**

The evidence is also clear as per the testimony of PW1 who is the deceased's mother and ex-lover of the Accused, that before killing the child, the Accused had taken/hijacked the said child while on the way to school where he was studying in nursery class. PW1 had previously conflicted with the accused to dissolution of their relationship. According to her testimony PW1 received a

call from the Accused that he had taken the child while on the way to school on 26/08/2016. On 27/08/2016 the Accused called her again stating that he was going to kill the child, the fact which he actually executed while in Safari Guest House at Bariadi on 30/08/2016. These acts by the accused person implicates that he actually had an intention to kill the deceased.

Further, the Accused person admitted in his caution statement (Exhibit P1) which had been noted down by PW4 that he actually killed the deceased on that 30/09/2016, the reason behind being that he had a conflict with the deceased's mother which led to dissolution of their relationship while he was still loving her. Further, having gone to Meatu "kusafisha nyota" with the said child, the Witch Doctor demanded a *child's patella bone* "kifundo cha goti la mtoto" for the local medicine to the Accused. He therefore killed the child for that purpose though he didn't execute the Witch Doctor's demand to supply him with child's patella bone for the sympathy that he sustained after killing the child.

In his testimony the Accused alleged that the caution statements had not been made by him and that his signatures therein were taken under the influence of torture. In the trial within a trial, the recording officer for the accused's caution statements, PW4, denied to have tortured the accused. He

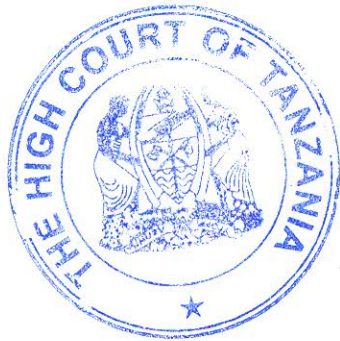
said that the accused adduced his statements freely, without compulsion nor torture. Actually the accused failed to prove that he was tortured. He just stated so orally without any proof.

The fact that the said caution statement of the Accused person tally with what the prosecution witnesses, PW1 and PW2 had stated, that he is the one who had killed the deceased, I find the said caution statement reliable to incriminate the accused for the murder of Steven Malimi.

These facts having been clearly proved by the prosecution witnesses particularly PW1, PW2 and PW4, I hereby agree with them that on the material date, the accused person intended to strangle the victim to death and he actually executed it. On that account, this issue too is answered in affirmatively that, the accused person killed the victim with malice aforethought.

All said and done, with this evidence and for want of evidence from the defense to create reasonable doubts, I am settled in mind that, the prosecution case has been proved beyond all reasonable doubts against the Accused person as required by the law.

In view thereof, the Accused Person, Herman s/o Babu @ Yesu is hereby found guilty of Murder, contrary to the provisions of sections 196 and 197 of the Penal Code [Cap 16 RE 2002] as charged and he is accordingly convicted.




S.M. KULITA
JUDGE
10/10/2022