

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)
AT BUKOBA**

CRIMINAL SESSIONS CASE NO. 89 OF 2020

**REPUBLIC
Versus
RENATUS GAMANYWA**

JUDGMENT

07th & 28th November 2022

OTARU, J.:

On 30th November 2016, the body of **Deodatha Gamanywa** (the deceased) was found buried in a *shamba* of **Renatus Gamanywa**, the accused herein. It was found during a search for the deceased conducted at Mgaza Village, Katerero Ward, within Bukoba Rural District in Kagera Region. The accused had earlier reported to the authorities of the disappearance of his blood sister, the deceased, living in the same compound as himself. The accused was arrested and charged with the offence of **murder** contrary to Section 196 of the **Penal Code** (Cap. 16 R.E. 2002).

When the matter came for hearing, the accused pleaded not guilty to the offence of murder thus the prosecution called 4 witnesses and tendered 2 exhibits in proving their case. The witnesses are;- Hilda Gaudence (**PW1**), Joas Michael Rutainurwa (**PW2**), Joseph Rweyemamu Tegamaisho (**PW3**) and Muharani Omari Mbonde (**PW4**). The documentary evidence tendered were

the Site Plan and Post Mortem Report (Exhibits P1 and P2 respectively). The accused defended himself under oath. He denied all allegations.

During the trial, the prosecuting Republic was represented by Ms. Judith Mwakyusa and Mr. Amani Kyando, learned Senior State Attorney and State Attorney respectively, while the accused was represented by Mr. Samwel Kiura, learned advocate. After due consideration of the nature of the case being based on legal principles, the court chose to hear the case in the absence of assessors, in accordance to Section 265 of the **Criminal Procedure Act**, as amended by Act No. 1 of 2022.

The facts of the case are such that on 24th November 2016 the accused reported to Hilda Gaudence (PW1) the local leader, about the disappearance of the deceased. She testified to the effect that the accused told her that the deceased had been missing for 8 days, since 17th November 2016. Being concerned about the fate of the deceased, she advised the accused to report the matter to police, so that search could be organized. According to PW1, on 29th November 2016 the accused informed her that he has reported the matter as advised. After receiving that information, search was organized in the village. On 30th November 2016 during search at the accused's *shamba* the body of the deceased was found.

As earlier stated, the accused denied any wrong doing. In his oral testimony in court, he stated that his sister had been missing since 9th

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November 2016 and not 17th November 2016 as testified by the prosecution side. He claimed that all witnesses who testified were malicious towards him and that none of them were telling the truth. He further claimed that he had reported the matter to PW1 on 9th November 2016 and to the Police on the following day of 10th November 2016. That he had been conducting searches single handedly without any success until 30th November 2016, when he was accused of having buried his sister. He finally told the court that until now he did not know that his sister was dead. After closure of the defence case, legal representatives for both sides made their respective final submissions.

On behalf of the defence, the counsel argued that the prosecution had not proved its case beyond reasonable doubt. That the prosecution failed to show the reason for killing the deceased because they failed to show presence of any conflicts or disputes between them. The defence also challenged Exhibit P2 for not indicating the cause of death and the person who identified the body was the investigator. The report stated that the body had decayed beyond recognition thus they doubt if the body belonged to the deceased Deodatha. Counsel cited the case of **Jimmy Lunangaza v. Republic**, Criminal Appeal No. 159 of 2017 (CAT) Bukoba (unreported), where the court at page 12 held that *'circumstantial evidence must be proved beyond reasonable doubt'*, also at pages 15 and 16 that *'it is settled law that in criminal cases where it is found that there are doubts then those doubts need to be resolved in favour of the accused person.'* Relying on the case of **Azizi Abdallah v. Republic** (1991)

TLR 91, the defence also questioned the failure of the prosecution to call witnesses who seemed substantial in proving the case, that:-

'the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach, but are not called with sufficient reason being shown, the court will draw inference, adverse to the prosecution'.

Counsel also challenged the credibility of PW2 and PW3 saying that their testimonies in court were not exactly the same as their statements taken at the police station.

On the part of the Republic, the Senior State Attorney argued that what was important was that all the necessary ingredients of murder have been proved beyond reasonable doubt against the accused person. She argued further that three of the prosecution witnesses positively identified the deceased who was buried in the accused's own *shamba*, only 22 steps from the accused's house. She also argued that the case has satisfied the test as outlined in the case of **Simon Musoke vs. Republic** (1958) AE 715 that the evidence should point irresistibly to the guilt of the accused, and it does. The prosecution further insisted on the presence of *mens rea* from the conduct of the accused in delaying to report the disappearance of the deceased; failure to show cooperation during the search, and trying to run away more than once. She

also amplified that the accused had made an admission before the 3 witnesses that led to the discovery of the body. Citing the case of **Mashaka Jumanne @Mtalula vs. Republic**, Criminal Appeal No, 140 of 2022 (CAT – Shinyanga) (unreported), the Prosecution urged the court to treat the accused's admission of burying the deceased as a confession of commission of the crime.

I have carefully considered the evidence on record, submissions by counsel for both sides as well as the applicable law. The offence with which the accused is charged is murder contrary to section 196 of the **Penal Code**, which reads that:-

'any person, who with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder'.

The necessary ingredients for the offence of murder in relation to the case at hand that need to be proved are whether Deodatha Gamanywa is dead? if yes, was her death a result of an unnatural cause? if yes, whether the accused was responsible for the death; and whether there was *malice aforethought* involved.

As regards the first ingredient, whether Deodatha Gamanywa is dead, I have considered the testimonies of PW1, PW2 and PW3 who identified the body after it was exhumed. They all stated that although the body had decomposed, the face was still recognizable and they did recognize it. PW4 also testified that the body was in a bad state of decomposition but could be recognizable by

someone who knew the deceased well. Further, according to the prosecution witnesses PW1, PW2, PW3 and PW4 the accused had made an admission of burying Deodatha Gamanywa (the deceased) where she was eventually found. I have considered the evidence and the fact that the body was taken by close relatives and buried on the same day. This to me suggest that whoever buried the deceased had no difficulty in identifying the deceased.

In addition to the relatives who buried the deceased body after exhumation, I have also considered the testimonies of the 4 prosecution witnesses which leads me to believe that there had never been doubt as to whose body it was. I therefore do not hesitate to say that the body that was exhumed from the accused's shamba was none other than Deodatha's. As such, the prosecution has proved to the required standard the 1st element, that Deodata Gamanywa was dead.

As to the cause of death, the same was not established by the Post Mortem Examination Report (Exhibit P2). The reason stated therein is '*due to the decomposed state of the body*'. I wish to rely on the decision of the Court of Appeal in the case of **Joseph Hamisi and Another v. Republic**, Criminal Appeal No. 13 of 1990 (unreported) where it was held that:

'where cause of death is not medically established, that is not necessarily fatal to the charge. This is so if there is other cogent evidence direct or circumstantial, from which to arrive at a conclusion as to the cause of death'.

Other cogent evidence from which one can arrive at a conclusion as to the cause of death is reserved to the end as the same can be established from circumstantial evidence. None of the 4 prosecution witnesses testified to have witnessed the deceased being killed. All the evidence herein is circumstantial. PW1, PW2 and PW3 testified to the effect that on 30th November 2016, one of the search teams searched the accused's property for the deceased who was reported missing by the accused. That while searching the accused's *shamba*, the team stumbled upon some suspicious ground that had recently been dug and sweet potato shoots planted over it. When the accused was requested to bring a hoe so the ground could be dug, he seemed nervous and tried to escape. It is on record that PW1 asked the accused why was he behaving like that. She asked him if he had hidden something under the ground. According to the witnesses PW1, PW2 and PW3, the accused was evasive at first, later he told PW1 in the presence of PW2 and PW3 that the deceased was buried underneath.

PW1 to PW4 stated that the accused told them that he was the one who buried the deceased there. All prosecution witnesses testified to the same effect and added that the accused described in every detail the direction and position of the body, as well as how it was wrapped and buried. The body was described to be wrapped in a mat and tied over by banana tree rope at the head, the midsection and the feet, then three big stones were placed over each tied place.

When the body was exhumed, the direction, position and description of the body was found to be exactly as he said. The admission of the accused to have buried the deceased is as good as a confession to commit a crime. As per **Mashaka Jumanne's** case (supra) a '*Confession need not necessarily be in writing and it can be given to a police or a civilian*'. The confession by the accused was given orally to three civilians and one policeman.

Having considered the evidence of both sides, I have also considered the doubts that the Defence side has raised. One being the credibility of the prosecution witnesses. I sought the wisdom of the Court of Appeal on that aspect. The Court of Appeal in the case of **Goodluck Kyando v. Republic** (2006) TLR 363, stated that '*every witness is to be taken as credible witness unless there are good reasons to question his credibility*'. I have tried to look at the contradictions that the defense has pointed out, one of them is based on the decision to search the accused's *shamba*. According to PW1 and PW2, each has a different reasoning however they are all in agreement that the decision resulted from the village meeting. I have considered this aspect and I am of the view that it is not unusual to have different opinions in meetings until a decision is reached. It is also not unusual to remember one or none of such opinions, but the decision itself. In our case, each witness recalled a reason different from the other. Considering the time gap between the commission of the offence in 2017 and the trial in 2022, such discrepancies should be expected. Further, I do not think how the decision was reached is material to

the facts in issue. As such, I do not think this should detain us any longer. At this point, from the way I observed the prosecution witnesses testify, I have no reason to question their credibility. They testified confidently, coherently and similar in material aspects of their evidence. I therefore consider them trustful, and rely on their testimonies accordingly. On the other hand, the testimony of the accused was evasive and shaky such that I found myself unable to believe what he testified about. As such, the evidence of the prosecution side remained unshaken.

It is an established principle that the court may convict a person based on circumstantial evidence, if such evidence draws an inference which irresistibly points to the guilt of the accused person(s), see **Ally Bakari and Pili Bakari v. R** (1992) TLR 10; **Protas John Kalongola and Another v. R** (1992) TLR 51 and **Hassan Fadhil v. R** (1994) TLR 89. As such, before relying on circumstantial evidence, I have warned myself that the same should leave no doubt that no other person than the accused could have committed the alleged crime and has indeed committed it.

What about the *mens rea*? According to Black's Law Dictionary (18th Edn.) *mens rea* means a guilty mind. It is state of mind that the prosecution must prove the accused had when committing a crime. *Mens rea* of murder is *malice aforethought* which has been well described in the case of **Enock Kipela v. Republic**, Criminal Appeal No. 15 of 1994, CA (unreported), such that any or all of the items below can satisfy the presence of *malice aforethought*:-

'Usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any, used in the attack, (2) the amount of force applied in the assault, (3) the part or parts of the body the blow was directed at or inflicted on, (4) the number of blows, although one blow may, depending upon the facts of the particular case, (5) the kind of injuries inflicted, (6) the attacker's utterances, if any, made before, during or after the killing; and (7) the conduct of the attackers before and after the killing.'

From the above analysis, there is no scintilla of doubt that by burying his sister, the accused portrayed a guilty mind. The fact that the accused buried a human being without any permission from authorities nor knowledge of friends, relatives or neighbors, is a clear indication of guilty mind. Why would anyone bury another person if one is innocent? I can confidently conclude that *mens rea* can be inferred from the conduct of the accused as per item 7 in the case of **Enock Kibera** (supra).

In **Mashaka's** case (supra) when observing the conduct of the accused, the court considered the test discussed in the case of **Enock Kibera** (supra), that where the conduct is doubtful, then the possibility of the accused committing the crime is significant. From the very beginning, the accused's conducts were very doubtful. The accused buried the body un-procedurally; he delayed in reporting of the disappearance; even after being advised by village

leaders to report the matter to police, he did not give it any urgency; there is no indication that the accused searched or tried searching for his sister from her *alleged disappearance* on 17th November 2016 up until 30th November 2016 when the body was found; his nervousness on 30th November 2016 and attempts to escape are all significant in indicating that the accused not only buried the deceased but also killed her. He did that with a guilty mind. Thus evidently, the deceased died an unnatural death.

From the above analysis, I am also satisfied that the circumstances from which an inference of guilt is sought to be drawn are cogently and firmly established. The circumstances are pointing towards the guilt of the accused; and the circumstances taken commutatively form a chain so complete that there is no escape from the conclusion that within all human probabilities, the crime was committed by the accused and no one else.

The guidance with regard to evidence against accused persons is found in the decision of **Magendo Paul and Another v. Republic** [1993] TLR 220, where the full bench of the Court of Appeal, held at page 223 that:

'If the evidence is so strong against an accused person as to leave only remote possibility in his favour which can easily be dismissed, the case is proved beyond reasonable doubt.'

Having said that, it is my finding and decision that the evidence is so strong that draws an inference which irresistibly points to the guilt of the

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Having said that, it is my finding and decision that the evidence is so strong that draws an inference which irresistibly points to the guilt of the

accused person and no other. The *actus reus* as well as the *mens rea* in this case have been proved by the prosecution beyond reasonable doubt.

Consequently, I find the accused **Renatus Gamanywa** guilty of the offence of **murder** contrary to Section 196 of the **Penal Code** as charged and I convict him accordingly.


Dated at Bukoba, this ^{4th} 27 day of November 2022.


M.P. Otaru
Judge

SENTENCE


There is only one penalty for the offence of **murder** provided under Section 197 of the **Penal Code** (Cap. 16 R.E. 2002), that is, death by hanging. Having entered conviction against the accused person, **Renatus s/o Gamanywa**, I hereby sentence you to suffer death by hanging.

Dated at Bukoba, this ^{4th} 27 day of November 2022.


M.P. Otaru
Judge

The right of appeal to the Court of Appeal is explained to the convict.




M.P. Otaru
Judge
27th November 2022