

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

CRIMINAL SESSIONS CASE NO. 23 OF 2021

THE REPUBLIC

VERSUS

- 1. SHABANI S/O KHAMIS KIHIZA**
- 2. ANITHA D/O MAYUMA NGESE**
- 3. MAGDALENA D/O HAJI**

JUDGEMENT

Date: 23/11/2022 & 14/12/2022

BAHATI SALEMA, J.:

In this murder case, the three accused persons namely **SHABANI S/O KHAMIS KIHIZA, ANITHA D/O MAYUMA NGESE** and **MAGDALENA D/O HAJI** stand jointly and together charged with a murder of Festo Misonge contrary to the provisions of section 196 of the Penal Code, Cap.16 [R. E. 2022].

According to the charge, on 27th February, 2021 the accused persons Shaban s/o Khamis Kihinza, Anitha d/o Mayunga Ngeese and Magdalene

d/o Haji Simtitu at Madukani area in Sikonge District and Tabora Region jointly and together murdered one Festo s/o Misonge.

Following the incident, the manhunt by the police led to the arrest of many suspects. Through a thorough investigation and scrutiny of the evidence, the prosecution machinery finally remained with the accused persons in court.

During the trial, the accused resisted the information, warranting the prosecution to parade eight witnesses to prove the offence to the required standard and tendered four exhibits.

The Court thereafter delivered the ruling on whether the prosecution established a *prima facie* case to allow the accused person to defend against the case. The Court ruled out that the prosecution has established a *prima facie* case against the accused persons and in the absence of any contrary evidence, the accused persons could be convicted as charged. Therefore, in line with Section 293 of the Criminal Procedure Act, Cap. 20 [R. E. 2022], the Court informed the accused of their rights to defend the case under oath and call a witness for defence. The accused persons, on the other hand, elected to testify under oath and they had neither other witnesses to call nor exhibit to tender during the defence.

Ms. Jane Mandago, Senior State Attorney, Mr. John Mkony, State Attorney, Ms.Mwamini Fyeregete and Mr.Merito Ukongoji, State Attorney both appeared for the Republic whilst the accused persons enjoyed the legal services of Ms.Stella Nyaki , learned counsel.

In this case, there is no dispute that Festo Misonge is dead and he met a violent death. This was confirmed by the evidence of all the prosecution witnesses who told the court that the deceased body had injuries on his head, neck and shoulder. This is further confirmed by the report on the postmortem examination tendered as exhibit P2 which stated that;

"Severe traumatic head injury with severe internal and external bleeding."

Basing on the state of the body; there can be no doubt that the deceased met a **brutal death** and whoever is responsible must have intended to cause death or grievous harm.

The only issue for determination by this court is whether it was the accused persons in the dock with **malice aforethought** that caused the death of the deceased.

The first prosecution witness (PW1) was **Seif Haruna**. He testified that on 27/2/2020 in the morning around 9 o'clock, Musa went to his house and informed him of the death of Festo Misonge and he went directly

to Festo's residence and found a crowd of people gathering outside and a police vehicle was there. The body of the deceased was already covered and thereafter was taken to Mazinge hospital. He told the court that the relationship between the deceased and his wife was not good before his death.

When cross-examined he stated that Seif Mavyombo used to undertake business with Festo Misonge and he owed Seif Mavyombo some money. Until his death, his debt was not paid by Seif. He filed a case at Sikonge Primary Court. On 27/2/2020 the case was set to be heard. That is the day Festo was killed.

PW2, Adiana Zakayo testified to the court that on 18/3/2020 the deceased went to her place with Shaban Khamis Kihinza and after they had greeted each other the deceased informed her that Shaban has told him that his wife Anitha Ngese had initiated some people to kill him. When she heard the news she was shocked. She further stated that Shaban told them that Anitha Ngese had found some people to kill the deceased, her husband. Shaban told her that after the death of the deceased's son one Frank Misonge in 2019, Anitha Ngese, the wife of the deceased found some people to kill the deceased since she was alleging that her husband (deceased) sacrificed his son for his business and she left the body of her son at the hospital and she wanted to go to

Shinyanga stating that "*Utamla Nyama*" means that the deceased sacrificed his son Frank who died in 2019.

PW2 further stated that after the burial ceremony of Frank Festo, their son convened a meeting between members of the families and settled the conflict. After the burial of their son, the deceased's wife went to see her friend Magdalena Haji. She also stated that Shaban also asked the deceased, if he remembered to found him with his wife. Shaban told the deceased that they have agreed to pay him TZS. 2,300,000/= to execute the plan and if the deceased had money, he could pay him to save his life but the deceased told him to wait until the end of the month. PW2 further testified that at the same time, the wife of the deceased went to her place of origin (Shinyanga) but Shaban told the deceased that although his wife was not at home, they could communicate with her friend Magdalena. He said, if he is dissenting, let me call your wife and hear what she says. After calling her, she replied to Shaban, "*I will not come to Sikonge until you accomplish the plan for the killing of my husband.*" Shaban told her that if he will be paid by the deceased, they would not kill him, but the deceased refused to pay such an amount of money. Then the deceased gave Shaban TZS. 20,000/= and Shaban left. She further stated that they went to their

mother Hadija Seif to inform her of the information they received from Shaban.

PW2 further testified that on 22/2/2020 Shaban went to her place but he did not find her. Again on 24/2/2020 PW2 was called by Shaban who told her that they had communicated with the deceased. On the following day, 26/2/2020 Festo who is now deceased went in the evening and found her watching the news and told her that they had settled the matter with Shaban and that the next day he would explain. Unfortunately, on 27/2/2020, she was called by her sister Pendo Misonge to inform her of his death. She then went to the deceased's place at Mikanga where she found a crowd of people. She found the police had already arrived and taken the body of the deceased to the hospital.

On the same day, PW2 called Shaban who went to the place of the incident and they sat outside. Upon asking him he told her that, he did not kill him but Anitha Ngese had hired people from Shinyanga and they went to Magdalena's place and executed their mission. She stated that the relationship between Anitha Ngese and the deceased was not good. She testified that the one who killed Festo is Shaban; Anitha Ngese, the deceased's wife and Magdalena are the ones who caused the murder.

During cross-examination, she stated that Shaban Kihiza and Shabani Kitunda is one and the same person. When Shaban went to her place, the deceased's wife was not at home and no one asked of her where about and the allegations. They did not report the matter to the police or ten cell leader. She told the court that Frank was sick for almost a year. They helped each other in taking care of their son at Sikonge hospital. She further stated that after the burial, they had a meeting between the two families. PW2 did not see the number used by Shaban to call Anitha Ngese. She never saw the killers.

PW3, Ast. Inspector Jumapili, testified that on February 27, 2020, while at Sikonge around 9:30 hours was informed on Festo's death and upon arrival, he found a crowd of people. Thereafter, they entered the room and witnessed Festo Misonge lying on a bed, his body in a pool of blood had wounds. He drew a sketch map assisted by Seif Haruna and later took the body to the Mazinge-Sikonge hospital where the body of the deceased was examined by Dr. Andrew Elias. The doctor explained that the cause of death was severe bleeding caused by skull damage. They allowed the relatives to take the body for burial service.

They went further and interviewed Adriana Zakayo Misonge a sister of the deceased explained that on 18/2/2020 Festo went to her complaining that his wife had hired some people to kill him. She told

them the name of his wife was Anitha Mayuma Ngese. He told them that the one who was requested to kill was Shaban Hamis and all the plans were told at Magdalena Haji's place and that Shaban was given TZS. 2,300,000/=.

PW3 testified that they arrested Magdalena Haji on 27/2/2020 in Ukanga area at her pharmacy assisted with the task force from Regional Crime Office- Tabora. They orally interviewed her but she denied having participated in the commission of the offence. After three days, he received information from ASP.Miselya that other suspects, (Shaban Hamis and Anitha Mayuma Ngese) were arrested in connection with matter and sent to Tabora. From Adriana's statement, he suspected that they were involved in the plan. The witness tendered a sketch map which was admitted as exhibit "P1".

During cross-examination, he stated that he did not find any weapon from Shaban.

PW4, Hadija Seif testified to this court that on 18/2/2020 around 20 hours while at home the deceased and his sister Adrianna Misonge went to her place. The deceased sat down while his sister sat on the bed. The deceased informed her that his wife wanted to kill him and Shaban was the one who informed him. He said that Shaban has told him to give him TZS. 2,300,000/= so that he cannot execute the murder

since they have grown together. She stated that the deceased said that he cannot give such amount of money. However, PW4 told him to give them money since "*Hela inatafutwa ila Roho haitafutwi*" and she began crying. From that time she never saw him until she received information of his death. She stated that the couple had a dispute and went to her place thrice for settlement.

PW5 G. 8379 Detective Corporal Alex, testified to this court that on 28/2/2020, he was with the task force in Tabora working on the investigation in respect of this case. They were informed by Corporal Paulo Victor Mwizaga about the murder incident which took place at Sikonge. He then directed to investigate and arrest those involved in the murder.

They went to Sikonge Police station and reported to the OCD's office and they were given two officers namely WP. DC. Tumaini, and DC Jumapili to work together. After that, they went to the scene of the crime at the deceased's residence and found a crowd of people and went to investigate on the crime. Upon investigation, they received information from the "informer" that Anitha Ngese had a long-time dispute with her husband due to the illness of their son Frank Festo, whom she alleged that her son had been bewitched by the deceased. PW5 further testified that Anitha Ngese received the information on

the death of her husband and she arrived from Shinyanga during the evening hours and they arrested her. They brought her directly to Tabora since the environment was better than Sikonge. She was interviewed and made her statement to Detective Sergeant Peter. She explained to them that she cooperated with Shaban and Magdalena Haji to plan the death of Festo. She stated that Magdalena Haji knew Shaban and that if Magdalena would be arrested she will be in a better position to find him. On 28/2/2020 they went to Sikonge to arrest Magdalena Haji.

They left at around 10:00 hours and arrived at 11:00 hours. They went to Sikonge police and liaised with Detective Tumaini and Jumapili and informed them what Anitha told them. Then they went to Magdalena's Pharmacy where she works and arrested her at 13:00 hours. After arresting her, they went directly to Tabora police Station at 16:00hrs for interview. He interviewed her and she made her caution statement which was rejected by this court.

PW6 Dr. Andrew Asantiel Elias testified that he examined the body of the deceased who had several injuries. One of them was on his head. On the left side of the head, there was a fracture at his left rib was cut by a sharp object and his head was smashed by a blunt object. The

cause of death was severe bleeding and he filled out a form (PF3) which was admitted as exhibit "P2".

PW7 F.9940 Detective Seargent Peter, testified that on 27/2/2020, he was at Tabora police carrying Anti- Homicide program with Inspector Banda, Detective Baraka and Detective Alex when they received information from RCO- Tabora on the incident of death at Sikonge. As a team, they arrived at Sikonge around 16:00 hours and went to the place of crime. They were also with Tumaini and Jumapili who were the police from Sikonge- Tabora. They started to investigate and received information from their informer that there was a family dispute that led to his death. He was informed that the deceased and his wife had a conflict.

At that particular time, the wife of the deceased was not around but at 18:00 hours she arrived from Shinyanga. Upon her arrival, she was arrested by WP. Tumaini and moved to Tabora police station. He further stated that they commenced the journey around 18:00 hours and arrived at 19:45 hours and the suspect was sent to Tabora central. Upon interview, the accused confessed to having participated in the killing of her husband. That upon the death of their son, she initiated murder and paid the agreed money to the murderer. She stated that she had paid half of the money. She further explained that she asked

her friend Magdalena Haji who assisted to find the killer called Shaban Mtunda who was paid TZS. 500,000/= to carry out the task. He further told this court that in November, 2019 Anitha Ngese managed to pay TZS. 260,000/= to her friend Magdalena who paid Shaban the agreed sum. She stated that after the completion of the task the balance of TZS. 240,000/= was to be paid. The interview ended at 21:20 hours. The caution statement was admitted as exhibit "P3".

PW8, Baraka PF 20153, testified that on 1/3/2020, he was in a task force with a team of 8 police officers at Tabora Region tracing people who kill people with albinism and elders. They were given files to extract and then went to Sikonge to make follow-up on the three killing incidents. While at Sikonge between 22:00 hrs, inspector Banda received a call from OC – CID Sikonge informing them that they had arrested one suspect. Since they were still in the village already they had arrested two people. One suspect was brought and they were 4 people so there were at least 5 people who were then arrested.

They then started to go back to Tabora Central police at 1:00 hrs during the night and arrived at 3:00 hrs with the suspects. Upon arrival at Tabora, they locked them in a cell while they started interviewing others. Among the suspects who were locked up was Shabani Kihiza. He further testified that they interviewed other culprits until morning and

then Shabani Kihinza was taken for an interview at 6:00 hrs in the morning and completed it at 10:00 hrs in the morning. His caution statement was admitted as exhibit "P4" and that marked the end of prosecution evidence.

Having heard the evidence adduced by the prosecution side the court ruled out that, the evidence is sufficient to require the accused persons to give their defence which means the prosecution has established a *prima facie* case against the accused persons and they were given their rights and were given chance to make their defence.

The defence counsel, Ms. Stella Nyaki notified this court that the defence had three witnesses and they did not have any exhibit.

In defence the accused person was featured as DW1 Shabani Khamis Kihiza testified that; he was a resident at Sikonge Mission. He was arrested by OC – CID Mselya, Msota, Zainobi, Zefa and Mayunga on 1/3/2020 at 21.30 hrs at his place and was taken to Sikonge Police station. He stayed at Sikonge for one day and he was brought to Tabora with other 5 suspects who were Seif Mwavyombo, Maude Idabia, Paulo Mtungilo, Chiku Kilomo (Mrs. Mpeziwe). They were sent to the Tabora Railway police station and he was asked to leave some of the stuff he had at the reception and thereafter he was locked up. Thereafter he was tortured and asked to identify the 2nd accused person Anitha d/o

Ngese and the 3rd accused Magdalena d/o Haji whom he did not recognize. He testified that he had no conflict with the deceased because he did not know him. He also denied knowing Adriana Misonge.

He further stated that he never took any money from Magdalena or Anitha. On 13/3/2020 he was taken to the justice of the peace after being tortured and assaulted on his legs and knees. He was sent to the hospital and was stitched, but was never given any medical transcript. He prayed to this court to be set free because he did not kill the deceased.

During cross-examination, he stated that he was not given any transcript from the hospital.

In re-examination, he stated that he met Magdalena and Anitha at the Railway police station.

DW2, Anitha Mayunga Ngese, stated that she started to live with her husband the deceased in 1995 in Iringa and later on in 1997 they moved to Sikonge. His husband was working at Water Authority - Sikonge and they were blessed with two children Frank who is now deceased and Flora is still alive. She stated that she was not involved in the killing of her husband since her son died of common diseases of

typhoid, malaria and UTI and later on, he developed boils on his buttocks. After that, they went to the pharmacy of Magdalena Haji to get medicine and Magdalena supported them. She testified that her son got ill from May, 2019 until he died in October, 2019. She further stated that he had no dispute with her husband even with her in-laws. He was in Mwanza for training on bakery activities (pastry) from 31/12/2019 and returned on 27/2/2020 after she received information on the death of her husband from Mrs. Mpeziwa who was her neighbour and her brother-in-law Alex now deceased. She testified that on 27/2/2020 she arrived at noon in Sikonge from Mwanza while they were at the last respect of her husband. The burial service was conducted at her sister-in-law's place and as she proceeded with the mass during the last respect, she was told by the police to wait and thereafter, she was arrested and taken to Sikonge police. It was on 27/2/2020 around 16:00 hrs when she was accompanied by the police namely Mwala and another Woman Police she could not remember her name and was locked up until the following day around 10:00 hrs. She was then informed to have participated in the killing of her husband. They told her that they have received information from Adriana Zakayo Misonge who is her sister-in-law. On 28/2/2020, they were taken to Tabora police Railway around 18:00 hrs and were locked up. On 29/2/2020 at 11:00 hrs, Corporal Jumapili came and informed her that

her husband's family suspected her of killing Festo Misonge. She was then taken to the room and was tortured but she denied knowing Shabani. On 2/3/2020 she was taken from the cell to identify Shabani whom it was her first time seeing him. Thereafter, she was forced to sign and was sent to central police and thereafter she was taken by the police called Chagalawe to the justice of the peace at the Primary Court where she showed her how she was assaulted. Until now she had not seen the extra-judicial statement. She also testified that her husband had a dispute with Seif Mavyombo on their business since he owed Seif some money and they had a case at Sikonge Primary Court on the date of his death. On 16/3/2020 she was arraigned in court for a murder case that she didn't know.

During cross-examination, she stated that while her husband was killed on 26/2/2020 she was in Mwanza from 31/12/2019. She also told the court she had no dispute with her in-law.

DW3, **Magdalena Haji Simtitu** a resident of Sikonge – Madukani and a nurse who used to work at the Mission but later on, she opened her pharmacy at Madukani Sikonge was a last witness. She testified to the court that she knew Anitha Ngese through the treatment of their son, who was sick and had a wound on his buttocks. She further testified that Anitha Ngese went with her husband asking for treatment for their son who could not move. She went to their place and advised them to

take him to the hospital where at the hospital they were advised to use hydrogen and Eusol. She treated him for 2 weeks while they were still taking him to the hospital.

She further stated that she was never told by Anitha Ngese if they had a dispute with her husband. She further stated that she was arrested by PC Jumapili on 27/2/2020 at 1:00 hrs and she was taken to the police station, then Chiku Kilomo (Mrs. Mpeziwe) was arrested at 18:00 hrs.

During cross-examination, she stated that she was arrested because she was a friend to Anitha Ngese. In general, the accused persons disassociated themselves from the offence leveled against them. They prayed for their acquittal.

That marked the end of both prosecution and defence evidence.

Both counsels did not wish to make the final submissions after closing their cases.

Essentially the burden of proving the guiltiness of the accused persons lies with the prosecution and the standard set is beyond a reasonable doubt. These principles are meant to ensure that no innocent person is convicted of freak or flimsy evidence. This Court is moved to determine whether the prosecution proved the case *beyond reasonable doubt* that the accused murdered the deceased. In answering this major issue, it is pertinent to address some legal issues involved in this case.

First, this is a criminal case that must be proved beyond reasonable doubt. The requirement is stipulated under **Section 3 (2) (a) of the Evidence Act, Cap. 6 [RE 2019]**. The section reads:

'A fact is said to be proved when—

*(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the **prosecution beyond reasonable doubt** that the fact exists;'*

The above position is also stated in the case of **Hemed v. Republic [1987] TLR. 117** where the Court held that:

'...in criminal cases, the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities.'

Second, the prosecution has the onus of ensuring that the offence is proved to the required standard. The stance was fortified in the case of; **Mohamed Matula v. Republic [1995] TLR. 3** where the Court insisted that:

'Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.'

Third, the accused is charged under section 196 of the Penal Code, Cap. 16[R.E 2022] which establishes the offence of murder. It is therefore pertinent for the elements of the offence to be proved before a conviction can be entered against the accused. The section provides:

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

Four elements must be proved for the offence of murder to stand:

- i. There must be the **death** of a person;
- ii. Death must be a result of an **unlawful act** or by an **unlawful omission**;
- iii. It must be proved that the **accused** is the one who killed;
- iv. The killing must be preceded by a pre-meditated evil intention (**malice aforethought**).

This court has found the issue to be determined in this court is whether the evidence adduced by the prosecution side has managed to establish their case to the required standards. If the answer will be in the affirmative the next issue is whether they caused the death with malice aforethought.

On the **first** ingredient, the prosecution evidence did not leave a gap on whether **Festo Misonge** died. There is no dispute that the deceased died a violent death which was unnatural. The evidence has proved that

the deceased was killed by an unknown murderer on the night of 26/2/2020. This was also supported by the postmortem report which was admitted as "P2" and the prosecution witnesses PW1, PW2, PW3, PW4 and PW5 who testified before the court.

Basically, the issue is who did the act of killing and whoever is responsible for that act must be proved by the prosecution that has done so with **malice aforethought**.

In determining whether the prosecution proved the case against the accused persons to the required standards, I would like to analyze the above ingredients vis a vis the available evidence.

On the **third** ingredient as to whether it is the accused persons in the dock who killed the deceased person. Admittedly, there was no direct evidence in the instant case, to implicate the accused in the charged offence of murder but purely based on circumstantial evidence and their confessions. The issue for determination is **whether it is the accused persons**, who caused the death of the deceased, *Festo Misonge*.

Upon my triangulation of the evidence on record, I have formed my mind that the entire case revolves around issues of credibility of evidence, circumstantial as well as repudiation of the caution statement

I will commence with credibility. From the record, there is no direct evidence of a witness who identified the actual person who killed the deceased. In her evidence PW2, Adriana Zakayo was open that she did not identify the attacker save that she merely was told by Shaban formerly while she was with the deceased Festo Misonge. Also PW4, Hadija Seif was told by Adriana Misonge and Festo Misonge on 18/2/2020. Also, PW2 put it clear that before the death of her brother Festo, they had a dispute with his wife as well as with another man called Seif Mavyombo. PW2 revealed that upon seeing the death of his brother she called Shaban who went to the place of the gathering and she asked if he was the one who conducted the killing but he denied having been involved. It follows therefore that the accused person was arrested on account of suspicion and implicated with the death of the deceased. It is a settled law that suspicion no matter how strong it is cannot ground a conviction. This position of law was celebrated in the case of **Nathaniel Alphone Mapunda and Benjamin Alphonse Mapunda V Republic [2006]TLR No. 403 as well as MT 60330 PTE Nassor Mohamed Ally V Republic V R, CAT, Criminal Appeal No.73/2002 DSM Registry(Unreported)** in this case it was held that;

" Suspicion however grave is not a basis for a conviction in a criminal matter."

On whether the above-explained circumstance irresistibly points to the guilty of the accused person, the answer is definitely “no” because the chain of evidence is not connected and there is no other possible explanation. Particularly this was not proved that the 1st accused person disappeared as the prosecution put it.

During the trial, the prosecution never tendered any weapon to support the killing. As it was held in the case of **Republic v Kerstian Cameron**[2003] TLR at page 87; To ground a conviction on circumstantial evidence, the following principles apply:

- a) That evidence must be incapable of more than one interpretation.*
- b) The facts from which an inference of guilt or adverse to the accused is sought to be drawn, must be connected with the facts from which the inference is to draw or inferred.*
- c) In murder cases, evidence should be cogent and compelling as to convince a jury, judge or court that upon no rational hypothesis other than murder can the facts be accounted for”.*

A conviction can be based solely on circumstantial evidence where the said evidence irresistibly leads to the inference that it was the accused and nobody else who committed the offence.

In the present case, as revealed already that the circumstances leading to the arrest of the first accused person were surrounded with suspicion and previous words narrated by him to Adronia Misonge thus such evidence is not cogent and plausible. If this could be true I think PW2, Adonia would be the first one to tell the police about that and the arrest of other people would not take place.

Coming to the issue of the *confession of the accused caution statements*, the law is clear that generally, the reliability or otherwise of a statement regarded as a confession is based on the assumption that it was made and, further that it was voluntarily made. In the case at hand, the caution statements of Anitha Mayuma Ngese and Shaban Khamis Kihiza had been repudiated when tendered. This court is seriously warned of the danger of relying on the confession of the accused person especially if such confessions were repudiated or retracted. The court in the case of **Kashindye Mei v Republic** [2002] TLR 374 stated that;

"It is now settled law that although it is dangerous to act upon a repudiated or retracted confession unless such confession is corroborated, the court may still act upon such a confession if it is satisfied that the confession could not but be true."

As a matter of law concerning retracted confessions, I am aware that the rationale is that, depending on the circumstances of the case, a conviction can be founded on such a statement after the court has properly directed itself on the evidence and is satisfied with its truthfulness. The case of **Hatibu Gandhi and others versus the Republic** [1996] TLR 12. Also, in another case of **Tuwamoi Versus Uganda** (1967), EA 84 at page 91 quoted with approval by the Court of Appeal of Tanzania in the case of **Umalo Mussa versus Republic, Criminal Appeal No. of 2005 (Unreported)**, stated that;

"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true."

It is however dangerous to act on uncorroborated retracted or repudiated confession. In the case of **Hemed Abdallah versus Republic** [1995] TLR 172.

Under the principle of law stated in the above case, where the confession of the accused persons has been retracted or repudiated, to base a conviction on such a confession must pass three important tests, **first**, the confession must be *corroborated by other independent witnesses*; **second**, the confession must be established that the *maker*

*made it of his free will; and **thirdly**, its central theme is believed to be nothing but the truth. It is therefore pertinent at this stage to examine the truth or otherwise of the caution statement of the accused persons.*

I wish to highlight some key statements in the caution statement of the accused persons.

The first accused, **Shaban Kihiza** stated that;

“Kesho yake kweli tukakutana tena palepale kwenye duka la Magdalena muda wa mchana na ndipo huyo mama Anitha Ngese akawa ameniambia kuwa yeye ndiye ameniita pale na ana shida kwamba Magdalena Haji ambaye ni rafiki yake amemwambia kuwa mimi ni mwenyeji wa pale sikonge pia nina uzoefu wa kufanya mauaji hivyo anaomba nimsaidie kwenda kumuua mume wake aitwaye Festo Misonge kwani huyo mume wake amehusika kumuua mtoto wake wa kumzaa kwa kumtoa ndagu ya madawa ya kienyeji...” Hatimaye nikawa nimepewa kiasi cha sh 500,000/= kama pesa ya kuanzia kumuua mume wa Anitha Ngese nilifanya mawasiliano na Anitha Ngese akiwa amekwenda huko Shinyanga na kumwambia anipe TZS 4,500,000/= na mawasiliano yote haya yalikuwa yakifanyika kwa kupitia simu ya Magdalena Haji na akawa amekubali kabisa...”

The second accused, P3 **Anitha Ngese** stated in her caution statement that;

"Niliamini kabisa kwamba mume wangu ndiye anayemloga mtoto na ndiyo maana hatoi ushirikiano wa kutosha kwenye matibabu hivyo nilikasirika na kufikiria kumuua mume wangu ili nisiendelee kumuona wakati mtoto akitaabika. Hivyo niliamua kumpigia simu rafiki yangu kipenzi aitwaye Magdalena Haji @ Magda na kumshirikisha jambo hili la kumuua mume wangu ambapo aliniunga mkono huku akisema yeye ana mtu anayeweza kumtafuta kwa lengo la kumuua mume wangu baada ya kukubaliana hayo mwezi oktoba, 2019 nilirudi kwangu Sikonge toka shinyanga na mtoto wangu na ndipo baba yake na mtoto alimtafuta mganga wa jadi mwingine na kuendelea kumtibu na yeye alinieleza kuwa mtoto amelogwa na baba yake kwa kushirikiana na ndugu zake na mwezi huo huo nilikwenda kwa rafiki yangu Magdalena na kumwomba anitafutei muuaji....siku moja kupita Magdalena aliniita dukani kwake na kunikuta akiwa na Shaban Mtunda na kunitambulisha kwa ajili ya kazi yangu. Nilizungumza na Shaban tulikubaliana TZS 500,000 kwa muda huo sikuwa nazo nilimwahidi kumtafutia pesa hiyo. Mwanzoni mwa mwezi wa 11 /2019 nilipata nikampatia 260,000 Magdalena Haji ili ampatie Shaban na huku nikimuahidi baada ya zoezi hilo la mauaji kuisha nitamalizia pesa iliyobaki TZS240,000/=

Magdalena alipokea pesa hiyo tukiwa nje ya nyumba yangu. Tarehe 11/11/2019 Frank Festo alifariki . Baada ya mazishi niliondoka na kwenda nyumbani shinyanga huku nikiendelea kuwasiliana na Magdalena haji namna ya kutekeleza mauaji hayo.

Having navigated through the caution statements of both parties' evidence over again yet, I noted that the statements are not true. I have not come across independent evidence to corroborate the exhibit; in his defence the 1st accused Shaban testified to this court that he made the statement out of free will and wanted to call his witness the justice of the peace who recorded him but the prosecution objected to the prayer since he was among the list of prosecution however he could not be brought in court. This court has considered the evidence of defence and noted that putting these surrounding circumstances into consideration, it cannot be held with certitude that the caution statement was made by the accused person voluntarily as required under section 27 of the Evidence Act, Cap 6[R.E 2022]. Suffice it to say that, if the accused person repudiated his statement, it will not be safe to rely on it unless it is corroborated with independent evidence. This was also held in the case of **Ali Salehe Msutu V R** [1980] TLR No. 1 where it was stated;

" It has long been established as a rule of practice in East Africa, including in this country that repudiated confession, though as a matter of law may support a conviction, generally requires corroboration as a matter of prudence as is in the case with a retracted confession."

Again, in **Ndorosi Kudekei vs The Republic, Criminal Appeal No.318 of 2016- CAT Arusha**, (unreported), the Court held:

"The trial court should accept any confession which has been retracted or repudiated or both the retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all circumstances of the case; the confession is true.

Since the statements of Shaban Kihinza and Anitha Ngese were not corroborated by the prosecution witnesses, especially on an extra-judicial statement in which the 1st accused and second accused complained. It is trite law that evidence that needs corroboration cannot corroborate another evidence that needs corroboration itself, see **John Cherehani and Another v. Republic**, Criminal Appeal No. 189 of 1989 (Unreported) (CAT). 1. This principle was also enunciated in the case of **Ndorosi Kudekei v R, Crim. Appeal No 318 of 2016, CAT** that;

"What was placed before the court in evidence was the cautioned statement only exhibit P1, whereas the whereabouts of the extra-judicial statement which was made to the justice of peace was nowhere to be seen. With the absence of the extra-judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant really confessed to having killed the deceased or not."

I am aware that, although there is no rule of law or practice making corroboration of a retracted confession essential; in this case at hand/ corroboration of a retracted confession is desirable by independent evidence as no other evidence points to the accused as having been identified as one who committed the crime herein.

Besides, their testimonies corroborated each other. In the case of **Aziz Abdalah Versus R [1991]**, TLR 71 the court observed that ;

"The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect of or incredible but only to confirm or support that which is sufficient and satisfactory and credible."

In this regard, therefore, I hesitate to rely only on the caution statements of the accused persons without having oral or extrajudicial

to corroborate each other. It is difficult to believe in the circumstances if the accused persons had voluntarily made the confession contained in the cautioned statement. If so, why did he not be brought before the justice of the peace? This question was asked by this Court in **Samson Kadeya Kazeze V R** Criminal Appeal No. 137 of 1993 (unreported) where a suspect was also alleged to have confessed in a cautioned statement but declined to do so before a justice of the peace. The court directed that such a statement ought not to have been admitted and/or taken with caution.

Having assessed the caution statements, therefore, the question of at what time accused persons can be said to have formed a ***common intention*** to commit an offence was well articulated in the case of **Godfrey James Ihuya versus R [1980] TLR 197 CAT.**

It is evident from the record that there is no direct evidence linking the 1st accused Shaban Kihinza, 2nd Anitha Mayuma Ngeze and 3rd Magdalena Haji Mtitu with the offence. There is no evidence that the accused persons were present and directly participated in the murder of Festo Misonge. In her evidence PW2 Adriana Misonge who testified to this court stated that Shaban and Festo Misonge went to her place to inform her of the plan, I doubt such a story as it is also a principle that a trial judge is better placed to assess the credibility of the witness as she

is in a position to grasp the inconsistencies to assess the demeanor and the flow of evidence from the said witnesses. See **Goodluck Kyando Vs The Republic**, Criminal Appeal No .118 of 2003 CAT Mbeya (Unreported). In this trial, I am the one who heard and recorded the evidence of PW2, Adriana Misonge who during the cross-examination she stated that they never reported the matter of killing to any body except to her mother. I also see doubts in this case when PW2, stated again that when she found her brother died she called Shaban Kihiza who denied having killed the deceased. In my understanding I would have thought as the witness she could have mentioned him at the earliest opportune but it was never than until Seif Maviombo was also arrested. It is a principle enunciated in the case of **Marwa Wangiti Mwita and Another v Republic**[2002] TLR 39. In this case, PW2 called him and later he left. Regarding whether the evidence was suspicious or not, it is the principle of the law as held in the case of **Jeremiah John and 4 others v Republic**, Criminal Appeal No. 416 of 2013 CAT –Bukoba (unreported) that;

“It is trite law that a suspicion, however strong, cannot be a substitute for proof beyond reasonable doubt”

As to the third accused Magdalena Haji Mtitu. In this case, there is no evidence from the prosecution of the accomplice. However, no

person can be convicted solely based on the confession of the co-accused. The confession must be corroborated by independent evidence. A mere fact of being mentioned in the statement does not implicate a person.

Therefore, to sum up, the offence of murder under which the accused persons stood charged is a serious offence carrying the capital sentence of death by hanging. In that regard, for one to be held culpable, the prosecution has to establish its commission beyond reasonable doubt. In the light of the shortfalls I have endeavored to illustrate above, it is evident that the threshold of establishing the commission of murder by the accused persons was not met and the doubts which have been expressed have to benefit them.

Considering the circumstances of the case, the evidence adduced by the prosecution and the analysis alluded thereto, it is now my considered view that the prosecution has failed to prove the case to the required standard. Having warned myself on the dangers of convicting only on the accused persons confession statements. In the upshot, the accused persons are hereby acquitted unless held for other lawful cause.

Order accordingly.



A. BAHATI SALEMA

JUDGE

14/12/2022

Right of appeal fully explained.



A. BAHATI SALEMA

JUDGE

14/12/2022

