

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
AT MBEYA  
CRIMINAL SESSION CASE NO. 67 OF 2020  
REPUBLIC**

**VERSUS**

- 1. EPHRAIM LINUS SHIPINDI**
- 2. BARAKA JAPHET NGELA**
- 3. HURUMA SASTON LWENJE**
- 4. RAPHAEL ANDALWISYE MWENGA**
- 5. JOSHUA SEPHANIA TUSIWE**
- 6. ANTHONY INNOCENT MWENGA**

**JUDGMENT**

Dated: 5<sup>th</sup> & 15<sup>th</sup> December, 2022

**KARAYEMAHA, J**

Incidents where one would wish their narratives are mute and not real are not uncommon. They impose threatening memories and deep grief in the mind and soul. Facts of this case tell such a story and instill fear. It is a story that was eloquently told by Leonard Muyatengile Kandonga (PW1) and Raphael Ramso Mwampashi (PW4). PW1 is a father Recho Leonard Kandonga (the deceased) who was murdered on 4/12/2018. She was a form two secondary school student. The incident

took place at Mbagara area Tunduma Township at about 19:07 hours.

Briefly, the facts of the case are that:

On 04/12/2018 PW1 was weeding his vegetable garden at about 19:07hrs. The deceased approached him and sought for TZS. 2,000/= to buy two exercise books. PW1 gave her that money. She then went to the shop. After almost five minutes, PW1 heard a gunshot at the shops area. Failing to suppress his eagerness, he run to the direction he heard the gunshot. When he got at the scene of crime, he heard people saying "*aliyepigwa risasi ni mtoto wa kandonga.*" He witnessed the deceased injured and saw blood thereat. Good Samaritan helped the deceased and took her to Tunduma health center via the Tunduma Police Station by a motorcycle. Nevertheless, the wound was fatal and due the excessive bleeding the deceased passed on.

The story from the prosecution evidence reveals further that the deceased was not a target. The bandits' target was to rob PW4, the M-pesa businessman. On the same date PW4 was from the shop located at Mwaka stand- Tunduma Township at about 19:00 hours. He was tracked from the moment he closed the shop up to when he got near UWATA church. It was at that place where two bandits invaded him. One of them ordered him to squat and the other said "*piga.*" He then heard a

gunshot and it was through that violence his small bag whose contents were two mobile phones make Itel and Tecno and cash TZS. 250,000/= respectively, were stolen. According to PW4, he managed to escape by running to the nearby house.

It was the prosecution case that one bullet hit the house PW4 entered in and the other hit the deceased. It appears that the bullet penetrated from the left rib to right rib as per PW1's testimony. The incident was instantly reported to Police Tunduma.

As is usually the case, murder is proved when it is established that a person killed another person with malice aforethought. In this case the deceased had a wound on his left ribs due to a gun shot which pierced to the right-side ribs. It goes without saying that even if no expert report, bleeding was severe. Therefore, her death was unnatural and was caused by wounds which led to a severe bleeding. In view thereof, actus reus was proved.

The most crucial question in this case is whether the murderers had malice aforethought.

It is now categorical that the bandits did not intend to kill the deceased. Their intention was to rob PW4 but in implementing their plan, they shot the deceased dead. A note worthy point is that in this

regard, the law is clear that a person who uses violent measures in the commission of a felony involving personal violence does so at his/her own risk and is guilty of murder if these violent measures result in the death of the victim. In other words, if death is caused by an unlawful act in the furtherance of an intention to commit an offence malice aforethought is deemed to be established. See, **Fadhili Gumbo @ Malota & 3 others vs Republic** [2006] TLR 50.

What constitutes malice aforethought or intention to kill is well defined by laws, literature and decided cases. According to the Black's law dictionary, malice aforethought is defined as:

*"A pre-determination to commit an act without legal justification or excuse... An intent, at the time of killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life: but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed."*

Section 200 of the Penal Code Cap 16 R.E. 2022, specifically, paragraphs (a) (b) and (c) clearly gives scenarios under which malice aforethought can be established by evidence proving one or more of the following circumstances:

*"200. Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances-*

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years*

In the instant case, the criminal principles dictate that provided that the bandits intended to shoot, there was a probable consequence to cause death. In view of the evidence before me, the bandits intended to kill PW4 but killed the deceased. They had knowledge that the act causing death would probably cause the death of PW4, and it doesn't matter whether PW4 was actually killed. Therefore, the bandits are responsible for their act. I find, therefore, that this is a case of transferred malice. In this case malice aforethought was established in that death occurred in the course of committing the armed robbery in question.

The issue for determination now is whether the accused persons were the ones who murdered the deceased.

The prosecution case is that it was the accused persons who shot the deceased dead in the commission of the armed robbery. Let me now revisit the evidence albeit in a nut shell.

F.1470 D/SGT Adonick a Policeman at Tunduma Police Station attended the scene of crime between 19:00hrs to 20:00hrs on the same date with other Police Officers led by ASP Michael Sabai, the then Momba OC-CID. When they got at the scene of crime, they found PW4 but were informed that the deceased was injured and taken to Tunduma health center. When he got at the health center, he was told that the deceased had died. He did not go to the mortuary to cross check. Later, he was appointed by the OC-CID to conduct investigation of this case. It was his further evidence that on 6/12/2018 he interrogated the 5<sup>th</sup> accused person who admitted through the cautioned statement (exhibit PE2) to commit the offence and mentioned Anthony as the owner of the gun they used in commission of the offence and Raphael @ Asukile as his accomplice. He admitted while responding to cross-questions that no witness mentioned Joshua.

Leonard Kazimzuri (PW3) a Resident Magistrate of Tunduma Primary Court recorded the 5<sup>th</sup> accused's extra-judicial statement (exhibit PE3). According to PW3, the 5<sup>th</sup> accused person admitted to commit the offence and mentioned Raphael and Shuku as his companions. It was through exhibit PE3 where the 5<sup>th</sup> accused mentioned Raphael as a shooter. But didn't mention Anthony.

Assistance Inspector Julius Sekuba Mkemi (PW5) worked in the RCO's office in Songwe Region. After getting information on 4/12/2018 about the incidents of murder and armed robbery, he and other police officers rushed to the scene of crime after concerting and meeting the Momba OC-CID. He also inspected the scene of crime. Upon conducting deep investigation, they managed to arrest the 5<sup>th</sup> accused person with a mobile phone suspected to be stolen during the incident of armed robbery. According to him, the 5<sup>th</sup> accused person mentioned Raphael Mwenga (4<sup>th</sup> accused person) and Shukuru @ Shuku after his arrest. He testified further that he was among the police officers who arrested the 4<sup>th</sup> accused person at Mlowo Township on 30/4/2019.

A police officer with force number G7118 D/CPL Masenga (PW6) recorded the 2<sup>nd</sup> accused person's cautioned statement (exhibit PE4). According to PW6 the 2<sup>nd</sup> accused person confessed to commit murder

with Ephraim and Huruma. Responding to cross-examination questions, PW6 said that the 2<sup>nd</sup> accused informed him that they hired a gun they used on the incident date from Huruma @ Bomba.

F.5517 D/CPL Joseph testified as PW7. It was him who recorded the 4<sup>th</sup> accused person's cautioned statement (exhibit PE5). PW7 said that the 4<sup>th</sup> accused person admitted his involvement in the incident of armed robbery which resulted into a killing of a child. According to PW7 the 4<sup>th</sup> accused person told him that the incident took place in Msasani Ward and mentioned Joshua and that he hired a gun from Anthony.

Of interest, PW2, PW5, PW6 and PW7 candidly informed the court that in mentioning each other the accused persons mentioned one name and did not describe each other to ease the arresting process.

The foregoing facts reveal how the accused persons were arrested after some were mentioned by their colleagues and eventually being charged with the offence of murder contrary to sections 196 of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2022). The indictment is that on 4/12/2018 at night times at Mbagala area Tundumba Township within Momba District in Songwe Region, the accused persons jointly and together did murder the deceased.

They denied the information of murder. Their respective defences were radically different from the prosecution's evidence. Whereas the 1<sup>st</sup> accused defended himself that he was arrested for buying stolen properties, the 2<sup>nd</sup> accused testified that he was arrested at his work place (shop) at Las Vegas, taken to police and forced to tell the police where their gun was. Similarly, the 3<sup>rd</sup> accused's defence was that he was arrested of selling smuggled oil and was required to mention his counterparts during interrogation. The 4<sup>th</sup> accused person defended himself that he was arrested on 15/4/2019 for importing pombe from Zambia to Tanzania without a permit. But because he had caused loss to PW7 of TZS. 7,000,000/= he was given to buy crops, paid TZS. 3,500,000/= and failed to pay the remaining TZS. 3,500,000/= he imputed on him a murder case. The 5<sup>th</sup> accused's defence was that he was arrested on 02/01/2019 for the offence of vagrancy but when he was taken to court on 13/01/2019 he was charged with murder. The 6<sup>th</sup> accused told the court that he was arrested on 04/05/2019 at Sumbalwela village which is in Mbozi in Songwe Region for corrupt acts. After that charge was withdrawn, he was charged with murder. He denied to own a gun and since he was on annual leave, he had no access to it.

Having closely and critically examined the prosecution evidence, two facts are patently clear. **One**, no single prosecution witness identified the accused persons at the scene of crime. Therefore, the prosecution evidence is circumstantial. **Two**, the prosecution's case hinges on the cautioned statements of the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused persons (PE5, PE4 and PE2 respectively) and the 5<sup>th</sup> accused's extra judicial statement (exhibit PE3). It is crucial to note here that the exhibits PE2, PE3 and PE4 were retracted and or repudiated. Undeniably, it is a settled principle of law in our jurisdiction, which may need no authority to prop it up that retracted or repudiated confessions generally require corroboration. I am not alone in this position. The case of **Ali Salehe Msutu vs. Republic** [1980] TLR 1 strengthens it. The Court of Appeal held that:

*"A repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted."*

Even where exhibit PE5 was not retracted or repudiated, as a matter of law it needed corroboration.

The vexing question as hinted earlier is who then killed Rachel Leonard Kandonga? The evidence on record does not give me many

options. It points unerringly to only the accused persons. The Republic has urged me to hold that it was the accused persons who killed the deceased with malice aforethought. It has relied on circumstantial evidence.

Our jurisdiction is replete with authorities which dictate that conviction must only be found on circumstantial evidence, if such evidence irresistibly leads to the conclusion that it is the accused, and no one else, who committed the crime. In other words, the indictable facts must not be capable of any other interpretation than that the person in the dock is guilty of the offence charged. In ***Republic vs. Sadrudin Merali and Umedali Merali***, Uganda High Court of Criminal Appeal No. 220 of 1963 (unreported) Sir Udo Udoma, C. J. accurately observed as follows:

*"... it is no derogation to say that it was so for it has been said that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by undersigned coincidence is capable of providing a proposition with the accuracy of mathematics."*

The same position was expressed in the case of **Seif Seleman vs Republic**, Criminal Appeal No. 130 of 2005 CAT (unreported) that:

*"Where evidence against an accused person is wholly circumstantial, the facts from which an inference adverse*

*to the accused is sought to be drawn must be clearly connected with the facts from which the inference is to be inferred. In other words, inference must irresistibly lead to the guilty of an accused person."*

Let me now consider circumstances in which the accused persons were arrested. The objectives are two. **Firstly**, is to ascertain whether there is a connection between the arrested and charged accused persons with the commission of offence. **Secondly**, to ascertain whether there is evidence connecting them with the commission of the offence.

It all started with PW5. In his evidence, he informed this court that on 06/01/2019 at about 9:00hrs arrested the 5<sup>th</sup> accused person. In the process they seized a mobile phone make Tecno stolen during the commission of the offence. Unfortunately, however, he did not tender it as an exhibit. I have already demonstrated hereinabove that no accused person was identified at the scene of crime. In circumstances of this nature, PW7 was required, in my considered view, to shed light on the factors that made him and other investigators to single him out and arrest him. However, PW7 did not give details on how he discovered that the 5<sup>th</sup> accused was involved in the commission of the offence. In

my view the most important stage was jumped. His story has no explanations of the initial steps taken but starts in the middle.

It is learnt from the evidence of PW2 and PW5 that the process of arresting the 5<sup>th</sup> accused was facilitated by the mobile phone through the assistance cyber crime unit. Apart from the fact that neither the said mobile phone was tendered as exhibits nor was any expert from cybercrime unit was produced to testify, exhibit PE2 indicates that after the armed robbery incident, the 5<sup>th</sup> accused was given a mobile phone make Tecno which he sold to Mwile Hanonga at a price of TZS. 10,000/= after 4 days. This means the phone was sold on 8/12/2018 after the incident which occurred on 4/12/2018. PW5 testified that they found him with it. Although PW5 is entitled to credence in view of the principle enunciated in the famous case of **Goodluck Kyando vs Republic** [2006] TLR 363, in view of exhibit PE2 I have strong reasons not to. As pointed out, the mobile phone left his hands four days after the commission of the offence. It was thus impossible to find him with it because it was with Mwile Hanonga. Given the seriousness of this offence, I find it was imperative for Mwile Hanonga to be called to explain when and under what circumstances he returned back the

mobile phone after buying it to the 5<sup>th</sup> accused and what were the reasons.

Apart from that the evidence indicates further that upon his arrest, the 5<sup>th</sup> accused person confessed before PW2 through exhibit PE2 and to PW3 through exhibit PE3. These exhibits indicate that the 5<sup>th</sup> accused person mentioned Shukuru @ Shuku and Raphael @ Asukile. Shukuru was not arrested and brought to justice. Raphael @ Asukile is said to be the 4<sup>th</sup> accused. I am not sure if the 4<sup>th</sup> accused person was the one mentioned by the 5<sup>th</sup> accused in his cautioned statement and extra judicial statement. I say so because the 2<sup>nd</sup> accused simply mentioned Raphael Asukile. But the arrested and charged person is Raphael Andalwisye Mwenga. The prosecution evidence does not shed light on where they got the two last names, who gave them those names and who described him to them. Even if they had an informer, he had to have full particulars and description of the culprit to avoid pointing at a wrong person.

The prosecution evidence indicates further that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were arrested on 17/12/2018. PW2 testified that after arresting them, they interrogated them and admitted to commit murder

in the course of robbing PW4. PW2 testified further that on 30/4/2019 the 4<sup>th</sup> accused was arrested.

In the light of the evidence as whole, I find as a matter of fact that there is no evidence on how the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> accused persons were traced and arrested and finally connected with the charged offence. PW1 who testified that he saw the 1<sup>st</sup> accused running on a different direction from where the sound of a gunshot was heard, admitted during cross-examination that he did not mention the 1<sup>st</sup> accused to police officers. He only saw him after the police had called him with an intention of showing the murderers of his child. At any rate of imagination, there is no plausible explanation indicating what made the investigators to connect the 1<sup>st</sup> accused with the incident of murder. The 1<sup>st</sup> accused was not mentioned in exhibit PE2, PE3 and PE5. He was mentioned in exhibit PE4 by the 2<sup>nd</sup> accused. However, it is in evidence that these two were arrested on the same day. PW2 failed to inform the court if they were arrested on different hours. In the same line of argument, the prosecution evidence does not clearly indicate what information triggered the police to arrest the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons.

Regarding the 6<sup>th</sup> accused person, the evidence is clear that he was mentioned by the 5<sup>th</sup> accused person to be the one giving them a gun which they used in the commission of crimes. This is reflected in exhibit PE5. However, exhibit PE4 bears a very sharp contradiction. It says that the gun they used on 04/12/2018 belonged to Huruma @ Bomba. Similarly, there is no evidence from the prosecution side intimating Huruma @ Bomba is the same person to Huruma Saston Lwenje.

I think the police investigators had an extra duty of getting more details about Baraka, Huruma, Raphael and Joshua. It is the obvious line of investigation which the police were expected to pursue. The concrete evidence would assuage the community that those mentioned in exhibits PE2, PE3, PE4 and PE5 were the same bandits who murdered the deceased. Unfortunately, the police for incomprehensible reasons, did not do what they could have easily done, that is, make struggle to get proper names and descriptions of the mentioned people. My conclusion is that in the light of the prosecution evidence, the arresting of the accused persons was just a guesswork.

I have tried to look for any other evidence to corroborate the repudiated and or retracted confession and I am unable to find any.

Now, in the light of the prosecution evidence, it is crystal clear and I am satisfied that the prosecution evidence in total does not corroborate the cautioned statements and extra judicial statement.

All the same, the evidence adduced does not graduate the test of circumstantial evidence set forth in the case of **Republic. vs Kerstin Cameron** [2003] TLR 105 that:

- (a) Evidence must be incapable of more than one interpretation;*
- (b) In a case where the evidence against the accused is wholly or exclusively circumstantial the facts from which an inference of guilt or adverse to the Accused sought to be drawn must be proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred: and*
- (c) That 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.*

It is, therefore, dangerous to rely on such evidence and mostly on cautioned statements and extra judicial statement to convict the accused persons unless they are established to be true. This view was adopted in the case of **Kashindye Meli vs The Republic** [2002] TLR 374 where it was held that:

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

I have dutifully studied the statements. In the whole they bear contradictions. Exhibit PE2 indicates that the offence was committed by three bandits at Mbagala street near Uwata Church by Raphael @ Asukile and Shukuru @ Shuku. Exhibit PE3 is clear that the 5<sup>th</sup> accused person did not know the person they planned to invade but in exhibit PE2 he said he knew him properly. With regard to exhibit PE4, it is clear that the 2<sup>nd</sup> accused confessed that the gun they used to kill the deceased on 4/12/2018 belonged to Huruma @ Bomba and was the one keeping it. The contents of this exhibit contradict the contents of exhibit PE5. Through it the 4<sup>th</sup> accused person told the police that he got the plan to steal from PW4 on 04/12/2018 at about 17:00 hours. He then made arrangements to get a gun from the 6<sup>th</sup> accused person who was in Mbeya. He travelled and found the 6<sup>th</sup> accused at Ngorongoro guest house at the carwash section. He collected the gun and returned to Tunduma. At about 19:30 hrs he met Joshua and Shukrani @ Shuku at Mwaka uwanjani. Thereafter they went to Msasani area where they

committed the offence. Undisputedly, this confession is unbelievable. It is impossible for a person to travel from Tunduma to Mbeya and return to Tunduma within 1<sup>1/2</sup> hrs, that is one. **Two**, it is not clear where the gun used was gotten from. Was it hired from Huruma @ Bomba or the 6<sup>th</sup> accused person. **Three**, places where the crime was committed differs from exhibit PE2, PE3 and PE4 to exhibit PE5.

In view of the clear contradictions, I am prepared to hold that statements tendered as exhibits are not truthful statements and no weight can be attached to them in proving the accused persons' guilty. The prosecution simply fell into the trap and did not smell these contradictions before tendering them as exhibits.

I am further guided that, basic principles necessary for ascertaining weight to be accorded to the confessional statement should be as those stated in the case of **Juma Magori @ Patrick & 4 others vs The Republic**, Criminal Appeal No. 328 of 2014 (unreported), to be (a) is there anything outside it to show that it is true? (b) Is it corroborated? (c) are the factors stated in it true as can be tested? (d) Was the accused the man who had the opportunity of committing the offence? Is the confession possible (f) is it consistent with other facts which have been ascertained and proved.

Flowing from the discussion above, I am of the settled mind that the cautioned statements cannot be acted upon because they are not true for containing varying and unrealistic stories.

Needless to say, these are discrepancies in the prosecution evidence. The question however, is what impact do they have on the prosecution's case?

The settled position is that discrepancies and inconsistencies in the testimony have an adverse impact if the same are fundamental. Discrepancies which are of remote effect are of no consequence and ought to be ignored. In **Luziro s/o Sichone vs. Republic**, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

*"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."*[Emphasis supplied]

In **Mukami w/o Wankyo v Republic** [1990] TLR, the Court of Appeal took the similar view that contradictions which do not affect the central story, are considered to be immaterial. See also: **Bikolimana s/o Odasi @ Bimelifasi v. Republic**, Criminal No. 269 of 2012 and

**Chrizant John V. Republic**, Criminal Appeal No. 313/2015 (both unreported).

My unfleeting assessment of the discrepancies and contradictions pointed out, brings me to a conclusion that the same are in the category of substantial discrepancies which affect the central story given by crucial prosecution witnesses and documentary exhibits. The central story in this case is the accused persons' involvement in planning to commit armed robbery and in executing it they killed the deceased. I am increasingly of the considered view that such a story has been neutralized by the highlighted variances. Their role in the commission of the offence has not been laid bare and the accused persons managed to show that they were arrested for different offences only to be associated with murder case at the last stage when they were taken to court.

Since besides the cautioned statements and extrajudicial statement which have not been corroborated and have been found unrealistic there is no any other evidence to implicate the accused persons, I hereby find them not guilty. It goes without saying therefore that the prosecution has failed to prove the case beyond reasonable doubt. I accordingly acquit them of the charge of murder preferred under section 196 of the Penal Code. On this, I restore them to liberty.