

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

CRIMINAL SESSION CASE NO. 25 OF 2020

REPUBLIC

VERSUS

PASKAZIA ANDREA SINDANO @ MWANA ANDREA

JUDGMENT

Last order on 15th November, 2022

Judgment date on 14th December, 2022

MASSAM, J

The accused person, one Paskazia Andrea Sindano @ Mwana Andrea stands charged with the offence of Murder contrary to Section 196 and 197 of the Penal Code, Cap 16 (Revised Edition 2002).

It is alleged by the prosecution that, on 15th February, 2019 at Misayu village, within Kahama District, in Shinyanga Region, the accused person murdered one Kashindye Megamagiko.

The facts presented by the prosecution which gave rise to this trial are that; the accused and the deceased were living at one compound. That on the material date, the victim's mother who is the mother in

lawof accused asked her [the accused] to take care of her two children while she was going to the farm. The victim who was 3 years of age was among the children accused left with on the material date. As soon as the mother left, the accused person asked the victim's brother to give her a bush knife as she wanted to go outside the house to look for the maize. After she was given, she ordered the victim's brother to go to look for forest fruits. It was the testimony of the victim's brother that, when he returned back home, he found neither the accused person nor the victim. Due to that situation, the victim's brother went to the neighbour's house to play. After he returned home for the second time, the victim's brother met the accused at home but victim was not around. He asked the whereabouts of the victim and the accused replied to him that he would not see the victim again. The mother of the victim after came back from the farm victim brother informed her the missing of the victim, so she went to the neighbour and found accused there and try to ask where about of the victim and she said she left him home playing with his brother. The victim mother informed the neighbours who help her to look for the victim, later on the neighbours when walked at the back of victim's mother house, they found the victim lying while covered with maize leafs. Report was made to the village leaders, who, when they interrogated the accused person, admitted to have killed the victim

and consequently showed where she had hidden the bush knife. The same was seized by Village Executive Officer and the accused was arrested. Post mortem report revealed that, the victim died due to severe bleeding from the cut wounds.

When the information of murder was read to the accused person during Plea taking and Preliminary hearing, she pleaded not guilty to the information. Further, on 14th November, 2022 when the case came up for trial, the charge of murder was reminded to the accused, again she pleaded not guilty thereto.

In discharging the duty of proving the charge against the accused, the prosecution summoned five witnesses and tendered three exhibits. The evidence of the prosecution and defense side can be summarized as follows:

Isaack Lucumay testified as PW1. His testimony was to the effect that, he was a police officer stationed at Bulungwa. He went ahead stating that, on 15th February, 2019 he was informed about the murder of a child at Bisayu. He added that, he together with Inspector Mchome went to the scene of crime. PW1 stated that, he managed to draw sketch map of the scene and his colleague was handled bush knife which was used for commission of the offence. PW1 tendered the sketch map, the same was admitted as Exhibit P2.

F 5218 D/CPL Steven testified as PW2. His testimony was to the effect that, on 17 February, 2019 he was assigned to investigate the murder offence in this case. On that account, he said, he got an opportunity to collect witnesses' statements together with exhibits, bush knife inclusive. PW2 tendered the bush knife and the same was admitted as Exhibit P3. Lastly, he stated that, his investigation revealed that, the accused person herein committed the murder to kill Kashindye Megamagiko.

When cross examined PW2 stated that, the bush knife had no special marks but he maintained that, the same was used to kill the victim. In reexamination PW2 added that, the bush knife was shown to the VEO by the accused person where she had hidden it.

Teleza Fala testified as PW3. In her testimony she stated that, she was living with her two children, Masalu and the deceased one Kashindye who was aged 3 years. She added that, together with them, they were living with her in law one Mwana Andrea.

PW3 went ahead stating that, on 15th February, 2019 at 0800 she went to the farm leaving behind her two children together with the accused person. On her return she met no body at home and after some time, there came her child, one Masalu. Upon her arrival, PW3 stated that, Masalu told her that Kashindye was missing. PW3 went on telling

the court that, Masalu found the missing of the victim after he came back home as he was ordered by the accused to go to find forest fruits. She added that, Masalu also told her that, the accused asked for a bush knife too before he left to look for those fruits. It was PW3 assertion that, Masalu told her that, when he went looking for the fruits, he had left the victim with the accused person.

PW3 added that, due to the missing of the victim, he went looking for the accused person whom she met in the neighborhood house of Gimbi. Upon asking where the victim is, the accused told her that, she had left the victim with his brother at home playing. It was her assertion further that, soon thereof she got information that the victim was found dead at the back of her house. When cross examined, she stated that, the accused person was married to her child one Mashaka Faustine and they were living together in the same compound.

Masalu Hamisi testified as PW4. His testimony is to the effect that, on the material date 15th February, 2019 after her mother left for the farm, he remained at home with his little brother one Kashindye and the accused person. PW4 added that, the accused person asked for a bush knife so that she could go to the farm to cut maize. He added that, after he gave her the bush knife, the accused ordered him to go to look for forest fruits. After his return, he stated that, he met no one at home. He

went ahead that, he went to the house of Gimbi where he met with the accused person. He added that, upon asking the whereabouts, of the victim the accused replied that he should go to look for him but he would never see him again.

PW4 stated further that, he tried to look for him in vain, he decided to go back home where he met with her mother. PW4 told the court that, he informed her mother on the missing of the victim and they continued searching for him. On their search later on, they came to find the victim's body behind their house. It was PW4's assertion that, while they were searching for the victim, the accused person remained at the house of Gimbi.

PW5 Jilala Lutalamila testified to the effect that, he is a VEO and Justice of Peace at the area where the crime happened. He went ahead stating that, on 15th February, 2019 he got a phone call from Mohamed Swalehe who informed him on the murder incident of Kashindye. He stated that, upon receiving that information he went to the scene where he met with many people. He added that, upon interrogating the accused person, she admitted to have killed the victim and took them to where she had hidden the bush knife which she used for the commission of the offence. PW5 further stated that, the accused person revealed the source of the killing being that, she had many miscarriages

and traditional doctor told her that, her mother-in-law bewitches her not to bear children. So, she killed the victim in revenge for that.

On these five witnesses as I said earlier, the prosecution case got closed. In terms of the provisions of section 293(2) of the Criminal Procedure Act Cap. 20, the accused person was found to have a case to answer. After being addressed in terms of section 293(3) of the CPA, Cap 20 the accused person opted to testify alone on oath as DW1.

Paskazia Andrea Sindano testified as DW1. Her testimony is to the effect that, truly on 15th February, 2019 she was left with the children of PW3 who is her mother-in-law. The children were Masalu and the deceased one Kashindye. In her testimony she said that, she stayed with them for some time, then she left for her sister-in-law one Siria, who was sick. She added that, later on her mother-in-law went and told her that the victim was missing. She went further telling that, while they were looking for him, one Mama Teddy told her mother-in-law that, the victim's body was found back of her house.

DW1 asserted further that, from there she was arrested, beaten, locked in, for the offence which she did not commit. When cross examined, she admitted that the victim was 3 years of age and PW4 was five years of age. She added that, as they are children, she was

supposed to stay with them and take care of them. She further told the court that, she is actually the one required to tell the court as to what had happened to the victim. Concerning the victim's body, she said that she saw it with wounds on the head and lied outside the house.

That marked the end of both parties' evidence. In view of the above evidence, the following issues call for determination: -

- 1. Whether the victim was met with unnatural death (if yes)**
- 2. Whether the accused person is responsible for that death of the victim (if yes)**
- 3. Whether the accused person with intention/malice aforethought killed the victim.**

Concerning the first issue, **whether the victim was met with unnatural death**, first, from both sides testimonies, it is not in dispute that Kashindye Megamagiko is dead. According to the post mortem report which has been admitted in court as Exhibit P1, it shows that, the cause of the death of the victim is severe blood loss.

The admitted post mortem report shows that, the deceased's body was found lying behind their house with scalp cut wounds including the

skull and brain. Also, cut wounds on right and left of head where temporal bones were fractured.

Such cut wounds on the vulnerable parts of the human body prove that, the victim was met with unnatural death. As there is no evidence disapproving this fact, then I see no need of dwelling much on this issue. This is positively answered that, the deceased Kashindye Megamagiko was met with unnatural death.

Concerning the second issue as to **whether the accused person is responsible for the killing of the victim Kashindye Megamagiko**, the prosecution side relies on circumstantial evidence cemented with the principle of last person to be seen with the victim, oral confession of the accused person that was testified by PW5 and confession that lead to the discovery of the bush knife used for commission of the crime.

From the evidence we have on records, it is not in dispute by both parties that, on the material date, it was the accused person who remained at home with the victim and his brother one Masalu. It is further not in dispute that, the two children who were left with the accused person on the material date, were minor of 3 and 5 years of age, thus incapable of taking care of themselves.

The above stated reasoning, is also cemented with the accused person's reasoning reached in her admission when she was cross examined. In it she clearly stated that, she is the one required to account for what had befallen to the victim. I suppose, this accused person's reasoning came after knowing that the two children were left under her care and the same children were very minor.

Further, the testimony of the victim's brother who testified as PW4 was clear that, he was ordered by the victim to go to forest to find fruits, so he left the accused with the victim. Simple reasoning leaves us with no doubt that, there is no way that, the accused person sent the victim of 3 years of age together with his brother PW4 to look for fruits in the forest. This is due to the fact that the victim was very minor of 3 years and accused person say nothing concerning ordering PW4 to go to the forest to search fruits.

Either way, on account of the discussion I have endeavored to give above, the accused person should be taken as the last person to be with the victim. As such, the same accused person should strive to give plausible explanation as to the circumstances leading to the death of the victim. Otherwise, the accused should be taken to be the killer herself. See, the case of **Mathayo Mwalimu and Another vs. Republic,**

Criminal Appeal No. 147 of 2008 CAT Dodoma where it was stated that; -

In our considered opinion, if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer.

In this case, the accused person has not given to this court any plausible explanations on the circumstances leading to the death of the victim Kashindye Megamagiko. What the accused person has done is to raise a defense of alibi that she was not at the place when the victim was murdered.

The said defense has been given without prior notice. In the Court of Appeal case of **Mwita Mhere and Ibrahim Mhere vs. Republic** (2005) TLR 107, it was stated that, prior notice has to be given before defense of alibi is given. Shortly, such defense would be relied upon when the requirements under section 194 of the CPA are complied with. Noncompliance with requirements set in the aforementioned provision of the law, leaves this court with discretion whether to accord any weight

to it or not. This is compliance with section 194(6) of the CPA which provides that: -

"If the accused raises a defense of alibi without having first furnished the prosecution pursuant with this section, the court may in its discretion accord no weight of any kind to the defense."

In the situation like that the accused person has not given prior notice before raising defense of alibi, this court gives no weight to it as it takes it as an afterthought. Likewise, in the situation that the accused person has not given any plausible explanation on the circumstances that have led to the victim's death, then it follows that, the accused person has killed the victim in this case.

However, there is testimony of PW5 that, the accused confessed before him and consequently showed him the hidden bush knife which was used in the commission of the offence.

I am alive with the principle of law concerning oral confession as stated in the case of **Boniphas Mathew Malyango vs. Republic, Criminal Appeal No. 358 of 2018** where the Court of Appeal referred

to its holding in the case of **Tumaini Daud Ikeru Vs. R, Criminal Appeal No. 158 Of 2009** where it stated that; -

We reiterated that oral confessions of guilt are admissible and can be acted upon, but we also emphasized that great caution is required before courts rely on oral confession to convict. Admissibility of oral confession does not automatically mean this genre of evidence carries sufficient weight to convict. Even where the court is satisfied that an accused person made an oral confession, the court must take an extra distance to determine whether the oral confession is voluntary.

In connection to the above quoted position of the law, at this juncture, I pose and ask myself, was the said oral confession taken voluntarily from the accused person? In her defense, the accused person stated that she was beaten by the militia man.

If we are to take that the accused person was actually beaten before she confessed, the question is, how should this court treat that confession which has led to the discovery of the bush knife that was used in the commission of the offence?

The answer, is not far to fetch. In the case of **Mboje Mawe & Three others, Criminal Appeal No. 86 of 2010** (unreported) the court held confession that has led to discovery as the true confession.

Further in the case of **John Peter Shayo and 2 others versus Republic (1998) TLR 198** the Court held that; -

Confessions that are otherwise inadmissible are allowed to be given in evidence under section 31 of the Evidence Act 1967 if, and only if, they lead to the discovery of material objects connected with the crime, the rationale being that such discovery supplies a guarantee of the truth of that portion on the confession which led to it.

As far as the above quoted excerpt is concerned, had it been truly that the accused person was not a free agent when she gave her oral confession, yet due to the discovery of the bush knife she used for commission of the crime, the same confession is taken to be the truth. Further, I see no point to think that PW5 was testifying a lie. Because as it was testified by the accused person herself that, she had no grudge with PW5 who is a VEO. On that account, this evidence too cements that, truly that the accused person showed the bush knife to the PW5

and thus it was the accused person who actually killed the victim Kashindye Magamagiko.

With the whole above discussion, I find that, the available evidence proves nothing else than the accused person is responsible for killing the deceased. This issue is also answered in a positive way that, the accused person is responsible for killing of the deceased herein.

Concerning the last issue, whether the accused person killed the deceased with malice aforethought. This issue tends to prove whether the accused is guilty of murder or manslaughter.

In the case of **Enock Kipala Vs Republic, Criminal Appeal No. 150 of 1994** (unreported), the Court had an occasion to consider a situation like the one at hand, where the appellant also pleaded not to have caused death to the deceased intentionally, when it stated that:

"Usually, an attacker will not declare his intention to cause death or grievous harm. Whether or not had that intention must be ascertained from various factors, including the following:

- (i) The type and size of the weapon, if any used in the attack;**
- (ii) The amount of force applied in the assault;**

- (iii) The part or parts of body the blows were directed at or inflicted on;***
- (iv) The number of blows, although one blow may, depending upon the facts of a particular case, be sufficient for this purpose;***
- (v) The kind of injuries inflicted;***
- (vi) The attacker's utterances, if any, made before, during or after the killing; and***
- (vii) The conduct of the attacker before or after the killing.(Emphasis supplied)***

In connection to the above excerpt, as we have seen above on what the Post mortem report has provided. The victim's body had cut wounds on the head. This is a vulnerable part of the human body. Further, the type of the object used for killing is sharp object. On those premises it is thus right to conclude that, the accused person intended to cut the deceased to death. If her intention was not to kill, then attack should have not been with a sharp object and should have not been directed to the delicate part of the human body.

Further, the record shows that the victim's body was found lying while covered with maize grasses. This shows that, there was a move to

hide the victim's body. Concealing the truth too depicts the accused person's ill motive, hence killed with intention.

On account of the above mentioned, this issue too is answered in affirmatively that, the accused person killed the victim with malice aforethought. Also in the evidence testified by PW4 the victims brother show that accused did alter some words after been asked about the whereabouts of the victim that he left him home but he will never see him again that prove that accused knew what happened to the victim thus why he altered that words. Again the record shows that accused after got the information of missing of the victim she did not help to look for him rather she continued stay to the house of Gimbi that acts show that she was the one who connected with that killing, as according to the relation they had this court finds that accused person be a number one person to go and search for victim considering that he was left under her care.

Lastly this court finds out that the act of accused person to send PW4 a boy of 5years to go to fetch for fruits forest and left her with victim show her conduct before killing the victim, that she want to be left alone in commission of that offence

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

In view thereof, Paskazia Andrea Sindano @ Mwana Andrea is hereby found guilty of the offence of murder contrary to the provisions of sections 196 and 197 of the Penal Code, Cap.16 and she is accordingly convicted.

It is so ordered.

DATED at SHINYANGA this 14th day of December, 2022.




R.B. Massam

JUDGE

14/12/2022