

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

**CRIMINAL SESSION CASE NO. 24/2020**

**THE REPUBLIC**

***VERSUS***

**LUJA S/O BUNELA**

**JUDGMENT**

*9<sup>th</sup> November & 14<sup>th</sup> December, 2022*

**MASSAM, J:**

The accused person, stand charged with the offence of murder contrary to Section 196 and 197 of the Penal Code (Cap 16 RE 2002). It is alleged by prosecution that on 28<sup>th</sup> June 2018, at Selya village within Kahama District in Shinyanga Region the accused persons did murder one Lukalu s/o Nkala (the deceased)



Briefly facts as established in the doc brief are that facts, the accused and the deceased were husband and wife living at Selya Village. On 31<sup>st</sup> day of August 2017 while a sleep, they were invaded with unknown persons. The invader attacked the deceased by stabbing him with a knife. The accused being seen the invaders were gone; he went to call one Kisandu Lukalu (the son of the deceased). Kisandu responded and went to the room of the deceased and awakened the deceased but the deceased could not respond. Being seen the deceased could not respond, he went awaken his brother Nkala Lukalu who in his trial to awaken the deceased he found the deceased was wrapped in blanket.

He unwrapped, and tried to touch him, he discovered the deceased had blood in his stomach in the end he realized that their father was stabbed by the sharp object and died. They asked the accused person as to what happened to the deceased, accused denied to know anything than to say that he awakens the deceased but he did not respond.

The matter was then reported to Police and the body was taken to hospital. The body was examined the report came with result that the deceased died due to haemorrhage. Accused was arrested in connection with murder of the deceased.



This court conducted the plea taking and Preliminary hearing the accused pleaded not guilty to the offence. She admitted only her name that she is Luja Bunela, the deceased was her husband and she know Nkala Lukalu and Kisandu Lukalu.

On 9/11/2022 When the case was called for hearing Mr. Jairo the learned State Attorney appeared for Republic while the accused person enjoyed the service of Jacob Somi learned counsel. The charge read over to her and she pleaded not guilty

In proving the charge laid to the accused person, prosecution called four (4) witnesses and tendered one documentary exhibit (Post Mortem Report). The accused person gave evidence on his own behalf with no exhibits to produced.

**PW1:** Joseph Michael Komba testified that he is a clinical officer at Selya Village. He testified that on 28/6/2017 he went to the hospital and found a deceased named Lukale Nkala. He conducted a postmortem by inspecting the body of the deceased and found a wound on his right side of stomach and on his hand. He informed that the deceased's clothes had with blood. He said he filled postmortem report and tendered which the court





admitted as exhibit P1. He said the cause of death was due to loss of blood which caused by that wound PW1 when examined, he testified that the wound was caused by a sharp object on a right side of stomach.

**PW2.** Kisandu Lukalu he is a son to the deceased. His evidence is to the effect that, accused person is his step mother, he never had any dispute with accused person, on 28/6/2017 he was at home at 1:00am accused person went to his room and inform him that his father is not talking.

PW2 went to the said room, he called his father but did not reply. He further informed that he went to call his brother to inform him, and later they went to their father's room together, they tried to call him, but they saw the blood and wound on his stomach and hand, they tried to ask the accused person what happened, she said that she knows nothing, they went to inform his uncle who did not come to the scene as he was blind, but their uncle told them to inform other people, later on accused person told people who gathered to the scene that, when she was asked, she said nothing about seeing that people.

When cross examined, PW2 responded that accused person told them that she saw two persons killing their father, again he said that he did not saw



that people as he was asleep, but when him (PW2) and his brother asked her she said that, she found him just like that and she tried to call him but he did not respond.

**PW3:** Nkala Lukalu. He testified that on 28/6/2017 at 1:00am, he was at home steeping, (PW2) went at his room and awake him and told him that, their father is not talking. He said they went there and found their father sleeping with blood. He said he asked the accused person as to what happened, she said that she found him like that, but he found his father is already died.

PW3 went on informing that he went to tell their uncle Kulwa who is blind, so he told them to tell people. He said that they tried to ask the accused what happened, she told them nothing though the deceased had with accused person at that night.

When PW3 was cross examined, he said accused told him that she saw two persons entering in the house but later on she said she was the one who killed the deceased, so her testimony was contradictory, andlastly, he said that they had like one year since accused person started to live with their father and they don't have any dispute with her.



**PW4:** Peter Madata who is a VEO at Selya village. His evidence is that on 28/6/2017 at about 1:00am, he was at his home. He was called by MhojaKatemi informed him that there is a person killed in his village so he went to the scene and found the deceased lied down covered with blanket. He testified that he found the deceased was cut with a sharp object, the body had a wound nearby the chest and on his hand so he decided to call the WEO, chairman and the police from Kahama. He ended testifying that the deceased was attacked by robbers. When cross examined, he responded to the effect that he doesn't know who killed deceased.

In defence, the accused person reiterated her plea of not guilty entered earlier. Accused person Luja d/o Bunela defended as **DW1**. Her defence had as follows;

That she knows Lukalu Nkala he was her husband. She said she knows the charge stands for to be of murder. She denied to kill the deceased by testifying that at about 2:00am the robbers entered and kill her husband that robbers were two. She said, they told her that not to call anyone, as they will kill her as they killed her husband (the deceased)





She went on defending by stating that she doesn't know the said robbers. She added by testifying that she heard testimony of PW1, PW2 and PW3. She said she is the one who went and call them and inform them their father is not talking as robbers killed him. She informed the court that she told them that their father was killed by robbers but they decided not to say the truth, robbers were the ones who killed the deceased.

She ended her defence by stating that she stayed with deceased for almost one year. She also said when people gathered, she told them that her husband was killed by robbers.

When cross examined, she responded that it is true her husband was killed, and it is true that Kisandu was the first person she informed and Kisandu informed Nkala Lukalu, it is not true that she told PW2 and PW3 that she knows robbers who entered to their home but she said she knows PW2 and PW3 as they are her step sons.

She went on saying that she did not conspire with robbers to kill her husband, her husband was killed by a bush knife. She also told this court that they lived in peace with her husband and his children because there was no reason for them to testify the evidence against her.



Being the prosecution and defence case closed their case, the task is left to the court to determine **whether the charge laid against the accused person has been proved beyond reasonable doubt.** To arrive to the above main issue, the following sub issues are the path to arrive destination:

- (i) **Whether the deceased one Lukalu s/o Nkala alleged to have died is actually dead; if yes**
- (ii) **Whether the death was of unnatural causes, if in affirmative,**
- (iii) **Whether it is the accused persons; Luja d/o Bunela is responsible person for the death of Lukalu s/o Nkala who is subject to this trial, if the answer is in affirmative.**
- (iv) **Whether her action was with malice aforethought.**

I will resolve the above raised issues basing on the evidence available in the record.

As to whether deceased person one Lukula s/o Nkala is actually dead; the issue of death of the deceased is not in dispute as this fact since





the prosecution brought the evidence and exhibit on that the effect, accused person did not dispute that the deceased Lukalu Nkala is died, though the admission of that fact was not direct but the wording of accused person that the deceased was her husband, and the said date she tried to awake him but he was not responding that is clear fact that she admit that Lukalu Nkala is died.

More also the testimony of PW1 the doctor who attended the body of the deceased proved that he received the body of the deceased he conducted the examination and found the body had wounds on the right side of the stomach and on his hand. He said the death of the deceased was due to loss of blood caused by cut wounds with a sharp object, Exhibit P1 which was post-mortem report proved the same that the death was due to blood loss caused by cut wounds. The evidence of PW2, and PW3 proved that after awaked by the accused and told them that the deceased was not talking, they went into his room and find the deceased not talking wrapped in the blanket. When they tried to touch him after they unwrapped the blanket, they found he was died and he had acut woundswith blood stains.



According to the mentioned evidence it is an undisputed fact that Lukula Nkala has died, now the simple issue is whether his death is an unnatural death. It is evident from the evidence of PW2, PW3 and PW4 that on 26/6/2017 at about 1:00am the accused person went to the room of PW2 he told him that their father (the deceased) is not talking. He said he went to the room of the deceased he called but could not reply so he went to call his brother (PW3) to inform what happened to his father. He told him and his brother went to the room of their father tried to call him, but could not respond, they saw the blood and wound on his stomach and hand. He narrated that they tried to ask the accused person what happened she said she knows nothing. The evidence of PW3 had the same material fact that when he on the material date and time his younger brother awakened him and told him that their father is not talking, they went to see him they found their father was sleeping with blood and found died, the evidence which backed by PW1 the medical doctor who proved that he received the deceased while died. His testimony is to the effect that, he examined the body of the deceased he found that the body had wounds in stomach and hand. His investigation found that the wound caused by a cut with a sharp object and the death was caused by loss of blood. The Post mortem report





(exhibit P1) revealed the same that the death of the deceased caused by a loss of blood.

Nevertheless, it is in the evidence of the DW1 on her defence which proved the fact that the death of the deceased was unnatural, the deceased on 2:00am was killed by two robbers who entered to their sleeping room threatened her not to call anyone as they will kill her, she said she did not know who killed the deceased and after the event she went to inform PW2 and PW3 who came to their house and found their father was dead.

The above being the substance of the prosecution evidence in the absence of rival from the defence, I find that the issues No (I) and (ii) is in affirmative that the said Lukalu s/o Nkala is actually dead and his death was unnatural as the evidence from the prosecution and the defence sides proved that the deceased was killed. DW1 connected to the death of the deceased but since the plea taking to her defence, she was in denial to commit the offence of murdering the deceased.

It is proper time now to determine the issue No. (iii) **Whether the accused person; Luja d/o Bunela is responsible person for the death of Lukalu s/o Nkala who is subject to this trial.**





It is clear from the record that no prosecution witness has testified to have witnessed the accused person killing the deceased, their evidence depend much on suspicious that when the event occurred, accused person was with the deceased. Her information that the deceased had killed by the robbers, they did not believe. Their entire evidence was based on circumstantial as accused had no straightfoward explanation on how the deceased was killed. Basing on that ground, the question is whether the court can ground conviction based solely on circumstantial evidence. In dealing with circumstantial evidence, see the case of **Balwinder Singh V. State of Punjab**, (Supreme Court of India) 1996 AIR 607 had this to say:

*"In a case based on circumstantial evidence the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they maybe to take place of proof"* .More also in the case of **Sadiki Ally Mkindi v**

**Director of Public Prosecution** Criminal Appeal no 207 OF 2009 this court held that *in the case which depends on circumstantial evidence the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of*



*the crime of which he is charged, and lastly it says that circumstances of strong suspicious without more conclusive evidence are not sufficient to justify the conviction even though the party offers no explanation of them.* Again in the case of **Simon Musoke v R [1958]** E.A 715 at Page 718 Court of Appeal for Eastern Africa stated that *in a case depending conclusively upon circumstantial evidence the court must before deciding upon conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the guilty.* And lastly in the case of **Beno Rashidi Ndimbo v Republic** Criminal Appeal No 27/1997 Court of Appeal Mbeya in this the court held that *circumstantial evidence must be water tight to ground the conviction.*

The case in hand as the prosecution established the fact that accused person killed the deceased, the prosecution cannot skip to comply the common principle that in criminal cases, the burden of proof is in the hands of the prosecution side. In the case **Aziz Abdalla v. Republic**, (1991) T.L.R. 71 the court observed that;





*".....the Prosecution 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."*

To prove the case as per above authority, the prosecution depended on the evidence of PW2 and PW3. Now whether the evidence of PW2 and PW3 had material value to prove that accused person killed the deceased.

PW2's evidence was that, on 26/6/2017 at about 1:00am while he was to his room he was awakened by the accused and told him that his father is not talking. He went to see his father to his room and called him but could not reply. He decided to go to his brother (PW3) to inform him what happened to his father. He said, later they went with PW3. When they went to the said room, they tried to call him, they saw the blood and their father had wounds on his stomach and hand. He said they asked accused person what happened, accused said she knows nothing.

He testified that when people gathered at the scene and asked accused person, she told those people that she saw two persons killing the deceased.





PW3 evidence is that on the material date and time he had asleep, PW2 awakened him and told him that their father is not talking. He said they went to the room of their father and found him sleeping with blood and was died. When she asked the accused what happened, accused she said nothing. Later she told them she saw two persons entering to the house and attack the deceased and kill him.

PW4 like PW2 and PW3 had similar statement that on the said date he was called by Chairman one MhojaKatami he informed him that one person was killed. He said he went to the scene and found the deceased body lied down and found with cut wounds. The wounds were seen with a cut with a sharp object nearby his chest and his hand.

Among these three witnesses no one who said he saw accused cutting the deceased rather their evidence only proved that they found the deceased with cut wounds on his stomach, hand and chest. Their evidence is more suspicious one. They suspect the accused to have killed the deceased as her statement was contradictory as at earlier stage when PW2 and PW3 asked her what happened, she said she knew nothing and when people gathered at the scene, she said she saw two persons entered the house of the deceased and kill him.



Indeed, it is suspicious because the accused in responding was not straightforward to clear answer to the witnesses as to what happened to their father. Is it safe for the court to convict accused on suspicious, the court of appeal in case of **B Mapunda V. R.** (CAT)\_DSM Cr. App. No. 2 of 1989 (unreported)

*"Upon a careful perusal of the record, we think that the evidence as adduced was such as to cast strong suspicion against the appellant.*

*It is trite law that suspicion alone, however strong, cannot be the basis of conviction."*

Again, the case of **Richard Mtangule and Another V.R,** (1992) TLR 5 at P.9 (CAT)

*"..... The appellants were the last known persons to have been with the deceased. This fact, without any doubt, casts a very good suspicion on them. But this in itself is no conclusive proof that the appellants killed the deceased."*

In my evaluation of the evidence of prosecution side, the testimony of PW2 and PW3 based on suspicious without and proof that accused person is a very person killed the deceased. It is true from the testimony of PW2 and PW3 as shown on record that accused was with the deceased





when the incidence occurred. Accused in her defence though she defended that upon seen the robbers entered the room of the deceased and killed him, she went to inform PW2 and PW3. Her story makes everyone wonder why she never even alarmed to ask for a help from the neighbours so that she can get assistance to arrest the murders, nothing can change the law, as far as evidence of the prosecution is suspicious, nothing evidence to ground the conviction.

I don't end up there I find that it relevant as per the substance of prosecution's evidence as its nature suggests or establishes the "**doctrine of the last person seen with the deceased alive**".

It is undisputed fact that at the time when the deceased was killed, he was with the accused person. The testimony of prosecution's witnesses is to the effect that accused person was with the deceased, she awakened PW2 and PW3 who then awaken PW4. They informed the court that they were told by the accused person that the deceased was not responding, they said when they asked the accused, she had contradictory stories. That when she was asked by PW2 and PW3 that what happened to their father, her response had nothing, but when people gathered and asked her, she





responded that she saw two robbers entered the room and killed the deceased.

It is my considered view that accused person is alleged to have been the last person to be seen with the deceased and in the absence of a plausible explanation to explain away the circumstances leading to the death, she will be presumed to be the killer. In this case accused had enough explanation as she told the court that she was the one who witnessed the killers entered the house of the deceased. The robbers attacked the deceased, she then went to inform PW2 and PW3 that their father is not talking. This fact had in support with the testimony of PW2 and PW3 who said they were awoken by DW1 who told them that their father is not talking, when they went to see him, they found him with wounds in his stomach and hand, when they tried to awaken him, he was already died. Though is not convincing, but it is enough explanation from the accused that the deceased was killed by the robbers.

The stance of the doctrine is that where an accused is alleged to have been the last person to be seen with the deceased, and in the absence of plausible circumstances leading to the death is presumed to be the killer of that deceased. In our case in hand the accused person had



enough explanation that she was not the one who killed deceased but the robbers did ,in her testimony said that on the material date and time the robbers attacked the deceased and kill him, this principle elaborated in the case of **DaugetSaitaya, In re, 1955 and W.R. 863**

*"The accused was charged with the murder of the woman who had been living with him as his wife. The circumstances established were that he and the deceased were seen together on the day of the occurrence, he had made himself scarce in the neighborhood. These circumstances are insufficient to sustain a conviction of the accused for murder"*

Having discussed at length the pitfalls of the prosecution evidence, I am of the firm view that in the absence of other evidence to connect the accused that she killed the deceased, nothing can convince the court to believe that accused killed the deceased. On that view, I find that the prosecution has failed to prove that Luja d/o Bunela is a very person who murder the deceased.



I hereby acquit the accused person as I have found him not guilty for the offence charged. The accused be released forthwith unless held under lawfully custody.

Order accordingly.

**DATED** at **SHINYANGA** this 14<sup>th</sup> day of December, 2022



  
**R.B. Massam**  
**JUDGE**  
**14/12/2022**