

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

SITTING AT SHINYANGA

CRIMINAL SESSION CASE NO. 17 OF 2019

THE REPUBLIC

VERSUS

SINGU S/O TUNGU

JUDGMENT

15th November & 2nd December, 2022

NDUNGURU; J

An accused person Singu s/o Tungu on 18th February 2020 he was served a notice of trial on the information for murder contrary to section 196 of the Penal Code Cap 16, the information was read over and explained to the accused Person who required to plea thereto, on his plea, he pleaded not true to the information. It was alleged in the particulars of offence that, the accused person Singu Tungu on 8/08/2016 at Kitwile Village within Shinyanga District in Shinyanga Region Murdered one Holo d/o Shada.

The brief facts are that the deceased Holo Shada was the accused's mother in law residing in Bulyandege Village located in Shinyanga District.

It revealed that on 8/8/2016 the deceased went to the accused's home for attending Vikoba ceremony. At about 00:00hrs accused informed his wife one Elizabeth d/o Lugulu (the deceased's daughter) that he was intending to conduct a traditional medicine to heal his home. He wanted his wife to escort him to bush.

The facts establish that on 9/8/2016 the deceased was not seen at the accused's home, the effort to find her proved failed. On 20/8/2016 accused stated before his wife and his in law that he killed the deceased and the dead body was hidden along Ning'wa river. The accused led the militia men where the dead body was hide, when they attended the place, they found the remaining body they took it to Shinyanga Government.

On 17/11/2022 the trial commenced; the Republic was represented by Ms. Ajuae B. Zegeli P/SA assisted by Rose Kimaro both learned State Attorneys whilst Accused person enjoyed the service of Godfrey Tuli learned counsel. To prove the offence against the accused person, prosecution called a total of four witnesses and they tendered two exhibits which are Sketch Map and the Post Mortem Report. The defence had one witness, the accused himself tendered no exhibit.

The summary evidence by the Republic witnesses were adduced by four, PW1 **Shinje Nela**, PW2 **Ema Lugulu**, PW3 **F9837 Coplo Gasper** and PW4 **Dotto Bwire**.

PW1 Shinje Nela, was the first to witness to testify. In his evidence he informed the court that, he knows Singu Tungu (the accused person) but they live in different villages, he said one day the accused went to his home (PW's home) to build his house, they bargained the price, when he paid the price accused started to avoid to go to work.

He testified that one day the alarm raised, people were required to go to the home of Emma the son of the deceased, when they gathered at Emma's home, they met an accused and his wife. While there he saw those people started to interrogate the accused and his wife on whereabouts the deceased, when interrogated, accused started crying. While the accused crying his wife told those people that her husband had brought traditional medicine to administer ritual (tambiko) they went to forest where they were practicing ritual, accused left at the forest and went home she was told he had forgotten other medicine at home, so he went to collect them, so she had to wait him there at the forest.

PW1 went on saying that, accused took longtime to follow his wife at the forest, when they arrived home, accused told his wife that as they

have touched medicine they were supposed to sleep in the kitchen. Accused's wife said when she woke up in the morning went to the room of the deceased, she did not find the deceased but found her clothes and sandals. Having missed her mother, they sent children to various places to look for the deceased.

He ended by testifying that, when accused was interrogated by Sungusungu leaders, accused told them he is the one who killed the deceased Holo d/o Shada and dumped the body at the river called Ning'wa. Then the Sungusungu traced to the river.

PW2 Emma Lugulu he is a son of the deceased, his evidence is to the effect that, he is living at Mwalukwa village with his mother (the deceased). He said in the Month of Augst 2016 his mother left went to her in law one Singu Tungu who was living at Kitwili Village. Accused had married to her sister Ester Lugulu taken took her so that she could attend Vikoba celebration. He went on saying that his mother after had left, he never went back any more.

PW2 said that one day his wife went to old Shinyanga to sell firewood, where she met the accused, she was asked if the deceased had gone back home, she told him that the deceased did not go back since the date she went to celebrate vikoba. PW2 said he went to the home of

the accused person to ask them whereabouts his mother, he was told by Singu Tungu and his wife that the deceased left about 10:04 went to Kahama. He said he told his sister to come to his home on the next date so that they could start tracing her to the relatives, but she did not go. He then reported the matter to usalama leaders (Sungusungu). He said after four days his sister (the wife of the accused) went to his home, meanwhile at all the time the accused was just at his home he told her to stop looking for her because he said she is at Kahama, but he phoned at Kahama.

He further testified that on 03/09/2017 he went to old Shinyanga, when he was on the way back home. He saw many people gathered at his home. He arrived and met Usalama Halmet leaders, Singu Tungu and his wife. The said Sungusungu started to interrogate the wife of the accused, she told the Sungusungu, at about 00:00hrs (midnight) her husband told her to go to administer local medicine at the forest, she said her husband left her there saying he was going to collect local medicine he left at home. That he went at home and stayed for about 30 minutes. When accused came back, she said she asked him why he was late, the said accused responded he missed the medicine. Then they went back home, when they arrived at home the accused told her that they had to

sleep in the kitchen. He testified further that, when they interrogated Singu, he said they went to administer medicine, he said did not understand what went wrong on as he was crying as his mother dead.

He went on testifying that when Singu and his wife were crying said the deceased is at river dead. PW3. F.9837 COPLO GASPER, he is Police Officer working at Shinyanga Police station. He told the court that on 03/09/2016 at night hours while he was on patrol he was called by the OCD and told him to go to Mwalukwa Village as the suspect of murder had been arrested. He said he went with him to Mwalukwa Village at the home of PW2. He met people gathered including Militia men (Sungusungu) they had the suspect under arrest., the Sungusungu told them that the arrested persons are suspected to have committed murder. He testified that they asked where the murder happened, they said it happened at old Shinyanga. He said they took the suspect and went to the place where offence happened. While they were in the vehicle he said they interrogated him on the involvement in killing, accused admitted to have been involved by saying he was with his fellow but denied to mention his fellow, but admitted to have involved in killing Holo d/o Shada by hitting her with a stone on her head, having noted that she is dead, they put the body in the sulphate bag and hide it in the leads at Ning'wa river.

He said they went to the river which located at old Shinyanga. He said arrived at the scene met the people had gathered, he said they dropped the accused from the vehicle, he directed them where the body was. The place had full of bad and pungent smell, he showed the body and took the remains of the body.

He ended to narrate that the body was completely rotten, what was seen was a skull of the head and skeleton. The scene had thick scrub of matete (leeds) and 'mabingo' (trees growing in swampy area) they took the remains of the body to hospital then sent the accused to police station.

When cross examined, PW3 responded that he did not identify whose body was, he did not know if there was any relative who identified the body because there were many people. At that time, he did not know who body was. And when he was re-examined by the State attorney, he said he did not remember who else led them to the scene apart from the chairman, it was Sungusungu who said having interrogated the accused said the body is at river.

PW4 DOTTO BWIRE, he is a Village Chairman of Old Shinyanga, on his evidence he told the court that on 03/09/2016 he was at Kijiweni taking Coffee, while there he got heard a shout alarming from Mwalukwa Village, the Kitongoji Chairman informed him that Sungusungu had been

gathered there, there is dead body found at the river Ning'wa, and the suspect had been arrested and was interrogated. He said he went to the scene. At the scene they found the dead body at the river bank. He said he phoned the Police who arrived at 01:00hrs carrying the accused and his wife, they dropped them down then went into the dead body. The dead was taken to hospital.

He ended to narrate that the dead body was rotten it remained the skull and skeleton with one leg and when the police went there they met them aside the river as they were not required to touch the body. They stood aside. Police Officers dropped the accused and told him to show the body where the body was, he just pointed there, Police took out the body and PW4 carried it, the body's leg, arm and head skull made them to know it was human body.

When cross examined, he said when they arrived at the scene, the accused was not yet arrived there, it was due to the bad smell which was there they managed to find/see the dead body and when the accused and his wife arrived at the scene, the people already discovered the dead body. He said it was very difficult to identify whose body was and himself did not identify it to be the body of someone

After PW4 called off his evidence the prosecution closed their case. The court under section 230 of Criminal Procedure Act Cap 20 R.E. 2019 after having passed through prosecution evidence had the view that, the prima facie case was established to enable an accused to defend the information laid against him.

Singu Tungu defended as DW1, he testified that, on 27/08/2016 at about 04:00pm at his home came his mother in law (the deceased) she asked him to go to build for her a house located at Mwalukwa Village. He said he told her to wait for three days as he was building someone's house, the deceased spent one night and on the next date at about 08:00 am she left. Having finished the house he was building, he said he went to the deceased a third day but he could not find her. Upon not finding her, he went to the home of his brother in law one Emma Lugulu (PW2) to ask whereabouts the deceased, PW2 told him that he never seen her since she went his home, he told Emma that let them look for her so that he can build for her house. They went on looking for her.

He defended that on 03/09/2016 about 04:00pm he was arrested by Sungusungu of Mwalukwa Village while building the house of one Kitungulu, they said they had discovered a dead body at the river, they took him to the home where his mother in law was rented some remained

with him there waiting for the Police while others went to river. He said that when they arrested him, they told him that they had seen the dead body at the river and the fact that the deceased disappeared from his home might be is the one who is dead. He said he denied to them to have known anything. He said the police arrived at about 19:00 hrs, he told the Police that he had not committed any offence, him and the police went to the scene. At the scene they met many people including Sungusungu. He was dropped from the vehicle as he was slept in the vehicle facing down while one police pressing his back, being there he found the remains of the body was being wrapped by cloth thrown in the vehicle he was. He was then taken to Shinyanga Police Station where he was interrogated but he said he denied to commit the offence. he prayed the court to find him innocent and let him free because he did not commit the offence alleged.

After the defence side closed its case that marked the closure of cases from either sides, meanwhile learned counsels had at rebate to file the final submission or not, in response they all opted not file the final submission leaving the court to proceed with judgement without final submissions.

The above being the prosecution and defence evidence, the issue for determination is whether the prosecution has proved the charge laid against the accused beyond reasonable doubt.

The accused before this court is charged with the murder offence. The murder offence is a creature of the statute. Section 196 of the Penal Code defines murder as;

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

From the wording of the above cited provision for the murder offence in this case established or to be proved the following issues must be proved beyond reasonable doubt:

- (i) Whether the person one Holo d/o Shada 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 person one Singu s/o Tungu killed Holo d/o Shada, if yes
- (iv) Whether his action was actuated with malice aforethought.

In my scrutiny of the prosecution and defence witnesses, no witness has testified to have witnessed the accused person killing the deceased on Holo d/o Shada. The evidence before me is entirely circumstantial. The question is whether circumstantial evidence is admissible and the court can ground conviction based solely on circumstantial evidence. In **Augustino Lodaru V. Republic** [2114] TLR 45 (CAT) the court held.

"it is settled law that a court a conviction based solely on circumstantial evidence. This is so where the said evidence irresistibly led to the inference that it was the appellant and nobody else who committed the offence. Such evidence must also, be incapable of more than interpretation and the chain linking such evidence must be unbroken"

Basing on the above case law it is settled not that circumstantial evidence can ground conviction, but the standard of proof has not been diminished. It has remained the same that is beyond reasonable doubt. In insisting the standard of proof to remain that is provided by the law, the Supreme Court of India in **Balwinder Singh V. State of Punjab**, 1996 ALR 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 may be to take place of proof”.

In the case at hand, prosecution case is centred on the evidence of PW1, PW2 and PW3 on one hand and PW4 on another hand. The testimony of PW2 and PW3 is establishing the fact that the accused person confessed to have killed the deceased. The testimony of PW1 is that on the arrest date Sungusungu having kept the accused under arrest interrogated him. It is his (PW1) assertion that during interrogated the accused admitted to have committed the offence. Looking at the testimony of PW1 careful, it is clear that the witness is reporting what he heard from the wife of the accused when interrogated. PW1 is not the one who interrogated the wife of the accused. His evidence qualifies to be called a hearsay evidence.

In his evidence PW1 did not tell the court how the accused was arrested, how the accused was found by Sungusungu at the home of PW2, but of more important PW1, told the court to have never seen the body of the deceased.

The substance of evidence of PW2 is that following the disappearance of the Holo d/o Shada he reports it to Sungusungu. The witness also did not tell the court who specifically interrogated the

accused, apart from naming the Sungusungu. To my scrutiny PW2's evidence is the weakest type of evidence. PW2 told the court that when the accused was interrogated, he did not understand/comprehend anything as he was just crying. Further he did not visit the scene where it was said the remains were found.

The testimony of PW3 is to the effect that when he arrived at the scene he met at home of one Lugulu found many people had gathered. That it was the Sungusungu who told him that they had arrested the suspect of murder. That he took the accused person into the vehicle going where the dead body was said to have been dumped at Ning'wa river. His evidence is further that while in the vehicle he interrogated the accused on his involvement in committing the alleged murder. It is his evidence that the accused admitted to having killed the deceased. It was his further evidence that at the scene they found the remains of the dead body no body identified whose body was. What was found was a skull and skeleton.

PW4 also told the court that he visited the scene and found many people had already gathered. He told the court that the accused at the scene while they had already arrived, and found the body as the scene was full of bad smell. That what was found at the scene was the remains. It was the skull, skeleton with one leg.

In his defence, DW1 told the court, his arrest is just because Holo d/o Shada disappeared while at his home.

Having gone though in a nutshell through the prosecution evidence, the question is whether there is evidence to prove beyond reasonable doubt that Holo d/o Shada is actually dead.

The evidence available is that what is alleged to be the body was completely decomposed what was seen was a skull and skeleton. That means what was found was a framework of bones. That being the case this is a what is called a **"bodyless murder trial"** or **"presumed murder"** trial. In criminal trials it is trite that a crime must have occurred in the first place in order to establish charge.

This being a **bodyless or pressured murder**, before establishing the charge of murder, it had to be treated as "missing person" case. in my scrutiny of the prosecution case, there is no iota of evidence is seen establishing that before being treated as a murder case it was a missing-person case. PW2 has never told the court to have reported the disappearance of Holo d/o Shada to the police station as a "missing-person case" for investigation. See **State V. Moody, 192 Ariz 505** (supreme court of Arizona's case).

The case at hand has not passed through the stage of being a missing-person case. The question engaging my mind is whether it is possible to convict a person for murder without purported victim's body evidence. However, cases of this type have historically been hard to prove often forcing the prosecution to rely on circumstantial evidence. Traditionally, there was for centuries a mistaken view that in the absence of a body a killer could not be tried for murder. In the case of **Hunay Laugwen and 3 Others V. The Republic**, Criminal Appeal No. 120 of 2002 (CAT) (Arusha) the court stated;

"if there is no proof beyond reasonable doubt that Gwandu Sige is really dead, then that is the end of the matter so we do not need to go to other grounds....."

To underscore the above, the fact that it is the prosecution who alleged someone is dead, it is the role its role to prove that the said person is really dead, regardless the body is found or not.

With the development in **forensic investigation science** in the recent decades it has been made more likely that a murder conviction can be obtained even if has not been found. This is due to the fact that death is always provable by circumstantial evidence. See **R.V Evadi Sylvester** (1967) HCD 130.

In the case at hand, there is no direct evidence proving that Holo d/o Shada is dead. Even the remains found have never been identified as being Holo d/o Shada. Facing such kind of the situation the Court of Appeal in the case of **Miriam Siri V. The Republic**, Criminal Appeal No. 3 of 1990 (at Dar es salaam) unreported had this to say:

"outside the legally permissible prescription of death, courts are understandably slow and wary to pronounce a person dead when the identity of the body of the alleged deceased has not been established with certainty. But of course, in appropriate case people have been found to have killed even when no portion of their mortal remains have at all been identified or even seen. You look at the relevant evidence available and apply a judicial mind to it"

In the case at hand, the evidence available is that the remains of the dead body was discovered, but nobody identified the remains being of the human being or, if yes whether it was a female or male person. The fact that the remains which the prosecution is trying to convince the court that it was the remains of Holo d/o Shada, investigation could go a mile ahead to establish whether the remains belong to Holo d/o Shada alleged dead. there was a need of conducting forensic investigation particularly after the discovery of the remains.

The other nagging situation is that, information for murder provides that the said murder happened on 8th of August, 2016. The evidence available is that the remains (skull and skeleton) were found on 31/09/2016. The simple arithmetic is that there passed only 27 days from the date of death to the date the remains were found. Again, there was a need for medical expert evidence whether the deceased could delay to the extent of remain skull and skeleton within those days.

Taking into account all that I have stated herein above, I very slowly and warily pronounce a person one Holo d/o Shada dead. I find that there is no any other relevant evidence for me to look at and ground conviction for murder.

The evidence being tainted with the above illustrated doubts, the same must be resolved in the favor of the accused. In the circumstance I find and hold that the charge of murder against the accused person is not proved. I hereby acquit the accused person for the murder charge he is facing.



It is so ordered.

D.B. Ndunguru
Judge
29/11/2022