

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

SITTING AT SHINYANGA

CRIMINAL SESSIONS CASE NO. 44 OF 2020

THE REPUBLIC

VERSUS

ISACK S/O NGASSA

JUDGMENT

18th & 29th November, 2022

NDUNGURU, J:

The accused person Isack Ngassa (herein known as accused person) stand charged with the offence of murder contrary to Section 196 and 197 of the Penal Code, (Cap 16 R.E 2002). It is alleged by prosecution that on 10th day of December, 2018 at Chembeli village within Shinyanga District in Shinyanga Region the accused person murdered one Kelvin s/o Peter.

The facts presented by the prosecution is that; on 10/12/2018 the deceased was at home compound with the deceased. That sometime later the accused took the deceased along with going to his grand father one Mondi s/o Mayunga who was living nearby. That deceased did not return

home on that date. That the deceased father one Peter Mondi got worried. He started looking for him, but search did not bear fruits.

The information was availed to Sungusungu leaders who gathered. In that gathering the accused was interrogated on the whereabouts of the deceased because he was the person last being with the deceased. As the accused had no plausible explanation the matter was reported to VEO (Village Executive Officer) of Didia one Elizabeth Gabriel and later to the police station. That the accused was taken to the police station. That at the police on 18/12/2018 the accused confessed to have killed the deceased. That the accused took the police to Chembeli village where he had hidden the deceased body. The accused was then arraigned for murder case.

During plea taking and preliminary hearing the accused maintained his plea of not guilty. When preliminary hearing was conducted, he admitted only his names, address and his being arrested. When the case was called for trial Ms. Ajuaye Zegeli, Principal State Attorney assisted by Rose Kimaro State Attorney appeared for Republic, while the accused enjoyed the service of Suzana Mussa Makomba, the learned counsel.

In proving the guilty of the accused person, prosecution paraded seven (7) witnesses, and tendered two documentary exhibits. The

prosecution and defence testimony can best be summarized as hereunder:

Maria Luhende, testified as PW1. Her testimony was that she is living at Chembeli with her husband one Peter Mondi. That deceased (Kelvin Peter) is her child. That the deceased died on 10/12/2018 PW1 went on testifying that on the fateful date at about 19:00 hours the deceased left with Isack Ngassa (the brother in law of PW1) for a walk around the compound. PW1 said she went on with home activities. PW1 said till 20:00 hours Kelvin had no yet returned home. Her husband asked her whereabouts of Kelvin she responded that may be he is at the home of his grandfather. PW1 went on telling the court that her husband went to Kelvin's grandfather to look for him but was not there. He went to look for him to the video show but in veil. That the matter was reported to Sungungu who assisted to look for the deceased but no success. When Isack (accused) was asked he responded that the child was at their home. He left him there.

PW1 went on testifying to the effect that the next date the matter was reported to police. Isack was arrested. She said on 18/12/2018, the policemen went to the village (at Chembeli) saying Isack wanted to show/reveal where he had kept the child (Kelvin). She said Isack

(accused) took them to the place where he had buried the deceased by covering with stones in the ditch (dimbwi) in the "rice bed" (jaluba). The body was hooked out. It had started decomposing. PW1 said she managed to identify the body being Kelvin her son by looking at the legs and toes. She said after medical examination, the body was handed to the family for burying. PW1 told the court that Kelvin (deceased) was her second son. He was four years old.

In cross examination, PW1 told the court, the accused is her brother in law. He was living with PW1's father in law. That Isack has lost all parents. Isack led them to the place he had buried the deceased.

PW2 is Mondi Mayunga. His evidence was that he is living at Chembeli village. He said on 10/12/2018 at about 19:00 hours, his son called Peter phoned to him asking him if his grandson Kelvin was at his home. PW2 went further saying he told Peter that Kelvin was not there. PW2 said Peter told him that Kelvin was not found at home. That he joined looking for him but did not find him. That he reported the matter to Sungusungu leaders. The people gathered. The villagers started looking for deceased the whole night but could not find him. The matter was reported to VEO then to police station. At the police station himself, Isack

Ngassa and the parents of Kelvin were interrogated. The police apprehended Isack Ngasa for further interrogation.

PW2 told the court that on 18/12/2018 at about 05:00pm the police went along with Isack Ngassa at Chembeli village. PW2 said the police told them that the accused was going to show them where Kelvin is kept. PW2 said Isack (accused) led them to the rice farms (majaluba). At the scene Isack picked the stones and took out the body. The body had wounds on head. It had decomposed at the back but the legs were still intact. The body was identified being Kelvin. That the body was medically examined, then handed to the family for burying. PW2 told the court that before his arrest Isack was living with him. He is the son of his sister in law.

In cross examination PW2 told the court that Isack's mother has passed away. He has lived with the accused for three years. It was in 2016 when he started living with the accused. He took him from Nzega following the death of his mother. His father is also dead. He lived with Isack peacefully. He said it is Isack who killed the deceased because he is the one who sent then to the place, he had buried the deceased.

PW3 was Elizabeth Gabriel Madaha. Her testimony was that he is a VEO of Chembeli village. That on 11/12/2018 she was informed of the

loss of child. She went to the hamlet where he found villagers had gathered. That he interrogated the relatives of the deceased who told her that before his disappearance, the deceased was with Isack (the accused). PW3 went on saying, she took the accused, the parents of the lost child and grandfather to the police station for interrogation.

PW3 told the court that on 18/12/2018 he was called at the police station where she was told that Isack was going to show where he has kept the child. She said they went to the village and picked the parents of the deceased. PW3 said Isack led them to the rice farm (majaluba) and shown where he had buried the deceased by covering with sand and stones. That Isack removed the stones and picked out the dead body which was identified being Kelvin (the deceased). The medical officer investigated the body then handed to the relative for burial process.

In cross examination, PW3 told the court that he witnessed Isack (the accused) showing the body. It is Isack who showed where the body was hidden/buried.

PW4 Dr. Richard Mwikwabi Okwachi. His testimony is to the effect that he currently a retired officer. That before his retirement he was working at Shinyanga Regional Hospital. He said on 18/12/2018 him with police officer went to Chembeli village to the murder scene. He went at

the rice farms (majaluba). At the scene the body of a male child (of approximately 4) was revealed. The body had wounds on head, legs and stomach. It had started decomposing. That in his investigation he revealed that the cause of death was due to severe blood loss due to the wounds. It is PW4 who tendered Post Mortem (Exhibit "P1").

PW5 was ACP Claud Kanyorota. His evidence is to the effect that in 2016 to 2019 he was working as OCD of Shinyanga District. That on 18/12/2018 at noon, he was in the office. That as OCD he went to inspect the lockup. That he met the accused who had stayed by then for 8 (eight) days, under investigation on the file of loss of the child one Kelvin Peter who had four (4) years. PW5 told the court that he took the suspect/accused to his office. When interrogated him, the accused told him that the child is not lost, he killed him and has hidden the body in ditch and covered with stoned at Chembeli village. PW5 said the accused was ready to lead the police to the scene. PW5 said he called OC CID and told him what the accused had told him. He further said, OC CID took the accused went to the scene. PW5 said in the evening OC CID reported back to have found the dead body according to what the accused told him.

In cross examination, PW5 told the court that he interrogated the accused person in his office. That what made him interrogate the accused

is because he had stayed in the lockup for a long time. When interrogated the accused was in a good condition. The witness said, the accused told him what made him to kill Kelvin was a revenge to the deceased father.

SSP Eliakimu Magambo Kimori testified as PW6. His testimony was that on 18/12/2018 was working as OC CID of Shinyanga. While in the office was called by OCD one Claud Kanyorota. He was told that the accused (Isack) has admitted before him to have killed the child who was suspected to have lost. That he (accused) was willing to lead the police to the scene where the body is hidden. PW6 told the court that he took VEO, other police and the accused going to the scene. At the village they took the parents and grandfather of the deceased along with to the scene. He said that the accused led them to the scene. The witness testified that at the scene at the rice farms (majaluba) they found a pile up of stones, when took away the stones found a dead body which had started decaying. The parents identified the body being Kelvin Peter. The witness said he took sample of DNA test and handled the body to the relatives for burying.

In cross examination PW6 told the court that the accused was in good condition. It is the accused who pointed the place. The deceased was identified by the parents being Kelvin Peter.

Assistant Inspector Edson Jumanne testified as PW7. The substance of his testimony is that on 18/12/2018 he was instructed by OC CID to interrogate and record the cautioned statement of the accused. That having finished recording he gave it to accused who read it and found it correct, he then signed it. PW7 tendered the cautioned statement as exhibit (Exhibit "P2").

When cross examined PW7 told the court that when he interviewed Isack Ngassa (accused) he was in good condition.

DW1 was Isack Ngassa. His evidence was that he was born at Ilagaja village within Nzega District in Tabora Region. That following the death of his parents, and in particular his mother who died in 2016, he was taken to Chembeli village to his elder mother in 2017. That when his beloved mother died by being cut/wounded with panga in 2016, he was a form II student. He said he was taken to Chembeli so that he could continue studying. But contrary to his expectation, his elder mother never bothered to find him a school. That when he tried to remind her the response was abusive, as he was told as his mother is dead, she could not assist him. He has to farm/cultivate. That it is the elder mother who told him that it was Peter Mondi (the father of Kelvin) who killed his mother. That having committed the offence, his elder mother told him not

to disclose to anybody. He said it was his elder mother who told him to kill Kelvin so that his father may also feel the pinch of loosing the son.

DW1 went on telling the court that, he doesn't know what pushed him thinking he was revenging. He said having told the police, he went with them to the scene where the deceased body was hidden. The body was taken for burial. He was taken back to police, then to the court.

DW1 told the court, it was his elder mother who made him commit such an offence, otherwise he couldn't have killed Kelvin. He said he is very sorry, said, remorseful and he repents for what he did. It was not himself.

When cross examined, DW1 told the court that it was true he committed the offence due to the anger and feeling of loosing his mother who was everything to him. His confession was a result of feeling of what he did. That was the end of the prosecution and defence case.

At this point, the question for the court to determine is whether the prosecution has proved the charged against the accused person to the standard the law dictates.

The evidence available, is very clear. All prosecution witnesses likewise defence witness are at one that the deceased one Kelvin Peter is

actually dead. PW1 is the mother of the deceased. She is among those who went to the scene. The body having been discovered. She identified it being Kelvin s/o Peter, her son. PW2 is the grandfather of the deceased. He is among those who visited the scene. At the scene he identified the dead body being Kelvin Peter his grandson. These two witnesses identified the body being of Kelvin s/o Peter because they were familiar to him.

Further, PW3, the Village Executive Officer. She also visited the scene and saw the dead body. That upon investigation of the body it was handed to the relatives. PW4 is the medical officer who conducted post mortem examination of the body. PW6 is the police officer who visited the scene and observed the dead body.

Further to that, DW1 (the accused) also visited the scene and identified the body being Kelvin s/o Peter whom he killed. That being the position there is no doubt that Kelvin s/o Peter actually dead.

The medical report is to the effect that the body had wounds on head, legs, stomach and hands. Post mortem examination report (Exhibit P1) reveals the cause of death being severe blood loss due to the wounds. The findings of PW4, the medical officer is corroborated by the cautioned statement of DW1 which states that:

".....Nilipomwachia nikaona bado anapumua hajafa ndipo nilipochukua mawe na kuanza kumpiga nayo na alitoka damu nying kichwani baada ya kumpona na mawe mpaka nikahakikisha amekufa....."

With this evidence it cannot be disputed that the deceased encountered the most violent death. In other words, his death was unnatural.

The question is whether it is the accused person one Isack Ngassa and nobody else responsible with the death of Kelvin Peter. The involvement or otherwise of the accused in killing the deceased traces its root on 10/12/2018 in the evening, as testified by PW1, when the deceased was left with the accused. That ever since the deceased was left with the accused, he was not seen again till when found dead. This kind of scenario establishes the doctrine of the last person to be seen with the deceased alive. The stance of the doctrine is that where an accused is alleged to have been the last person to be seen with the deceased in the absence of plausible explanation to explain away the circumstances leading to the death is presumed to be the killer of that person. See **Mathayo Mwalimu and Another V.R** [2002] TLR 271, **Richard Matangule V. Republic** [1992] TLR 5, **Makungire Mtani V. R.** [1983] TLR 179 and **Misoji Ndebile V.R** [2015] TLR 517.

The evidence available is to the effect that the accused person was initially arrested on account that he is the last person seen with the deceased. The evidence of PW5 which was never challenged at all by the defence side, is that at the police station being the OCD in the course of his duty when inspected the remandes found the accused to have been in remand/lockup for eight days. When interrogated him in the office, DW1 (the accused) narrated how he killed the deceased and he was willing to lead the police to the scene. Actually, it is from that information, PW6 took the accused person to Chembeli village. At Chembeli village the accused led the police to the place the dead body was hidden, covered with stones. It is the accused confession which led to discovery of the body.

Not only that in his caution statement (Exhibit "P2") which was not objected, the accused person confessed to have killed deceased (Exhibit "P2"). The accused had narrated the way he executed the mission, likewise his motive behind.

Further, in his defence, the accused confessed to have committed the offence. On oath the accused (DW1) told the court the way, he planned, his motive and that he executed his plan of killing the deceased. The accused defence is rather lamentation and repentance.

It is trite law that in criminal cases best witness is the accused person who confessed his guilty. This position was stated in the case of **Paul Joseph V.R, Criminal Appeal No. 63 of 2010** (CAT) at Arusha (unreported) where the court held;

".....in criminal cases the best of witnesses is an accused person who confesses his guilty, and especially if he does so in the course of his defence."

See **Seleman Hassan V.R**, Criminal Appeal No. 364 of 2004 and **Mohamed Haruna V.R**, Criminal Appeal No. 259 of 2007 (both unreported). Taking all the above into account, I am of the firm view that, it is the accused person one Isack Ngassa who is responsible with the killing of the deceased one Kelvin s/o Peter who is subject in this trial.

The most contentious and controversial issue to be determined is whether the accused's act was actuated with malice aforethought. Malice aforethought is statutory. Section 200 of the Penal Code (Cap 16 R.E. 2022) provides for circumstances in which malice aforethought can be said to have established. The case law has also provided for indicators of which malice aforethought can be inferred; such weapons used in the commission of the offence, part of the body the harm is inflicted or the

blow is directed, motive, conduct of the accused before and after the commission of the offence any many others, the list is not exhaustive.

Looking on the mode the accused executed the offence, as stated in his cautioned statement, (Exhibit "P2") that first he drowned the deceased in to ditch (dimbwi) for the purpose of killing him. After few minutes having noted that he was still alive started to beat with a stone him to death. This act alone is sufficient for the court to find the accused that he was actuated with malice aforethought. Again, looking at the motive or driving force, that it was a revenge. In law revenge has never been a good defence. Under normal circumstance in the ordinary eye any reasonable person could have concluded that, the accused murdered Kelvin s/o Peter.

It is the trite position that each case must be looked at and be decided based on its own circumstances. I have carefully followed this case. According to the record available, the accused was 18 years old when he was brought to the court for the offence charged.

Further, the accused had lost his father while very young and he was brought up by his mother who as well passed away in 2016 while he was a form II student. Following the death of his beloved mother, as she was invaded by bandits who wounded her with machetes (pangas) to

death, the accused and his brother and one Peter the father of Kelvin (deceased) were arrested as suspects. Being arrested, the accused stayed in remand custody till 2017 when he was released.

That, following the death of his mother, the accused remained as orphan. He was taken by his elder mother to Chembeli village, hoping he would continue with studies. To his surprise he was handed the hoe for farming. The schooling dreams ended there. Further whenever reminded his mother about schooling, he was told he has to farm. His mother is dead nobody has to bother with him.

Worse still, the accused's elder mother with whom he was living with is the one who told him that his mother was murdered by Peter and instigated him to revenge. All these facts are contained in the cautioned statement (Exhibit P2) and the sworn evidence of DW1 (the accused).

I have further looked at the motive (reason) for killing the deceased that it was a revenge why couldn't he kill the one suspected to have killed his mother. In his reasoning Peter was elder and strong he could not overcome him. As I have said above, when committed the offence he was 18 years old. To my view taking into account his thinking, I am convinced that the accused was on transition from the foolish age. But further taking into account the life he has lived from the death of his loved mother to

the time he committed the offence I am satisfied to conclude that, his life was full of misfortunes for him to manage.

As a court of justice, I have taken into account of all these circumstances surrounding the commission of the offence. On that I am fully satisfied that the accused person was not himself. In other words, the accused was not "**in his own senses**". To the end, I find if malice aforethought was there within its broader meaning, then it was very remote.

In the premises, I reduce the offence from murder contrary to Section 196 and 197 of the Penal Code (Cap 16 R.E 2011) to Manslaughter contrary to Section 195 and 198 of the Penal Code. I accordingly convict the accused person one Isack s/o Ngassa for the offence of manslaughter contrary to Section 195 and 198 of the Penal Code.

It is so ordered.



DATED at **SHINYANGA** this 29th day of November, 2022


D.B. Ndunguru
Judge
29/11/2022