

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

CRIMINAL SESSION CASE NO. 47 OF 2020

THE REPUBLIC

VERSUS

JUMA TAGAMBAGA

JUDGMENT

Date of last order 23/03/2022

Date of judgment 24/03/2022

Kilekamajenga, J.

The background of the case is as follows: Mr. Elias was married to Tabiza James and Fatuma Paulo. Also, Mr. Elias had other two children namely Lucia Elias and Dotto Elias who were from another woman. The accused in this case was married to Lucia. It is alleged that, the accused's children mysteriously died at different dates. When the second child fell ill, the accused approached a witchdoctor called Milembe who told him that his children were being bewitched by Fatuma Paulo. It is alleged that, the accused, thereafter, planned to murder Fatuma Paulo. The accused hired his cousin from Kasulu Kigoma called George Tagambaga who seemed to be a professional murderer. The plan to kill was organized in the house of the accused's brother-in-law, Dotto Elias. It is further alleged that, on 08th May 2019, at around 8 pm, the accused and George

Tagambaga stormed the family of Mr. Elias. They found Mr. Elias and his first wife in the house preparing the bed whereas the second wife (Fatuma Paulo) was in the kitchen. It is further alleged that, the accused prevented Mr. Elias and his first wife from coming out of the house while George Tagambaga butchered Fatuma Paulo to death. An alarm was raised and the accused attended the gathering of villagers and left George Tagambaga in the house of Dotto Elias. When the police got the information and went to the crime scene, they immediately arrested Dotto Elias and the deceased's co-wife (Tabiza James). The investigation finally led to the arrest of the accused within three days. However, Dotto Elias was discharged and George Tagambaga has not been brought to court.

Therefore, the accused was arraigned before this court for the offence of murder contrary to **section 196 of the Penal Code, Cap. 16 R.E 2002**. The information of murder shows that, on 8th May 2018, at Rusenga village in Biharamulo District, the accused murdered Fatuma Paulo. When the case came for hearing, the accused pleaded not guilty prompting the court to engage in a full trial. The learned Senior State Attorney Mr. Hezron Mwasimba was assisted by Mr. Geoffrey Mlagala, the learned State Attorney, in representing the Republic whereas the accused was represented by the learned advocate, Miss Esther Sentozi. For the sake of justice and clear understanding of the charge and

evidence, the accused was afforded the services of an interpreter. In proving the case to the required standard, the prosecution paraded six witnesses and tendered four exhibits. The exhibits tendered were, the post-mortem examination report (exhibit P1), sketch map (exhibit P2), accused's cautioned statement (exhibit P3) and accused's extra-judicial statement (exhibit P4).

The prosecution's evidence showed that, PW1 (Bahati Barnabas), being a Medical Doctor, attended at the crime scene and witnessed the deceased with a big wound on the neck which was caused with an application of a sharp object. His examination revealed the death of the deceased to be excessive loss of blood. He tendered the post-mortem examination report which was admitted as exhibit P1.

PW2 (E. 9360 Detective Corporal Daniel) accompanied PW1 to the crime scene on 09th May 2019. He also witnessed the cut wounds on the deceased's neck. He drew a sketch map which was admitted as exhibit P2. PW3 (Assistant Inspector Yoya Matala) who was the detective corporal by then, investigated the case and discovered that, three persons planned the murder of the deceased. However, the murder was executed by the accused while assisted by George Tagambaga.

PW5 (H.3140 PC Daniel) interrogated the accused on 12th May 2019 who confessed to kill the deceased. He prayed to tender the accused's caution

statement which was admitted as exhibit P4. PW4 (Edward Samara), the Primary Court Magistrate and justice of the peace recorded the accused's extra-judicial statement on 15th May 2019. Before PW4, the accused confessed to kill the deceased. The extra-judicial statement was admitted as exhibit P3.

PW6 was Monica Elias who was only 13 years old, after promising to tell the truth and not to tell lies before this court, she testified that, her father had two wives namely Fatuma (deceased) and Tabiza James. She was among the children of Tabiza. On 08th May 2019, she was at home at night hours; on that day, two people came. She described them as visitors. They came looking for Fatuma (deceased). She recognised one of those visitors as Juma Tagambaga (accused) who was her brother-in-law (sheméji). One of those visitors wore a torch on his head. The assistance of the torch and moon light enabled her recognise the accused. When the two persons attacked Fatuma, she ran to hide in the bush. She came back and found her aunt (Mama Mdogo) dead. She testified that the accused went to prevent the door of the other house while the other person killed the deceased. She insisted that, though she did not recognise the other person, she saw him cutting the deceased. She clearly stated that she knew the accused before because he is married to her sister called Lucia. She recognised the accused because she was just five footsteps away from him.

In his defence, the accused (DW1) testified that, on 09th May 2019, he was phoned by his father-in-law and was informed about the death of the deceased. DW1 went to the house of his father-in-law who was also the husband of the deceased. On the same day, Dotto Elias and Tabu (Tabiza James) were arrested. Thereafter, they continued with the burial processes. DW1 stayed at the funeral for three days. On the third day, Tabu was released by the police. On 11th May 2019, the accused was arrested and taken to the police station where he found Dotto Elias. Thereafter, DW1 was taken to an interrogation room where he was tortured and forced to confess but he denied. Finally, he was told to punch his thumb in the ink and punch on the documents. He was later taken to Biharamulo police station and finally taken to the justice of peace called Samara where again he was forced to sign documents using his thumb.

In determining this case, the major issue is whether the prosecution proved its case beyond reasonable doubt. In resolving this issue, I have to consider the evidence at hand. I should make it clear that the prosecution's case in this case is hinged on the evidence of the accused's cautioned statement and accused's extra-judicial statement. These two pieces of evidence are further corroborated with an eye witness who alleged to see the accused at night. I now delve into the nitty-gritty of the value of such evidence. Under the law, before leaning on

the accused's cautioned statement which so far was repudiated/ retracted, the court is warned and must carefully apply such evidence unless there is other independent evidence to corroborate. There is vast authority on the application of retracted/repudiated confession. For instance, in the case of **Kashindye Meli v. Republic** [2002] TLR 374, the Court of Appeal of Tanzania stated that:

"...it is now settled law that although it is dangerous to act upon a repudiated or retracted confession unless such confession is corroborated, the court may still act upon such a confession if it is satisfied that the confession could not but be true."

In the case at hand, I wish to analyse the accused's caution statement which was admitted after overruling the objections raised by the accused. The caution statement contains detailed account on how the murder was planned and finally executed. It coherently explains the reasons for the murder. The accused clearly narrated that after the illness of his child, he visited a witchdoctor called Milembe who revealed the witch behind his child's illness. The accused was informed that, the deceased was behind the frequent deaths of his children; he found no other option rather than to murder the deceased. The statement explains how he hired his cousin from Kasulu and how the murder was finally accomplished. He even detailed how George Tagambaga remained in the house of Dotto Elias after the alarm was raised.

The caution statement shows that, only the accused and his cousin, George Tagambaga went to kill the deceased while Dotto Elias remained at home. The accused went further detailing how he assisted the murderer by preventing Mr. Elias and his first wife from rendering assistance to the deceased as George Tagambaga was butchering the deceased. This detailed account of the murder was worthy consideration because no one could give such a detailed account of the murder and its motive unless he was involved. The police officer who interrogated the accused could not have given such a coherent story about the death of the deceased. The statement explains how Dotto Elias participated in planning the murder but he did not accompany the accused and George Tagambaga during the execution of the plan. In this case, the court warned itself on the danger of relying on this statement but, without any doubt, the information contained in the accused's cautioned statement is not only true but also squarely fits other pieces of evidence.

Furthermore, the evidence of PW4 corroborated the accused's cautioned statement. PW4 recorded the accused's extra judicial statement which also accounts for the reasons and how the accused was involved in the murder. Generally, the accused's statement given before the police and the extra-judicial statement are indistinguishable. They support each other in explaining the death of the deceased.

Moreover, the evidence of PW6 is worthy consideration. According to her evidence, she identified the accused at night when they attacked her family. Before applying this piece of evidence, the court must clear all the legal issues associated with evidence of identification at night. It is an established principle of the law that where evidence is based on visual identification at night, such evidence must be carefully applied. This position of law was stated in the case of **Stuart Erasto Yakobo v. The Republic**, Criminal Appeal No. 202 of 2004, CAT at Dar es salaam (unreported) where the Court stated that:

"...visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight."

In addition, in the case of **Shiku Salehe v. Republic** [1987] TLR 193 the Court had the following to say:

"It is now trite law that before basing a conviction solely on evidence of visual identification, such evidence must remove all possibilities of mistaken identity and the court must be fully satisfied that the evidence is watertight."

See also, the case of **R. v. Eria Sebwato** [1960] E.A. 174. Furthermore, the landmark case of **Waziri Amani v. Republic** [1980] TLR 250 lists the qualities of the evidence of visual identification thus:

"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect, to find in the record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred for instance, whether it was day or night-time whether there was good or poor light at the scene; and further whether the witness know or had seen the accused before or not."

The evidence at hand shows that, PW6 was just eight years old when the murder of the deceased was done but her account on the event is worth noting. She correctly remembered the event to have occurred at 8pm when they were still preparing to bed. At that time, the deceased was in the kitchen and her father and the first wife were in the other house preparing to bed. PW6 correctly stated that, only two people attacked her family. She quickly recognised the accused because he is married to her sister Lucia and they live within the same village. She further informed the court that the other person whom she did not

recognise, held the *panga* and he is the one who butchered the deceased. At that time, the accused prevented the door of the house where her father and mother were. This other person wore a torch on his head; when he turned, the light enabled her to spot the accused. Also, there was moonlight enough to identify a person. By that time, she identified the accused as she was only five footsteps away. When testifying, she still remembered that the accused wore a greenish jacket during the attack.

The coherence of her testimony leaves no doubt that she recognised the accused. Among all her family members, she was the only person who recognised the accused on that night. In my view, the evidence of PW6 squarely fits the other two pieces of evidence analysed above. This evidence corresponds to the accused's cautioned statement that only two people went to murder the deceased. It also fits well that, George Tagambaga cut the deceased while the accused held the door of the other house. In my view, this was a good piece of evidence to corroborate the caution statement and extra-judicial statement.

The evidence above clearly proves that, the accused planned the murder and accompanied George Tagambaga to the execution of the plan. The accused might have not raised the *panga* to strike the deceased, but his common

intention with George Tagambaga counts. Under the law, where two persons form an intention to commit a crime, the two shall be criminally responsible even if only one of them executed their common intention. **Section 23 of the Penal Code Cap. 16 R.E 2019** provides clearly on what amounts to common intention thus:

"23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The above provision of the law does not need further interpretation. There is no doubt, the accused formed an intention to murder the deceased. The plan was made in the presence of Dotto Elias and finally involved George Tagambaga who executed the plan while assisted by the accused. Under the above law, the accused is criminally liable just as the person who butchered the deceased.

In his defence, the accused informed the court that, he was arrested in connection with the offence and taken to the police station where he was tortured and forced to sign documents which contained information given by his co-suspect. Thereafter, he was taken to the justice of the peace where he was

also forced to sign documents containing information given by his co-suspect. In my view, the accused's defence failed to shed doubt on the prosecution's evidence.

In this case, I have no hesitation to find that the prosecution has exhausted the requirement of the law which requires a criminal case to be proved beyond reasonable doubt. See, **Section 3 (2) (a) of the Evidence Act, Cap. 6 R.E 2019**. See, also the case of **Hemed v. Republic** [1987] TLR 117 where the Court stated that:

"...in criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities."

In the case at hand, the prosecution evidence has discharged the onus of ensuring that the offence is proved to the required standard. The prosecution evidence has proved that, the deceased was brutally murdered on the night of 08th May 2019. The death of the deceased has been proved by the evidence of PW1 who witnessed the body. He examined the deceased's body which revealed the cause of death to be excessive loss of blood. PW2 also went to the crime scene and witnessed the body of the deceased. The accused also attended the crime scene and the burial of the deceased.

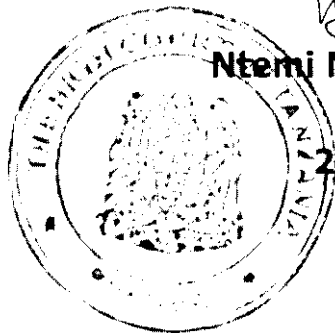
Furthermore, there is no doubt that the death of the deceased was done with a person who had evil intention to kill. There is no shred of doubt, the murderer had malice aforethought to kill. The prosecution evidence has further proved, beyond reasonable doubt, that the accused was involved in the planning and murder of the deceased. He had malice aforethought to kill the deceased. Under the doctrine of common intention, the accused is also guilty as the one who butchered the deceased. The prosecution evidence has exhausted the elements of the offence of murder as provided under **section 196 of the Penal Code, Cap. 16 R.E 2019**. Also, all the honourable assessors who sat with me opined that the prosecution proved the case beyond reasonable doubt. They unanimously opined that the accused should be found guilty of murder of the deceased. Based on the analysis above, I, without any shred of doubt, find the accused guilty of murder. I hereby convict the accused (Juma Tagambaga) with the offence of murder under **section 196 of the Penal Code, Cap. 16 R.E 2019**.

Ntemi N. Kilekamajenga
JUDGE
24/03/2022

SENTENCE

Having convicted the accused for the offence of murder, I hereby sentence the accused (Juma Tagambaga) to suffer death by hanging (until death).

DATE at BIHARAMULO this 24th March, 2022.



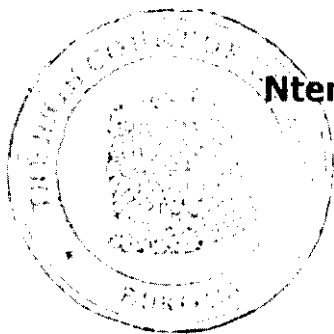

Ntemi N. Kilekamajenga

JUDGE

24/03/2022

Court

Right of appeal explained. I hereby thank and discharge the Honourable assessors.



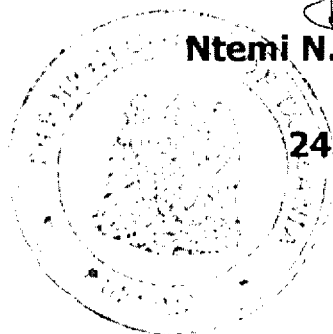

Ntemi N. Kilekamajenga

JUDGE

24/03/2022

Court:

Judgment delivered this 24th March, 2022 in the presence of the accused and his counsel, Miss Esther Sentozi, Advocate and the learned Senior State Attorney, Mr. Hezron Mwasimba assisted by Mr. Geoffrey Mlagala, the State Attorney.




Ntemi N. Kilekamajenga

JUDGE

24/03/2022