

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

CRIMINAL SESSION CASE NO. 40 OF 2020

THE REPUBLIC

VERSUS

METHOD PAULO

JUDGMENT

Date of last order 17/03/2022

Date of judgment 21/03/2022

Kilekamajenga, J.

In this case, the accused was arraigned before this court for the offence of murder contrary to section to **section 196 of the Penal Code, Cap. 16 RE 2002**. According to the information of murder filed in this court, it is alleged that, on 02nd July 2018, at Mgera village in Biharamulo District, the accused murdered Yohana Samson. It was further alleged that, the accused and the deceased were neighbours. Later, the accused established a sexual relationship with the deceased's wife called Tabu Manhyakenda. As their evil relationship blossomed, the marriage relationship between the deceased and his wife became sour. Some few days before the death of the murder, the deceased's wife returned to her parents who lived in Sengerema.

It was further alleged that, in the process of ensuring a fruitful relationship between the accused and the deceased's wife, the two planned to murder the deceased who was also suffering from kidney problems. On the fateful day, at night hours, the accused hid in the bushes near the house of the deceased; he finally crept towards the deceased's home who was still enjoying the warmth at the bonfire. The accused cut the deceased's neck from behind leaving all the nerves and veins supplying oxygenated blood to the brain disconnected. The deceased suffered from severe haemorrhage and died instantly. The accused escaped to the forest and disposed of the *panga* used to kill the deceased in an unknown place. In the next morning, the accused went to unpack his charcoal kiln in the forest and did not attend the funeral.

On 2nd July 2018, early in the morning, an unusual alarm was raised which prompted the gathering of villagers at the house of the deceased. Alas, the deceased was found lying in a pool of blood. As the relationship between the accused and the deceased's wife was well known to the community, villagers suspected the accused to be the murderer. PW1 (Pius Elias), being the commander of a traditional militia guard in the village, led a group of five *sungusungu* militiamen to patrol the accused's house. They finally apprehended him taking refuge in the bush near his home. The information in the file shows that, they broke the deceased's leg and wounded him with a *panga* on the face

and he (accused) confessed to kill the deceased. The police were phoned and arrived in the village on the same night and rescued him. The accused was taken to Nyantakara police station and interrogated within the same night and confessed to kill the deceased.

During the trial of the case, the prosecution which was represented by the learned State Attorneys, Messrs, Hezron Mwasimba and Geoffrey Mlagala, summoned five witnesses and tendered two exhibits, namely the sketch map (exhibit P1) and post mortem examination report (exhibit P2) to prove the case to the level of beyond reasonable doubt. On the other hand, the accused enjoyed free legal services from the learned advocate, Miss Esther Sentozi.

The account of the prosecution's evidence stands as follows: the deceased's brother called Clement Samson (PW2) confirmed that, the deceased's marriage was marred with perennial squabbles. The deceased frequently blamed the accused for having an affair with his wife (Tabu Manhyakenda). On 02nd July 2018, the deceased's children told PW2 about the murder of their father. PW2 was the first person to arrive at the crime scene. He found the deceased's neck cut. They immediately suspected the accused to be the person responsible for the murder. PW1, PW3 and other people went to search for the accused while PW2 remained at the deceased's home. He was informed that, the accused was arrested and confessed to kill the deceased.

The evidence of PW2 was supported with PW1 (Pius Elias Njige) who testified that, on 02nd July 2018, an alarm was raised in the village and he immediately responded by going to the crime scene where he found Yohana Samson murdered. At the crime scene, PW1 got information from the deceased's relatives about the accused being responsible for the murder because he was always blamed of having an affair with the deceased's wife. PW1, being the commander of Sungusungu, led a group of five people to patrol the accused's house until at 10 pm when they spotted him taking refuge in the bush near his house. They apprehended him and he confessed to kill the deceased.

PW3 (Zuberi Ibrahim) who was the neighbour and the street leader of the deceased, testified that, he knew the deceased's marriage conflict as it was reported to him. Also, the affair between the accused and the deceased's wife was reported to him more than once. On 2nd July 2018, PW3 went to the crime scene and witnessed the deceased butchered outside his house. Immediately, villagers suspected the accused for the murder. PW3 and other people commenced the search of the accused who was finally arrested in the evening. After the arrest, the accused confessed to kill the deceased.

PW4, (E.8044 Detective Sargent Peter), who worked at Nyantakara police station testified that, on 02nd July 2018, he received a phone call from the chairman of Mgera village and informed him about the murder. The chairman requested for

the immediate assistance from the police. PW4 immediately went to the crime scene accompanied with a medical doctor. He conducted an inspection at the crime scene and noticed that the deceased's house was surrounded with bushes and it was closer to Nyantakara forest. PW4 drew a sketch map and interrogated some people at the scene. The information garnered at the scene linked the accused to the murder. He tendered the sketch map which was admitted as exhibit P1 without any objection.

PW4 further testified that, on the same day |at night hours, the accused was arrested by villagers and he was phoned to fetch him. Upon arriving in the village, he found the accused under the arrest of PW1. PW4 fetched the accused at 10 pm and they arrived at Nyantakara police station and immediately interviewed the accused at 11 pm. The accused confessed to kill the deceased by cutting his neck with a *panga*. The accused further admitted that he had sexual relationship with the deceased's wife something which later became known to the deceased. He therefore planned to kill the deceased in order to marry the deceased's wife. The accused further confessed that, after killing the deceased, he went into the forest and threw the *panga* in an unknown place. PW4 tendered the accused's caution statement which was objected by the accused alleging that he was tortured and forced to sign the statement. The court conducted trial

within trial and the evidence proved that the accused was under terror and pain before the interrogation. Hence the accused's caution statement was rejected.

PW5 (Gabriel Soga Mashauri) was the medical doctor that examined the deceased's body. On 02nd July 2018, PW5 accompanied the police to the crime scene and found the deceased body cut all the nerves on the back side of the neck. After the examination of the deceased's body, he realised that the deceased died due to excessive haemorrhage. He thereafter filled-in the post-mortem examination report which was admitted as exhibit P2.

In his defence, the accused informed the court that, on 01st July 2018 at night hours, he was at home with his family until he went to bed at around 8 pm. In the next morning at around 5:45 am he left his home and went to unpack charcoal in the forest. It is a three hours walking distance from his home to the forest. He arrived back home at around 7:30 pm and found children who informed him that their mother went to the funeral. He prepared himself to attend the funeral; just a short distance from his house, he was arrested. He was beaten with a stick on the face and lost consciousness. He regained his memory when the police had arrived. The police took him to the police station where he was, again, hit with an iron bar leading to loss of consciousness for the second time. Thereafter, he was forced to sign some documents that he did not know their contents.

Having considered the prosecution's evidence, the major question for determination is whether the prosecution proved the case beyond reasonable doubt. I should make it clear that, the law imposes an obligation for the prosecution to prove the case beyond reasonable doubt. For clarity and easy reference **section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2019** provides that:

"A fact is said to be proved when—

*(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the **prosecution beyond reasonable doubt** that the fact exists;"*

The above position is also stated in 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 line with the above provisions of the law, the prosecution has the onus of ensuring that the offence is proved to the required standard. The stance was fortified in the **Mohamed Matula v. Republic** [1995] TLR 3 where the Court insisted that:

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."

Now, in this case, the accused was charged under **section 196 of the Penal Code, Cap. 16 RE 2002** which establishes the offence of murder. It is therefore pertinent for the elements of the offence to be proved before a conviction can be entered against the accused. The section provides:

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

There are four elements requiring proof in the offence of murder. **First**, there must be **death** of a person. **Second**, the death must be a result of an **unlawful act** or by an unlawful omission. **Third**, the prosecution's evidence must satisfy, beyond reasonable doubt, that the accused is the one who killed. **Fourth**, the killing must be preceded by a pre-meditated evil intention (**malice aforethought**). In this case, there is no doubt that Yohana Samson met a brutal death on the night of 1st July 2018. The evidence shows that, he was butchered outside his house when he was at the bonfire. His neck was cut with a sharp object from behind. There is no hesitation to declare that the death of the deceased was not an act of God but the work of a devious mind of a man.

The most difficult point of determination is whether or not the accused was responsible for the murder of the deceased. In proving this vital element, the prosecution's evidence is hinged on circumstantial evidence. There is a plethora of authorities on the application of circumstantial evidence in criminal cases. For instance, in the case of **Bahati Makeja v. The Republic**, Criminal Appeal No. 118 of 2006, Mwanza (unreported), the Court of Appeal of Tanzania observed that:

"in a case depending conclusively on circumstantial evidence the Court must before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis that of guilty."

Also, in the case of **R v. Kerstin Cameron** [2003] TLR 84 the Court had the following to say in connection with application circumstantial evidence:

To ground a conviction on circumstantial evidence, the following principles must apply:

- (a) The evidence must be incapable of more than one interpretation;*
- (b) The facts from which an inference of guilty or adverse to the accused is sought to be drawn, must be proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred;*

- (c) *In murder cases, evidence should be cogent and compelling as to convince a jury, judge or court that upon no rational hypothesis other than murder can the facts be accounted for.*

See also the case of **Sadiki Ally Mkindi v. DPP**, Criminal Appeal No. 207 of 2009, CAT at Arusha, (unreported).

Furthermore, the case of **Lucia Anthony @ Bishengwe v. The Republic**, Criminal Appeal No. 96 of 2016, CAT at Mwanza (unreported) reproduces various conditions for the application of circumstantial thus:

- i. *That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused none else (See **JUSTINE JULIUS AND OTHERS VS. REPUBLIC**, Criminal Appeal No. 155 of 2005 (unreported)).*
- ii. *That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See, **SIMON MSOKE VS. REPUBLIC**,*

(1958) EA 715A and JOHN MAGULA NDONDO VS. REPUBLIC,
Criminal Appeal No. 18 of 2004 (unreported)].

- iii. *That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected [see **SAMSON DANIEL VS. REPUBLIC, (1934) E.A.C.A 154**].*
- iv. *That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. [See **SHABAN MPUNZU @ ELISHA MPUNZU VS. REPUBLIC,** Criminal Appeal No. 132 of 2002 (unreported).*
- v. *That the circumstantial evidence under consideration must be that of surrounding circumstances which, by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics. (See **JULIUS JUSTINE AND OTHERS VS. REPUBLIC (Supra)**).*
- vi. *That the facts from which an inference adverse to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See **ALLY BAKARI VS. REPUBLIC (1992) TLR, 10 and ANETH KAPAZYA VS. REPUBLIC,** Criminal Appeal No. 69 of 2012 (unreported).*

In the case at hand, despite dearth of an eye witness, the evidence of PW1, PW2 and PW3 shows that the accused was suspected of murder as his sexual relationship with the deceased's wife was well known. The suspicion intensified when the accused missed at the villager's gathering on 02nd July 2018. PW1 and PW3 participated in the search and arrest of the accused. The two witnesses confirmed that, the accused confessed to kill after the arrest. PW2 also insisted

that he was informed that the accused confessed to kill the deceased after the arrest. However, there is no clear proof on this allegation. It is evident that, the accused was tortured and finally injured after the arrest. For instance, the statement of PW1 recorded by the police shows that, after the accused was arrested, he was cut with a *panga* on the face and his leg broken. What seems to be evident is that, the accused seemed to confess after he was brutally tortured.

Even the caution statement recorded by PW4 was rejected for containing information indicating that the accused confessed while he was under pain. In fact, PW4 rescued the accused from the village otherwise he could have been another deceased in the same series of event. Under such circumstances, the court cannot bank on the confession given before PW1, PW3 and PW4 because it was done after the accused went through terror and pain.

In general, there is no water tight evidence to directly link the accused to the murder of the deceased. The court cannot depart from the standard established on the proof of beyond reasonable doubt and decide based on suspicion. Even the Honourable assessors who sat with me unanimously opined that there is lack of evidence to sustain a conviction against the accused. Based on the reasons stated above, the court does not find the accused guilty of the offence charged. I

therefore acquit the accused. He should be discharged forthwith unless held for other lawful reasons. It is so ordered.

DATE at BIHARAMULO this 21st March, 2022.

Ntemi N. Kilekamajenga
JUDGE
21/03/2022

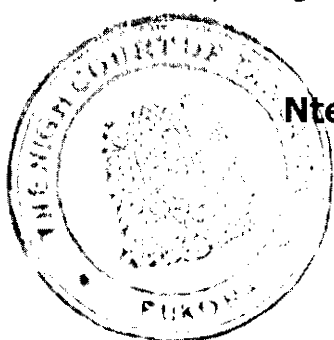
Court

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

Ntemi N. Kilekamajenga
JUDGE
21/03/2022

Court:

Judgment delivered this 21st March, 2022 in the presence of the accused, and his counsel, Miss Esther Sentozi and the learned State Attorneys, Mr. Hezron Mwasimba and Geoffrey Mlagala.




Ntemi N. Kilekamajenga
JUDGE
21/03/2022