

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

CRIMINAL SESSIONS CASE NO. 10 OF 2019

THE REPUBLIC

VERSUS

OMARY JASTON SAMBWIGA

JUDGMENT

Dated: 28th April, 2022

KARAYEMAHA, J

The accused person in this case is **Omary Jaston Sambwiga**. According to the prosecution version, he is the biological son of the deceased **Taifa Hotel**. He is accused of murdering her hence contravening **sections 196 and 197 of the Penal Code [Cap 16 R.E 2002] (currently R.E. 2019)**. It is alleged in the particulars of the offence that on 10/01/2019 the accused murdered **Taifa Hotel**. It is alleged further that the incident took place during night hours at Isende village in Mbalizi area within the City and Region of Mbeya.

In a bid to prove its case, the prosecution led by Mr. Almachius Bagenda, learned State Attorney, paraded three (3) witnesses including Ackson Jaston (PW3) the accused person's brother. The others are

D6402 D/SGT Ivan (PW1) and Onesmo Ernest Zunda (PW2). The prosecution also relied on a number of Exhibits, to wit, documentary such as the Post mortem report (exhibit P1), the sketch map of the scene of crime (exhibit P2) and the accused person's extra-judicial statement (exhibit P3). The defence being led by learned Counsel Mr. Samson Suwi, did call one witness, the accused person, and tendered no exhibit.

The prosecution case can be conveniently summarized as follows. From the totality of the prosecution evidence, it is not disputed that up to her demise in 2019 both the accused person and the deceased lived in the same compound each in his house in Isende village. It is also common ground that the accused person's house is standing 136 ft equivalent to 45.3 meters from the deceased's house in view of exhibit P2 (the sketch map). It was the prosecution case that sometimes in 2019 the deceased threatened to sacrifice the accused to the group of witches to which she was a member like she did to his two sisters. It is discerned from the extra-judicial statement (exhibit P3) that following that threat, the accused sold a pig and travelled to Mbalizi. When he got there he met Isack and John who were cutting grass for cattle and narrated the horrifying story to them. These two volunteered unhesitatingly to finish the deceased first if the accused paid them Tshs.

100,000/=. The trio agreed on what to do and on the same day left Mbalizi for Ilembo Village using two motor cycles. When they got at Ilembo they abandoned motor cycles and walked up to Iwiji. They spent a night together in the accused's house. On the next day in the evening, Isack and John requested the accused to go to the deceased's house and confirm if she had returned from the club. Upon being sure that she was there, the accused informed Isack and John. Quickly, the two went to the deceased's house and eventually killed her. After the bestial act, the killers returned to the accused's house who showed them the way out of the village.

Apparently, when the incident was taking place, PW3 was out of his house for a short call. He saw a touch light illuminating in the deceased's house and later heading to the accused's house which had solar light. Shortly after 20 minutes, his children who had gone to sleep at the deceased's house, returned to PW3's house running. They informed him that the deceased was agonizing and uttering words that she was dying. Without wasting time, PW3 rushed to the deceased's house only to find her grasping her last breath and saying she was dying. He witnessed two wounds that had been inflicted on the deceased's stomach and blood oozing there from. He called people to help but the deceased had already passed away. Undisputedly, PW3 did

not call the accused. But it appears that after people had gathered and noted to be absent, PW3 followed him at his house and informed him of the incident.

It was further the prosecution case that on the next day, i.e., 11/01/2019 both PW3 and the accused were suspected to have a hand in the death of their mother. Village leaders, decided to tie them with ropes and lock them in the house while waiting for the arrival of the police officers who were already notified of the incident. Few minutes before the police had conveyed at the scene of crime, PW3 was released and the accused remained incarcerated. It was the prosecution case that on his arrest, the accused confessed to have been a part in his mother's death. On 15/01/2019 he was taken to the Justice of Peace where his extrajudicial statement was recorded by PW2 in his capacity as the Justice of Peace (the JP henceforth).

In his defence, the accused testified as DW1 and distanced himself from the prosecution accusations. It was his defence that on 10/01/2019 at about 20:00hours Furaha Richard and PW3 followed him and informed him that his mother was stabbed with a knife to death. He said that he could not hear the alarm because he had his radio on high volume. When he got at the scene of crime he found Abel William,

Emmanuel Kabenga and many people. Since he was late to get there, Samwel Kabenga tied him along with PW3 stating that they would explain to police. According to him when the police got at the scene of crime, they arrested him and later arrested his father. At police he was interrogated but denied confessing to have been involved in murdering his mother. He told this Court that what was written in exhibit P3 was made up by Damas the police officer because he never said those words. Since he was tortured and threatened he agreed to sign on exhibit P3.

DW1 defended himself further that on 10/01/2019 was alone at home since his wife and two children had gone to help their grandmother to weed her farm. He said that he didn't go with them because there was no one to feed his pigs and graze his father's goats. He testified further that he didn't go on safari and that from 9-10/01/2019 was the one feeding and grazing cattle. He denied knowing and seeing Isack and John but read their names in documents. He wound up by denying knowing who stabbed the deceased to death.

The foregoing consists of the material evidence of the case. Parties made final submissions. I shall consider their respective arguments raised as I will be analysing the evidence. Those raised but

not discussed in my analysis, I must state, ought to be considered deemed irrelevant.

From the totality of the prosecution version, it cannot be doubted that the deceased died unnatural death. The evidence of PW3, Ackson Jaston explains to the hilt how he found the deceased grasping her last breath and later discovered that she had two injuries on her stomach and was bleeding. Together with that evidence, there is evidence from the PF3 (exhibit P1). This exhibit reveals that the deceased was assaulted and stubbed on her stomach which resulted into liver injury. This injury caused internal bleeding. The PF3 indicates further that there was:

"Penetrated wound to the stomach and food content come out also liver injury."

Although the doctor was not called to testify, it is, however, clear the cause of death was due to severe internal bleeding due injuries sustained.

Mr. Bagenda raised an issue whether the assailants had malice aforethought. This medical evidence, in my view, proves that the assailants had malice aforethought. The nature of the wounds as stated in the PF3, viewed in light of the body part where they were inflicted it

is enough evidence that the attackers intended to cause death. The evidence supports Mr. Bagenda's conviction that the deceased's death was unnatural and the perpetrator had malice aforethought.

This is a murder case. It is upon the prosecution to prove the case beyond reasonable doubts not only that Taifa Hotel is dead but also that it is the accused person who has a hand in her death. Murder is proved when the death of one person is caused by another with malice aforethought. As stated hereinabove, there is no dispute that the deceased was murdered and the assailant had malice aforethought. That has been proved beyond reasonable doubt. The issue for my determination, therefore, is one. It is whether or not the accused person is responsible for the deceased's death.

Having dispassionately considered the evidence and arguments from either side, I propose to first address the evidence in respect of the accused's arrest. On this, the evidence before me is heavily shaking. PW3 who was at the scene of crime had no useful text on the reasons why the accused was arrested. His testimony intimates that after people had ushered in responding to the cries, the accused was not there. On probing, he was found at his house cooking food. Apparently, suspicion over him started crystallizing. On the next day (11/01/2019) he and the

accused were suspected hence tied with ropes by Emmanuel Kabenga (the hamlet chairman). A moment later he was released. There is no evidence adduced demonstrating why PW3 was released and the accused not. Similarly, the police officers who went to the scene of crime did not make any effort to get to the bottom of the matter. PW3 testified that after he was interrogated and a sketch map drawn, they left with the accused and his father. To demonstrate gross unprofessional and aggressiveness, they arrested and incarcerated Jaston Sambwiga who on the date of incident was going on with treatment at Itumba Hospital in Ileje District. In view of the evidence, there is no lucid reason why the accused and Jaston Sambwiga were the only ones among all people who were in the hamlet on the incident date arrested. Much worse, PW1 did not tell the court if they got any rumours at the scene of the crime that made them suspect the accused and Jaston Sambwiga. If so, I am inclined to borrow the Court of Appeal's words in ***Mashimba Dotto @ Lukubanija v Republic***, Criminal Appeal No. 317 of 2013 (unreported) which observed that:

"There is no dispute that murder is a very serious offence which upon conviction attracts the death penalty. That being the case, it is always expected that its investigation and

eventual prosecution would always be done with great care and seriousness.”

True to this disposition, it does not need extra-ordinary thinking to know that this case was poorly investigated. In the similar vein, the prosecution of it is doubtful. I say so because in the absence of plausible explanation why the accused was arrested in the first place creates a room of doubting the process. In the same spirit, in the absence of any other evidence on which the prosecution case would stand or fall on the word of the accused regarding the date of the event, I think the case becomes weak. I think in this case prudence demands that the village leaders who decided to apprehend the accused ought to have been summoned with the aim of hearing their versions on why they did so. Perhaps if summoned their evidence would have helped in lending credence to the accused's story contained in exhibit P3. In the absence of the evidence of these people it is not safe to belief wholeheartedly that conviction will be sounding. In this position I need only to pay homage to what the Court of Appeal stated in the decision of ***Aziz Abdallah v Republic*** [1991] TLR 71 at page 72 which was quoted in the case of ***Mashimba Dotto @ Lukubanija*** (supra): where holding (iii) speaks as follows:

"(iii) The general and well known rule is that prosecution is under prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within the reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

This is no doubt a good principle from which we can draw inspiration. Aware of this principle Mr. Bagenda submitted aided by **section 143 of the Evidence Act [Cap 6 R.E. 2019]** that they only needed three witnesses to prove the case and specific number of witnesses is needed. I absolutely agree with him. Nevertheless, if there are facts that need more witnesses who from their connection with transaction in question are able to testify to those material facts, the prosecution is under prima facie duty to call them. In the instant case I agree with Mr. Suwi that more witnesses were needed. As pointed hereinabove, those witnesses would shed light on why the accused was given to the police officer. Ultimately, we would be spectacularly connected to the gist of exhibit P3.

Recalling the issue raised, whether or not the accused person is responsible for the deceased's death, the prosecution relies on the evidence from PW1, PW2, PW3 and exhibit P3 to establish that the

accused person hired Isack and John to murder the deceased hence involved in the murder incident. Admittedly, the evidence of PW1 and PW2 is hearsay. Following that fact, in his submission, Mr. Bagenda invites this court to heavily rely upon the confessional statement made by the accused and recorded by PW2 in his capacity as the JP and that it amounted to nothing but the truth. To add flavor in this judgment, I think, it is best if exhibit P3 speaks of the occurrence narrated by the accused:

"Mimi ni Mpagani, Mkulima, ninaishi katika Kijiji cha Iwiji kilichopo Mbeya Vijijini katika Mkoa wa Mbeya. Nakumbuka kuwa siku moja mama yangu aliniita na kusema mwanangu sijakurithisha kitu chochote ila kaka yako nimemrithisha, sasa natakiwa nikutoe mchango kwa wachawi kama dada zako. Nikasema mama utanitoaje mchango kwa wachawi? Akasema unaona dada zako wameenda wapi? Nikapata hofu kwa kuwa dada zangu wawili walisha kufa. Niliona ni bora nikimbie hapa nyumbani, nikaamua kuuza nguruwe nikapata nauli nikakimbia kijiji nikaenda Mbalizi, stand ya Umalila nilikutana na vijana wawili wa nyumbani wanaokata nyasi za mifugo; niliwaeleza mama alivyoniambia kuwa anataka anitoe duniani. Wakaniambia kuwa kama una hela shilingi laki moja tupatie ili tumtoe yeye duniani. Kwa kuwa nilikuwa na hela hiyo nikawapatia. Baada ya kuwapatia wakasema twende sasa hivi

na tuliondoka kwa kukodi pikipiki mbili toka Mbalizi hadi Ilembo. Tulitembea kwa mguu hadi Iwiji tukafika nyumbani kwangu ambako tulilala. Kesho yake jioni wakasema niangalie kama mama amerudi kutoka kilabuni. Nilipoona yupo ndani mwake nikawaambia nendeni, wakaenda na waliporudi wakasema tumeshamaliza, wakaomba niwapeleke njia tuliyoingilia nikawapeleka wakaondoka. Nilipowasindikiza nilirudi nyumbani kwangu ambako nilifuatwa baada ya muda mfupi na kuelezwa kuwa mama ameuawa; nikaenda na nikakuta watu wengi wamekusanyika pale kwa mama. Viongozi wa Kijiji wakanifunga kamba na kusema kwa vile nimechelewa nitakuwa nahusika na tukio hilo; wakapiga simu Polisi waliokuja pale wakanifunga pingu na kunichukua hadi Mbalizi ambako niliwekwa ndani hadi leo hii. Wale nilioenda nao Kijijini mmoja alijitambulisha kwa jina la John s/o? na Yisaki s/o? wote walikuwa wageni kwangu.”

Mr. Bagenda seems to argue aided by the case of ***Chande Zuberi Ngayaga and another v Republic***, Criminal Appeal No. 258 of 2020 (unreported) that the accused self-incriminated himself and is the best witness. Of course this is the position of the law. Looking forward to believe the learned State Attorney, I have first subjected this confession to critical examination. From it there are a lot of disturbing features. The ones I consider to be major are four: **Firstly**, how the deceased would

be so confident to inform his own child that she was going to sacrifice her to witches and mention her other children she sacrificed. Didn't she consider that the accused would expose her bestial behavior to the whole family and severe consequences to follow the stream? **Secondly**, exhibit P3 does not state categorically when the threats were mounted to the accused and when he left the village. **Thirdly**, exhibit P3 is doubted on the manner the accused easily got Isack and John and how these two young men unhesitatingly agreed to a dangerous mission. The same exhibit is clear the accused did not know them prior. This corresponds with his defence evidence that he did not know them except reading their names in documents. What is gleaned from it is that he did not take a pause and acclimatize with them. **Fourthly**, is the question how Isack and John knew that the deceased had gone to the club and request the accused to go and check whether she had returned? In my view, irrespective of the fact that admissibility of the extra-judicial was not objected, the existence of these doubts intimates a light and implausible statement. It is indeed unrealistic because it shows that the accused did not take any caution in the move to eliminate his mother. He simply met the young men, trusted them very quickly, exposed himself and gave them the assignment. In my view this is unbelievable.

The accused stated in his defence that he did not make this statement but stated what was already written on the paper he was given and instructed to recite by the police. He also said that he signed on it because he was threatened. The accused replied further that he did not go to safari and that from 9-10/01/2019 was the one feeding and grazing cattle. His evidence is corroborated by PW3. I think it will be best if the witness (PW3) picks a tale in his own words:

"Omary had pigs and was grazing our father's goats. He was living with his wife. It was him who was feeding pigs personally. I did not see his wife on the date our mother died. All the time Omary was feeding his pigs and grazing our father's goats. Prior our mother's death, I did not see any other person feeding pigs and grazing goats. It was him who was doing that. I don't know if prior our mother's death Omary went on safari. What I know is that he was feeding pigs and grazing goats every day."

Thus, from the witness' telling, one gets an impression that the accused was all the time at home and never went to any other places far from the village till the incident date. It also gives an impression that the accused never travelled to Mbalizi because he was seen at home feeding pigs and grazing goats on the said days. So, the contents of exhibit P3 are substantially contradicted by PW3. More so, if the contents of exhibit P3 were a true story, it is my firm view, that the

same needed corroboration. To the contrary, PW3 whom, I think, could corroborate the same said when responding to cross-examination questions that the deceased was of good character and loved her children equally. After the deceased's death he was also suspected of having a hand in her death. However, he was set free except the accused who was blamed for getting at his mother's house late on the incident date. He, nevertheless, testified that the accused did not confess before them or his father that he was involved in the death of the deceased. According to him circumstances didn't point at anybody to have murdered the deceased. Therefore, having a doubted and seemingly unrealistic confessional statement, corroboration was very important otherwise, I am afraid; no conviction can be grounded on it.

Another infraction that has been the center of complaint by Mr. Suwi is connected to a failure by the JP to comply with the Chief Justice's guide. I am attracted to have a word on it. He said that PW2 failed to comply with item 6 which required him to inspect the accused person's body. According to him, PW2 having two options under that item he had to indicate vividly what option he took. The learned counsel invited this court to draw an inference adverse to his evidence. He observed further that in recording extra-judicial statement, the JP must properly consider each item prior recording the accused's statement. He

buttressed his argument with the case of ***Jackson Protaz v Republic***, Criminal Appeal No. 385 of 2020 (unreported).

The learned counsel has implored this Court to consider whether PW2 complied with the dictates of the CJ's guide. I have keenly examined exhibit P3 particularly item six. In this item, the accused is to be told when he is before the JP and asked whether he is ready to be inspected. Then, the JP has to record the gender and state whether he has inspected/failed to inspect him/her and give reasons. Item 6 of exhibit P3 reproduced states:

"6. Mtuhumiwa ni ***mwanaume*** nimemkagua /nimeshindwa kumkagua mwilini mwake lakini yeye mwenyewe amesema kuwa ***hana kovu lolote mwilini.***"

This extract needs no much time to ascertain that what PW2 did is confusing. It is not clear on what PW2 did. Like Mr. Suwi submitted, it is not clear if he failed or managed to inspect him. The law requires the JP to state categorically what he did under this item. Given the fact that the accused has raised the issue of torture and threats, I am inclined to hold that had PW2 inspected the accused his answers would be lucid. Having this position, I am behooved to hold that PW2 contravened the stand of

law. The Court of Appeal had to grapple with a corresponding scenario in the unreported case of **Jackson Protaz** (supra) which quoted the decision in yet unreported Criminal Appeal No. 367 of 2008- **Japhet Thadei Msigwa v Republic**. Just as is in the instant case the JP failed to follow the CJ's instructions. The Court made the following remark:

"... when the justice of the peace is recording confessions of persons in custody of the police, they must follow the chief Justice's instructions to the letter. The section is coached in the mandatory."

The Court stated further revealing the rationale behind, that:

"We think the need to observe the Chief Justices instructions are two-fold. One, if the suspect decided to give such statement; he should be aware of the implications involved. Two, it will enable the trial court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntarily."

Another sub question for determination is in what ways exhibit P3 should be treated given the fact that its admissibility was not objected. Mr. Bagenda's stance is that a confession or statement will be presumed voluntarily made if not objected at the time of its admissibility. The learned counsel added that a person who confesses to a crime is the

best witness. I agree with him because this is not a mistaken notion. I say so because confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers. But a confession forced from the mind by the flattery of hope, or by the torture or fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected. As already pointed out, the confession by the accused before PW2 raises doubts and was recorded in contravention of the rule, it is unsafe to ground conviction relying on it. While Mr. Bagenda is completely holding a view that once admitted without objection, a confession is presumed to have been made voluntarily and casting doubt on it during defence stage is an afterthought. Mr. Suwi voyage is different. He is arguing that even if a confession is admitted without being objected the court must satisfy itself if the confession contains nothing but the truth.

Undisputedly, exhibit P3 was admitted without being objected as correctly argued by Mr. Bagenda. Nevertheless, in the course of analysing the evidence I have come to a definite conclusion that the said

exhibit is unrealistic and cannot stand by itself to convict the accused person. I say so because no truth can be discerned from it. Corresponding remarks were pronounced in the case of ***Kija Iseme v Republic***, Criminal Appeal No. 175 of 2015 recalling its earlier decision in ***Inota Gishi and 3 others v Republic***, Criminal Appeal No 5 of 2008 (both unreported) that:

"... even if the confession was not objected to by the defence, the court was still bound to be cautious in admitting such statement, and ought to have looked for corroboration and could only convict if it is satisfied that the confession contained nothing but the truth...."

Thus, when all said with respect to exhibit P2, it is clear that it deserves no credit and was not materially corroborated. As correctly argued by Mr. Suwi it was yet recorded in contravention with the conditions stipulated in the CJ's guide. In a nutshell, I rule out the probative value of it and no weight is accorded to it.

The remaining issue is for determination is whether the remaining evidence can sustain the conviction. Unfortunately, a short answer to the question is in the negative. The evidence of PW3 is in all fours not supporting the charge. The evidence of PW1 and PW2 is hearsay. It has nothing to offer as far as the events of the said date are concerned. As

correctly formulated by the defence counsel, I am thus of the view that there is no cogent evidence to sustain conviction of the accused.

The charge has, therefore, not been proved to the hilt. I find the accused not guilty. I acquit him of the charge of murder contrary to section 196 of the Penal Code. On this account, I restore him to his liberty unless otherwise to be held for other lawful reasons.



DATED at MBEYA this 28th day of April, 2022

**J. M. KARAYEMAHA
JUDGE**