

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

**CRIMINAL SESSION CASE NO. 96 OF 2019**

***THE REPUBLIC***

***VERSUS***

***MINU MAKUJA  
KIJANGEREJA***

**JUDGMENT**

*01<sup>st</sup> April & 08<sup>th</sup> April 2022*

***Kilekamajenga, J.***

The facts of this case are as follows: the accused persons (i.e. Minu Makuja and Kijangereja) and their friends called Komya Sebi and Masanja Kisinda migrated from Bariadi to Nyakanazi in Biharamulo in search for agricultural land. They found a fertile land at Nyakanazi and decided to establish their place of residence. Komya Sebi was married to Kwandu Kasile (first deceased) and Salome Safari. Komya Sebi had three children from the senior wife (Kwandu Kasile). In the early morning of 16<sup>th</sup> October 2016, the villagers of Nyakanazi heard an alarm; they gathered at the family of Komya Sebi and found his senior wife (Kwandu Kasile) and his child called Komiwa Komya dead. The two people were brutally slaughtered in the bush near the house of Komya Sebi. It is alleged that, the unknown murderers went to the house of Komya Sebi at night and did not find him at home. At that time, Komya Sebi was in the forest guarding his

charcoal kiln. The murderer took the two wives and the last child of the Komya Sebi and went with them in the bush; they raped the victims before slaughtering the senior wife and her child. The first deceased's private parts were removed. However, the junior wife (Salome Safari) escaped immediately after the alleged rape. It is further alleged that, the accused persons were close friends; and the first accused (Minu Makuja) was the uncle (Baba mdogo) of the first deceased. Immediately after the incident, the police arrested Komya Sebi, Salome Safari and other three persons. After almost a month, the accused persons and Masanja Kisinda were arrested in connection with the murder. Alas, Masanja Kisinda died in the hands of the police just a day after the arrest.

The accused persons were finally arraigned before this court for two counts of murder contrary to section to **section 196 of the Penal Code, Cap. 16 RE 2002**. The information shows that, on 16<sup>th</sup> of October 2016, during night hours at Nyakanazi village within Biharamulo District in Kagera Region, the accused persons murdered two persons namely Kwandu Kasile and Komiwa Komya. During the trial, the accused persons pleaded not guilty to the information of murder allowing the prosecution to prove the case to the required standard. The prosecution summoned eight witnesses and tendered eleven (11) exhibits for the case. The admitted exhibits in this case were as follows: the post-mortem examination report of the first deceased (exhibit P1); the post-mortem examination report of the second deceased (exhibit P2); the first accused's

caution statement (exhibit P3); the second accused's caution statement (exhibit P4); the sketch map of the crime scene (exhibit P5); the first accused's extra-judicial statement (exhibit P6); the second accused's extra-judicial statement (exhibit P7); Government Chemist report (exhibit P8); Certificate of Seizure (exhibit P9); the first accused's extra-judicial statement (exhibit P10) and the second accused's extra-judicial statement (exhibit P11). During the trial, the case commenced under the flamboyant learned State, Miss Naila Chamba but later taken over by the learned State Attorneys, Messrs. Hezron Mwasimba and Geoffrey Mlagala. The first accused was represented by the learned Advocate, Mr. King Manase whereas the second accused enjoyed the legal services of the learned advocate, Miss Esther Sentozi.

The gist of the evidence is as follows: Doctor Tumpare Hakimu (PW1) arrived at the crime scene at around 12 noon and examined the bodies of the deceased. The two deceased were slaughtered and the first deceased's private part was removed. She tendered the post-mortem examination report for the first and second deceased which were admitted as exhibits P1 and P2 respectively. Superintendent Haji Rajabu (PW6) informed the court that, on 16<sup>th</sup> October 2016, he went to the crime scene and found the two deceased persons slaughtered. He took blood swab from the first deceased for further examination. He instructed another police officer called Freddy to draw the sketch map. He testified further that, on 05<sup>th</sup> November 2016, the accused persons confessed to

kill the deceased persons. In their confession, they planned to kill Komya Sebi who was the 1<sup>st</sup> deceased's husband. When they missed him, they ended-up killing the deceased. After the confession, PW6 requested the accused persons to give him the clothes they wore during the murder.

Therefore, PW6 went to search the houses of the accused persons. He searched the house of the first accused and got a shirt with long sleeves and a jeans trouser with blood stains. He seized the trouser for further investigation. He thereafter filled-in the certificate of seizure which was also signed by the witnesses. He went to search the house of the second accused where he got a trouser and a shirt. He also got the bicycle which the second accused took from the house of the deceased after the killing. The bicycle was an AVON make and greenish in colour. Furthermore, the second accused admitted that the bicycle belonged to the first deceased's husband (Komya Sebi). PW6 filled-in the certificate of seizure which was also signed by witnesses. PW6 tendered the two certificates of seizure which were admitted without objection as exhibit P5 and P6. He further tendered the jeans trouser which was admitted without objection as exhibit P7. The bicycle was also tendered and admitted without objection as exhibit P8.

Godfrey Andrea (PW4) who was the hamlet chairman of the accused persons told the court that, on 05<sup>th</sup> November 2016, he accompanied the police to search

the house of the accused persons. He witnessed the search of the first accused's house where they found a trouser jeans, a draft shirt with long sleeves. The jeans trouser had stains of blood. Thereafter, he signed the certificate of seizure. He also witnessed the search of the house of the second accused where they found a trouser with drafts, a white shirt, a jacket, bicycle and shoes made from car tyres. He testified further that, the white shirt had red stains and that the bicycle was an Avon make. Before this court, PW4 identified all the items seized in the house of the accused persons.

Leonard Ayubu Msama (PW5), who was the chairman of Nyakanazi village, informed the court that, on 16<sup>th</sup> October 2016, a woman and a child were murdered in his village. He went to the crime scene and witnessed that the two people were slaughtered. On 05<sup>th</sup> November 2016, he accompanied the police during the search of the accused persons' houses. In the house of the first accused, they found a shirt with long sleeves and a jeans trouser. He further testified that the jeans trouser was stained with blood. He further testified that, the first accused admitted to wore the clothes during the murder. PW5, thereafter, signed the certificate of seizure. He also witnessed the search in the house of the second accused where they got one white shirt with long sleeves, one trouser with drafts, a jacket, shoes made from shoe tyres (katambuga) and a bicycle. He testified further that, the trouser had stains of blood. PW5 told the court that, the second accused admitted to wear the shoes and clothes during

the murder. The second accused further admitted that, the bicycle belonged to the husband of the deceased. After the search, PW5 signed the certificate of seizure.

Leticia Nchagwa Waitara (PW7) who was the chemist from the office of the Government Chemist testified via virtual court from Dar es salaam. She revealed that, on 27<sup>th</sup> December 2016, while at work, she received a sealed parcel which was accompanied with two letters; one letter from the forensic bureau of Dar es salaam and the other one from the office of OC-CID of Biharamulo. In her office, the parcel was registered with laboratory Number 2299 of 2016. She was instructed to examine the samples to establish the DNA. The parcel had three samples thus; **one**, blood swab from the deceased called Kwandu Kasile which she marked it as exhibit A; **two**, a trouser from Kija Ngereja (2<sup>nd</sup> accused) which had stains of blood believed to be blood, and she marked it as exhibit B; **three**, a trouser from a suspect called Minu Makuja (1<sup>st</sup> accused) which was believed to have blood stains which she marked it as exhibit C. PW7 immediately commenced examination of DNA; **first**, she extracted DNA from the exhibits. **Second**, she amplified the DNA from the exhibits into 15 aspects. **Third**, she detected DNA from the exhibits. The results from the examination were as follows: the swab of blood from exhibit A showed the DNA of a woman. Exhibit B did not give any result. Exhibit C showed that, the stains were the blood of a female person. After comparison, she concluded that the DNA from exhibit A and

C showed that the blood from the first deceased (Kwandu Kasile) was on the trouser of Minu Makuja (1<sup>st</sup> accused). She thereafter prepared a report which she signed and the same was approved by the head of the department called David Elias. The report was finally authorised by the Acting Government Chemist called Benny Mallya and stamped accordingly. She tendered the report which was admitted without objection as exhibit P9.

Detective Staff Sargent Josephat (PW2) informed the court that, on 03<sup>rd</sup> November 2016 while at Nyakanazi police station, he was assigned to interview the first accused person. During the interrogation, the first accused confessed to plan the killing of the first deceased's husband but ended-up killing the two deceased persons. He prayed to tender the first accused's caution statement which was objected by the first accused. After conducting trial within trial, the first accused's caution statement was admitted as exhibit P3.

Detective Sargent Elizabeth (PW3) testified that, on 05<sup>th</sup> November 2016, she was assigned to interrogate the second accused. During the interview, the second accused confessed to kill the deceased while assisted by the first accused and Masanja Kisinda. PW3 tendered the cautioned statement of the second accused person which was objected by the second accused. After conducting trial within trial, the second accused's cautioned statement was admitted as exhibit P4.

Edward Samara (PW8) who was the Magistrate at Biharamulo Primary Court and justice of the peace testified that, on 07<sup>th</sup> November 2016 at 12 noon, Detective Corporal Kiruma brought the first accused to his office for recording an extra judicial statement. Before the justice of the peace, the first accused confessed to participate in the killing of the deceased. PW8 further testified that, on 09<sup>th</sup> November 2016, Detective Corporal Kiruma brought the second accused for recording an extra judicial statement. The second accused also confessed to participate in the murder of the deceased. PW8 tendered the two extra judicial statements which were objected by the accused persons. The court conducted trial within trial and finally admitted the two extra-judicial statements. The extra-judicial statement of the first accused was admitted as exhibit P10 whereas the extra-judicial statement of the 2<sup>nd</sup> accused was admitted as exhibit P11.

During the defence, the first accused (DW1) testified that, he relocated from Bariadi to Nyakanazi in 2012. The first deceased's husband (Komya Sebi) was his son in law because the first deceased (Kwandu Kasile) was the daughter of his brother called Kasile Makuja. On 15<sup>th</sup> October 2016, he spent the whole day at home until he went to bed with his wife Salu Ruchanganya. They slept until the next morning and he prepared his family to go to the shamba. On the way to the shamba, he heard an alarm and immediately went to the crime scene and found his daughter (Kwandu Kasile) and granddaughter (Komiwa Komya) dead. He also



found many villagers at the crime scene. Immediately, DW1 phoned his brother Kasile Makuja and informed him on the death of the deceased. The police arrived and examined the bodies and interrogated the first deceased's husband (Komya Sebi) and Salome Safari who was the junior wife of Komya Sebi. Salome Safari informed the police that he saw two people though he did not know their names. However, she promised to recognise them if he could see them. The police ordered villagers to sit in a circle for identification but Salome Safari did not identify any person.

At the crime scene, the police arrested Komya Sebi, Salome Safari, Ndongo Dotto and Kazinza and another person. However, Komya Sebi named DW1 as the person who could take care of the two remaining children of the deceased and the properties as he (Komya Sebi) was being taken to the police station. After the examination of the bodies, the bodies of the deceased were handed to DW1 as he was a close relative to them. His brother instructed DW1 to transport the bodies to Bariadi for burial. DW1 requested the police to assist him by taking the bodies from the bush to his home as they arranged for transport. DW1 went to the deceased's house and brought a bed sheet and a piece of Kitenge to wrap the bodies and finally ferried the bodies using the police car to his house. As they were about to depart to Bariadi, DW1 took off the dirty clothes he wore and left them in the house. He wore the jeans trouser and shirt when handling the

deceased bodies. The deceased were buried on 17<sup>th</sup> October 2016 in Bariadi and DW1 stayed there for more than a week before returning back to Nyakanazi.

On 03<sup>rd</sup> November 2016, DW1 was arrested in connection with the murder of the deceased and sent to the police station. While at the police station, he went through torture as he was forced to confess. On 04<sup>th</sup> November 2016, other suspects including Masanja Kisinda were brought in the police lock-up. They were also severely tortured. In the morning of 05<sup>th</sup> November 2016, Masanja Kisinda passed on. On the same day, DW1 was forced to sign some papers and he finally signed using his thumb. He was later transported to Biharamulo Police station. On 07<sup>th</sup> November 2016, DW1 was taken to the justice of the peace for recording of an extra-judicial statement. Again, he was forced to confess the murder of the deceased. He again signed some papers using his thumb in the presence of the justice of peace. In his testimony, DW1 stated that the first deceased and his wife had a marriage conflict. Komya Sebi accused his wife of being unfaithful to their marriage and one year later, he (Komya Sebi) married a second wife (Salome Safari).

Salu Ruchanganya (DW3), who was the wife of DW1, testified that, on 15<sup>th</sup> October 2016, she went with her husband (DW1) to the shamba and came back later in the evening. On 16<sup>th</sup> October 2016, they prepared to go to the shamba with DW1 and other family members. On the way, they heard the alarm and she

went to the crime scene where she found the bodies of the deceased. The police came and examined the bodies before the relatives were allowed to take them. Thereafter, the bodies were transported in the police car to her house before being transported to Bariadi for burial. She further testified that the first deceased had a conflict with her husband (Komya Sebi). Komya Sebi accused the first deceased for having a relationship with Kabote. DW1 attempted to resolve the conflict without success.

Kasile Makuja (DW4) testified that, the first accused (Minu Makuja) is his young brother and that the deceased Kwandu Kasile was his daughter. He confirmed that her daughter Kwandu Kasile (deceased) and Komya Sebi had a conflict. Komya Sebi alleged that, Kwandu Kasile had an affair with another man. The birth of the last child Komiwa Komya (second deceased) fuelled the conflict because Komya Sebi rejected that child. This conflict further led to another conflict between the first accused and Komya Sebi because Kwandu Kasile was always taking refuge at the house of the first accused whenever they fought. DW4 consistently denied the accused persons being involved in the murder. He blamed Komya Sebi for being the person responsible for the murder of the deceased.

Kija Ngereja (DW2) testified that, on 15<sup>th</sup> October 2016 in the morning he went to the farm with his senior wife called Theresia Clement. They worked until late

in the evening before coming back home. He thereafter spent the whole night together with his wife. On 16<sup>th</sup> October 2016, he heard an alarm and proceeded to the crime scene where he found two deceased persons. The police came and interrogated Komya Sebi and his junior wife, Salome Safari. They were later told to stand in a circle for identification but she (Salome) did not identify any suspect. At the crime scene, five people were arrested for further investigation. DW1 was assigned to take care of the properties of the deceased. After the examination of the bodies, the bodies of the deceased were handed-over to DW1. Thereafter, they took the bodies to the house of DW1 and later transported them to Bariadi for burial. He immediately returned to Nyakanazi and continued with his normal activities.

On 04<sup>th</sup> November 2016, DW2 was arrested and taken to Nyakanazi police station. He was thereafter tortured and forced to confess the murder of the deceased. On 05<sup>th</sup> November 2016, his co-suspect called Masanja Kisinda died within the police lock-up. He was later forced to sign some papers and he signed. On the same date, the police searched his house and found a bicycle, trouser, shirt and jacket which were his properties. He was later taken to Biharamulo police station. He insisted that the bicycle belonged to him. On 09<sup>th</sup> November 2016, he was taken to the justice of the peace where he signed the statement.

Theresia Clement (DW5) who was the wife of the second accused (DW2) testified that, on 15<sup>th</sup> October 2016, she spent the whole day at the *shamba* with DW2. At night, they went to bed together and that her husband (DW2) did not go out on that night. In the next morning, they heard an alarm and DW2 went to the crime scene. DW5 stayed at home with the children because one of them was unwell. In her testimony, DW5 testified that, they owned a greenish bicycle which was an AVON make.

Having considered the evidence from the prosecution and defence, the most pertinent issue for determination is whether the prosecution proved its case beyond reasonable doubt. See, **Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2019**. It is the duty of the prosecution to exhaust this requirement of the law. See, the case of **Hemed v. Republic [1987] TLR 117**. The duty of an accused is merely shading doubt to the prosecution case. For instance, in the case of **Mohamed Matula v. Republic [1995] TLR 3**, the Court of Appeal of Tanzania 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.'*

In this case, the accused persons stand charged with murder contrary to **section 196 of the Penal Code**. The prosecution evidence does not leave and

doubt that the deceased were brutally slaughtered on the night of 16<sup>th</sup> October 2016. This is not one of the contested issues because even the accused persons witnessed the bodies. Being the close relatives to the accused persons, they escorted the bodies to Bariadi for burial. I have no reason to analyse further whether the deceased died or not. The next issue is whether the accused persons are responsible for the murder of the deceased. On this issue, the court received three kinds of evidence namely, circumstance evidence, evidence based on confession and expert evidence.

It is already settled under the law that, the application of circumstantial evidence would demand the court to take an extra caution. In the case of **Bahati Makeja v. The Republic, Criminal Appeal No. 118 of 2006**, Mwanza (unreported), the Court of Appeal of Tanzania had the following observation:

*"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 the application of 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 cases of **Sadiki Ally Mkindi v. DPP, Criminal Appeal No. 207 of 2009**, CAT at Arusha, (unreported) and **Lucia Anthony @ Bishengwe v. The Republic, Criminal Appeal No. 96 of 2016**, CAT at Mwanza (unreported).

In this case, there was no eye witness to the murder of the deceased. Even the surrounding circumstances, do not link the accused persons to the murder of the deceased. The accused persons had no any conflict with the deceased. In fact, the first accused was the uncle of the first deceased and the grandparent of the second deceased. The second accused was a closer friend to the first accused and also well-known and friend to the deceased. There is no evidence suggesting that the accused persons had any motive to murder the deceased. Generally, the circumstantial evidence at hand cannot be relied on for a conviction.

I should now consider the next piece of evidence. The prosecution evidence shows that, the accused persons were arrested and interrogated on divers dates. They confessed to participate in the murder of the deceased. They were later taken to the justice of the peace for recording of extra-judicial statement and they again confessed. However, the court must take extra-caution before convicting an accused based on a confession. On this point, I wish to consider the guidance of the law provided 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.'*

The above position of the law is further expounded in the case of **Tuwamoi v. Uganda [1967] 1 EA 84**, where the East Africa Court stated that:

*'We would summarise thus a trial court should accept any confession which has been retracted or repudiated with caution, and must before finding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessarily in law and the court may act on confession alone if it is fully satisfied after*



*considering all the material points and surrounding circumstances that the confession cannot but be true.'*

In the case at hand, the evidence shows that, the accused persons were arrested on divers dates and interrogated. All of them confessed to participate in the murder of the deceased. However, a closer scrutiny at the confessions made before the police shows that there was discrepancy in the motive behind the murder. The first accused confessed to have participated in the murder because he was solicited to do so by Masanja Kisinda. They wanted to kill Komya Sebi in order to take the fertile land that he owned. They believed that, the death of the Komya Sebi would prompt the scatter of his wives leaving the land unattended. On the other hand, the second accused's cautioned statement shows that, he participated in the murder of the deceased after being solicited by the first accused. He mentioned the motive behind the murder being the conflict between the first accused and Komya Sebi as the later had taken away a goat that belonged to the first accused.

However, throughout the prosecution and defence evidence, there is no any witness who confirmed that Komya Sebi ever kept goats in his family. What was evident is, the husband of the first deceased (Komya Sebi) was a charcoal maker and lived with his family in the forest. There is dearth of evidence suggesting that he kept goats. Also, both the cautioned statements and the extra-judicial

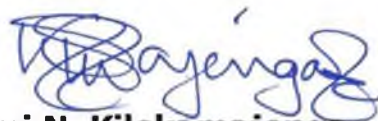
statements do not bring a coherent story on the death of the deceased. For instance, the second accused stated that, the first accused raped the first deceased, killed her and later removed her private parts. I am a bit hesitant to believe this story because, as stated before, the first accused was the uncle (Baba Mdogo) of the first deceased. He could not have raped her own daughter in the presence of the other persons and thereafter remove her private parts. It is real hard to imagine this in an African life. On his part, the first accused stated that, Masanja Kisinda raped the first deceased, killed and removed her private parts. It is therefore evident that the confessions bring different stories on the motive and death of the deceased.

Under these circumstances, the court must take an extra-caution in believing the confessions because the same confessions were repudiated/retracted by the accused persons. In their defence, the accused persons vehemently argued that they were severely tortured and forced to confess. During that torture, one of their co-suspects (Masanja Kisinda) passed on in the hands of the police. Though the reasons for the death of Masanja Kisinda were given by one of the prosecution witness, it shades doubt on whether the confessions made by the accused persons were procured without a torture. There is a higher possibility that torture might have been applied leading to the confessions that have no coherence.

On the other hand, the evidence of PW7 shows that the DNA of the first deceased was found on the trouser of the first accused. The report from the chemist was admitted without any objection. However, both the prosecution and defence witness shows that the first accused was the only close relative who received the bodies of the deceased after the medical examination. The first accused's defence showed that, he received the deceased immediately after the examination. He went to the deceased's house and secured a bed sheet and a *kitenge* to wrap the bodied before taking them to his house for burial preparations. The first accused did not dispute the presence of the blood stains on his trouser which might have been caused by him handling the bodies in his house. The evidence of DW1 was supported with DW2, DW3 and also hinted by PW6. In my view, the evidence casts some lights on the presence of the DNA of the first deceased on the first accused's trouser.

In conclusion, there are some gaps not filled-in with the prosecution evidence and this court is left in a state of doubt. For instance, **first**, if the deceased were killed at night and Salome Safari escaped the death at that night; and that the first deceased's husband was in the forest guarding his charcoal, then why was the alarm raised in the morning and not at night. What did Salome do at that night until in the morning? **Second**, if Salome Safari identified the accused persons, then why did she fail to name them when the police came? The accused persons were so far well known to her and one of them allegedly raped

her. She actually named the accused persons after she was arrested and her husband implicated in the murder. **Third**, there is no clear evidence on the ownership of the bicycle seized from the second accused. The prosecution failed to neither procure the attendance of the real owner of the bicycle nor tender his statement to prove the ownership of the bicycle. **Fourth**, it seems, Salome Safari and Komya Sebi immediately disappeared from the village as soon as they were released from the police. DW4 evidence showed that, Komya Sebi who did not bury his wife did not even bother to see the grave of his wife. In fact, Komya Sebi abandoned the remaining children in hands of DW4 until the date of hearing of this case. **Fifth**, the first deceased had three children and the only child slaughtered was the one who caused the conflict in the marriage between Komya Sebi and the first deceased. In fact, Komya Sebi disowned that child. I also tend to believe that, Komya Sebi and Salome Safari might have orchestrated the murder of the deceased. There are several gaps not filled-in with the prosecution evidence. I have no hesitation to conclude that, the prosecution failed to prove the case beyond reasonable doubt. The accused persons should be acquitted forthwith unless held for other lawful reasons.



**Ntemi N. Kilekamajenga**

**JUDGE**

**08/04/2022**

**Court:**

Judgment delivered in the presence of both accused persons, Mr. Geoffrey Mlagala - State Attorney for the republic and Ms. Esther Santoz for the accused persons.



**Ntemi N. Kilekamajenga**

**JUDGE**

**08/04/2022**