

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT TARIME**

**CRIMINAL SESSIONS CASE No. 137 OF 2022**

**THE REPUBLIC**

**VERSUS**

**NEEMA D/O MARATU JOHN @ SHIDA**

**JUDGEMENT**

*23<sup>rd</sup> & 28<sup>th</sup> February, 2023*

**M. L. KOMBA, J.:**

Wankyo d/o Masatu was a child of 5 years. It is alleged that her right to life was infringed and terminated brutally and her body was found lying in the evening of 21<sup>st</sup> October, 2021 in a farm owned by Jackson Mhenga within Tarime town and District, Mara Region. Deceased and accused were relatives. Wankyo death was said to be unnatural because her body was found lying in the bush without head. Anna Maswi, PW3 was the last person to saw Wankyo with her aunt (accused) claiming to go and buy her burn (*andazi*). The accused person denies the charge, the prosecution took the position that the accused is the one who killed deceased with malice aforethought hence charged her with the offence of murder.

Accused, **NEEMA MARATU JOHN @ SHIDA** was charged with the offence of murder contrary to Section 196 and 197 of the Penal Code, Cap. 16 [R.E.2022]. It was alleged that on the 20<sup>th</sup> day of October, 2021 at Tarime town and District in Mara Region, the accused person murdered one Wankyo d/o Masatu. After the information read over and explained to the accused in the language she understood, she denied the offence and the plea of not guilty entered against her.

Brief facts of the case go like this; On 20/10/2021, the mother of the deceased (PW2) was doing her normal house home activities, then she decided to bath her children. When was done with bathing she told her daughter, Wankyo, to call her brother to take bath too. Wankyo went to the nearby house where their aunt stays (accused), and call her brother, Muhere, who was playing there. PW2 went to the market to buy food stuff and when PW2 return home from the shopping she only finds her son. PW2 asked whereabouts of the Wankyo and Muhere replied that she remained to their aunt (mama mdogo) when she go and call him. PW2 decided to go to her young sister (the accused) to take her daughter and found nothing. Accused and her daughter were not there.

On the second visit to the accused place few minutes later, PW2 found the accused lover who after talking over the phone with accused, he said accused is alone where she is. In searching for the missing daughter, Anna Maswi (PW3) a child of 10 years by then informed PW2 that she saw Wankyo and her aunt (accused) forcefully going down the street in that evening. In the next day the body which is alleged to be of a child (Wankyo) was found dead in the bush, slaughtered and her head was not found anywhere and it was not yet recovered to the time of composing this judgement. Police were informed and the body was taken to Tarime hospital. On these grounds accused was arrested and after investigation she was arraigned in court.

As the cardinal principal in criminal law, the burden of proof always lies on prosecution side. In the case at hand, the prosecution was led by Ms. Ester Kyara, learned State Attorney who marshalled a total of six witnesses and tendered two exhibits (Sketch map and post mortem report) to prove the charge laid against the accused person. Accused was represented by Mr. Paul Obwana, Advocate.

The testimony of the first prosecution witnesses **SSP Ramadhani Hassani Sarige, (PW1)** a police officer was to the effect that, in the

evening of 21/10/2021 he received a call from Msati street Leader called James Mwita who informed him that there was a body of a baby girl which has no head found lying in his street. Following that information, he gathers some police officers and went to the scene where he found crowd of people and the body lying in grass without neck and without head. He informed the court that the body had no other wound apart from that she had no head and the neck was starting to decay.

It was his testimony that he informed people who gathered at the scene to share that information if any baby went missing the parents should go to Tarime Hospital where the body is going to be placed for custody, he further shared information with WP Amina, In-charge of gender desk who acknowledges she has a report of missing child a day before. Because the victim (PW2) shared her communication she was traced and show up immediately. Witness informed the court that when PW2 saw the body she cried a lot.

It was his testimony that the suspect was known as previously they opened file of missing child and after discovery of the body they opened the file of murder. He further informed the court that the accused was relative to PW2 but he did not remember the name. During cross examination PW1

informed the court that they did not institute the charge against the owner of the plot where the body was found because he is not staying at that area. He further testified that the mother of the baby did not identify the body at the scene as she was not around and he had no information who killed the deceased.

**Nyanokwe Muhone Mwikwabe, (PW2)** as briefly stated in facts, she testified to the effect that on 20/10/2021 she was doing her normal house chaos, then she decided to bath her children. When was done with bathing her daughter, Wankyo, she told her to call her brother to take bath too. Wankyo went to the nearby house where their aunt stays (*mama mdogo* who is the accused), and call her brother Muhere who was playing there so that he can take bath. PW2 went to the market to buy food stuff and when she return home from the shopping she only finds her son. PW2 asked whereabouts of the Wankyo and Muhere replied that she remained to their aunt when she go and call him. PW2 decided to go to her young sister (the accused) to take her daughter but she did not find her neither her daughter.

She waited for while then she went back at her home. After few minutes she decided to go again to accused house to take her daughter as it was

becoming too dark. This time PW2 found the accused lover who was also looking for the accused. He called accused and they talked then PW2 know he was talking to accused, she asked him to tell accused to bring back the child. That man called again accused who then replied she is alone without any child. When accused appeared in the street, PW2 saw her and asked where her daughter is.

In searching for the missing Wankyo, this witness she was informed by Anna Maswi (PW3) a child of 10 years by then that she saw Wankyo and her aunt (accused) forcefully going down the street in that evening, she added that accused was telling Wankyo she is going to buy her burn (*andazi*).

PW2 further informed the court that after some time, when accused returned and asked about Wankyo she replied by question that who saw her with Wankyo, PW2 was informed it was Anna who saw them. This witness informed the court that she asked the accused to show her daughter but she keeps on denying knowing anything about Wankyo. She reported the matter to Street leader who send one of his Street Member, Boaz to reconcile/mediate parties. During that reconciliation, PW2 informed the court that Neema acknowledged to take Wankyo to buy her burn

(*andazi*) and let her go back home. On statement, PW2 decided to report to Tarime Police station.

It was her further testimony that they were interrogated about the missing child and it recorded that accused was suspected to be the last person to be seen with that child. In the following day that is 21/10/2021 accused was bailed so that she can corporate in searching for the missing child and they were in street looking for her only to be informed by passer-by that there was a baby found lying dead in bush and was taken by Police then advised them to go police, and they went. She further tells the court while at police post she was told the death was unnatural one as the baby was slaughtered. The police officer show to PW2 the picture of the dead body from the phone and that PW2 recognised the body. On 22/10/2021 she went to hospital and identified the body of her daughter from the clothes which she dressed her after bathing, she explained it was white blouse with red dots and black skirt with white dots. The body had no head and that she knows her daughter as her legs resembles her daughter's legs.

While in examination in chief, witness informed the court that she knows the habit of her young sister, when they stayed together there was misunderstanding between them following the loss of 40,000/ which PW2



planned to buy clothes for her children and shared the mission with accused, in the following day money was missing the fact which caused argument among the two. When PW2 return from her business she found Tsh.30,000/ was returned and besides the money there was a letter which had threatening words. She said, that letter was written by accused as her handwrite is similar to the said letter although she declared she cannot read properly as she did not complete class seven. She concluded her evidence by saying she suspected Neema because of the letter. She insisted to know Neema hand write as she stayed with her and used to ask her to write letters on her behalf for various purposes.

During cross examination by Mr. Obwana, PW2 confirmed she did not give description of her feet and that her daughter was buried without head and that the correct and easy identification is by face but a person can be identified by other means like clothes. When asked about DNA test of remaining of the body of her daughter she informed the court that the issue of DNA will be answered by the government, for them they were just given the body for burial ceremony by Police.

**PW3, Anna Maswi** had short story, she informed the court that in the evening of 20/10/2021 she was asked by her neighbour to go and buy



tomatoes, she was accompanied by Anitha, on the way she saw accused who was holding Wankyo and forcing her to walk (alikuwa anamvuta) telling her she is going to buy her burn (*andazi*). Later on, she heard Wankyo was missing and immediately told PW2 that she saw Wankyo with her aunt (accused) going down the street. She informed this court she went to Tarime police station in a company of her mother and mother of Wankyo where she was interrogated over that incident. She confirmed to the court she did not saw accused slaughtering Wankyo.

**James Mwita Nyonya** testified as PW4. He is a street chairman. This witness informed the court that he received a call from mama Juma who told him that there is an issue which need his attention. He said he went to the bush and find a body of a baby laying without head nor neck just the body (kiwiliwili) was found and about to swallow. It was his testimony that he called police who came at the scene and took the body to the hospital for further steps. He informed the court that he doesn't know what makes the body to be there and the body was not identified at the scene of crime. He said he did not go to the hospital and he was not there when the body was identified. About identification he said there are different ways of

identification but one must mention specific feature which help in identification.

**PW5 PF21684 A/Insp Amina Juma Hoza** is an investigator of the crime committed. She said first on 20/10/2022 it was reported the missing child and she was doing investigation of the missing child. She interviewed accused and Nyanokwe Muhere. Nyanokwe informed PW5 that she asked the Wankyo to go and call her brother from accused house where he was playing and Wankyo did not return home. She decided to go to the accused home with intention to take her daughter as it was becoming too dark but she did not find her daughter. For the second time, witness said, Nyanokwe found accused lover who talked to Neema over the phone and informed her Neema is alone where she was. When Neema was returning she was confronted by and they had some argument over the missing daughter, then Street leader was informed but failed to reconcile the parties and decided to inform police and then the two parties went to police, investigation file was opened, it was about child stealing. After interrogation accused remained in custody and other relatives were at large.

As an investigator, she asked Nyanokwe if there was any misunderstanding in their family and she acknowledged they were not in good terms with accused and the source being the missing money, sum of 40,000/ in her room and Neema was suspected. When she was asked the money was recovered in less amount, Nyanokwe found the money and a letter (piece of paper) on the same day. The piece of paper had threatening words. This witness informed the court that she took the said paper for investigation purposes.

PW5 also interrogate accused who told her that on 20/10/2021 she left home alone, leaving Wankyo playing with other children to Belinda (mama Light) a person whom they are in the same social group, (kikundi) while she was on there she received a call from Samwel who asked about the child where she said she had no information and she denied to be associated by that piece of paper.

It was PW5 submission the when she had information about the discovery of the body of the child from PW1 she looked for Nyanokwe in vain but she asked the physical appearance of the body which was said to be recovered. When she made closed follow up, she was informed that the body was taken to hospital and the mother of the missing child also was on her way

to hospital. PW5 also decided to go the hospital upon arrival she saw crowd of people accused being among them. She informed the court she ordered the accused to be taken to police for her safety. The car which took the dead body was at the hospital the dead body was inside it and Nyanokwe was trying to look at the car to see the body but she was shown a picture in a phone by one police and she recognized the body she cried a lot; she panicked and fainted.

Following discovery and recognition of the body, murder file was opened and PW5 continue with investigation. In that capacity she, PW5, went to the deceased's mother home for more interrogation and managed to find PW3 whom she informed PW5 that on fateful day she saw accused holding deceased forcing her to go on machinjioni (slaughterhouse) direction. Witness informed the court that Sketch map was drawn, exh.P1 and deal with the piece of paper by sending it together with other specimen to handwrite expert who was in Mwanza and confirmed that handwrite was of the accused. As investigator she concluded that accused was a suspect Neema was involved in the killing of deceased as she was not at home in the evening of the day deceased went missing and she was not at mama Light's place. She further relied on PW3 testimony and the threat in the

piece of paper. During cross examination she confessed that what she was informing the court was hear-say as she did not witness the killing she did not see accused killing. She further informed the court that the first to get information on the discovery of the body is OCD, SSP Sarige and that the deceased mother found the body of her child at the hospital while it was in the car and the following day deceased mother went to mortuary for further identification.

**PW6 Masiaga Joseph Chacha** who is Clinical officer informed the court that on 22/10/2022 when he was at his working station police went to his office and after introduction, they informed him that there are relatives who want the body of the deceased to be examined. Together with police and relatives they went to mortuary and ordered the body to be laid on the table. According to this witness and exhibit P2, the body of deceased was introduced to PW6 by Masatu Msendo and Robert Agostino. Witness further informed the court that he found it was the body of the girl child whose head was cut and removed, the body had no head, she lost her hymen, the wound at the neck was not fresh and the cause of death was excessive bleeding (acute hemorrhage) and prepared Exh. P2.

During cross examination he said those who introduced the body to him their names are featured in Exh. P2 and explain further that in order to identify the body professionally they should have conduct DNA by taking specimen of the dead body and that of the person claim to be the relative for test and informed the court that DNA result, according to him is 100% correct.

Upon closing the prosecution case and this court to rule out that the ***prima facie*** case has been established against the accused, leading by advocate, Mr. Paul Obwana, the accused entered her defence.

**DW1 (Neema Maratu John @ Shida)** who was the only defence witness informed the court that on 20/10/2022 she left from her home early morning around 06.30 hrs. and went to Rebu market where she always buys fruits in whole sale and sell them in retail in various markets within Tarime and in bus stand. In the particular day she sold them at Tarime bus stand and that she was at stand until 19.15 hrs. and decided to wait for her friend (Mama Light) whom they are in the same social group (kikundi). While waited for her she received a call from Samweli who among other things he informed her about the missing child that DW1 sister is looking for her child, and immediately decided to go home.

It was her testimony that on her way home she meets the deceased mother, PW2 whom asked her about Wankyo, she denied to take her and they started arguments which lead the matter to be reported to street leader and then to police. Under interrogation PW2 gave police a piece a paper and that she remained under police custody until 21/10/2021 when she was bailed out on condition to help looking for the missing child. On the same day she informed the court that they start searching for the baby Wankyo and was informed of the discovery of the dead body in certain bush and they were told by good Samaritan to go to Tarime hospital to identify it.

DW1 further informed the court that together with PW2 they went to Tarime hospital where they meet police officers who showed PW2 a picture from the phone, she cried a lot and DW1 was told to enter into the police car and was sent to lockup until 12/11/2021 when she was taken to District court for the first time. This witness denied to know anything about the money and that she came aware of the letter/ piece of paper when they were at Street chairman and the when they were at police when PW2 surrendered that paper. She admitted to exist misunderstanding between herself and PW2 who is her sister (mtoto wa mama mdogo) arising from



social life of PW2 especially of having many lovers at a time especially when she was working as a bar attendant.

Having gone through the evidence adduced by both parties, I find the apposite issue to deal with is whether the prosecutions proved their case beyond reasonable doubt. And in doing so, I will stand firm to see whether all elements of murder are proved against the accused person. In the case of **Philimon Jummane Agala @ J4 vs. The Republic**, Criminal Appeal No. 187 of 2015, the Court of Appeal held that in murder trial, the prosecution must prove the elements of murder.

I will sail in the same boat that, in trials like this, the prosecution has to prove beyond reasonable doubt. By that, it means the proof of the charge against an accused person must not leave a shadow of any reasonable doubt that the person charged indeed kill the deceased in the manner stated in the information. By doing so, prosecution has to prove the elements of the offence of murder, which are; **one**, that the person alleged to have been killed is in fact dead; **two**, that the alleged death was unnatural one; **three**, that the accused before the court is the one who killed the deceased; and **four**, that the killing was done with the intention

of either causing death or causing serious bodily injury. That is the killing was done with malice aforethought.

Regarding 1<sup>st</sup> element that the person alleged to have been killed is in fact dead. In final submission, Prosecution started with the second element to prove that the death was unnatural, they don't find a need to prove the first element. Final submission of defense counsel was to the effect that the first two elements were proved via PW6 and Exh. P1 and that they have problem in proving the third and last element.

I think I have different position in proving the first element which is; the person alleged to have been killed is in fact dead. Facts from the information which was read to accused person condemn her for the death of a person called Wankyo s/o Mashauri. All six-witness who were paraded by the prosecution testified against the death of Wankyo d/o Masatu and not son of Mashauri. Regardless of the gender which might need minor correction, here we have two different surnames which are Mashauri and Masatu. The question remains unanswered is who was the person who said to be dead. I doubt if there is a person who dead.

On the second element that the alleged death was unnatural one is clearly explained in Exh. P2 that the body which was the center of this case was found lying in bush without head. It was not disputed by defence either. That explain the brutality which was done. Despite the fact that the accused did not dispute the deceased death during the preliminary hearing and even during trial, there is no evidence, professionally, that explained the body which was found dead is the body of deceased in this case.

The crucial issue which is the third one is whether the deceased was murdered by the accused person who is before this court. Before answering this issue let us be precisely on whether it is the daughter of **Nyanokwe Muhone Mwikwabe**, who is PW2, who said to be dead as the body which was the center for prosecution was found without head.

It is from prosecution (PW3) that accused was with deceased in the last evening before she went missing. PW3 did not informed the court how the accused was dressed. PW2, explained how her child was last dressed. White blouse with red dots, black skirt with white dots and underwear. It was not established that PW3 saw Wankyo while in the same dress. PW2 while lead by her advocate she said it was around 18.45 when she started looking for her daughter and when it was becoming too dark, she went to

accused house for the second time. That means Wankyo disappeared in the evening but was not established by the prosecution condition of light when PW3 meet accused and Wankyo. See the case **of Waziri Amani vs. Republic** [1980 TLR 250.

After considering the evidence of prosecution I find more discrepancies. When PW2 informed the court that on 21/10/2021 she saw the picture of the **dead body while at police station** from the phone of police officer and that PW2 recognised the body to be her daughter. On 22/10/2021 she went to hospital and identified the body of her daughter from the clothes which dressed her after bathing which was white blouse with red dots and black skirt with white dots. The body had no head and that she knows her daughter as her legs resembles her daughter's legs without explaining what was specific features of her leg to differentiate with others. To the contrary, PW5 informed the court that **PW2 saw the dead body on 21/10/2021 while at hospital** still in the police car. On the same time she saw the picture of dead body from one of the police officer's phone.

That being not enough, PW2 informed the court that on 22/10/2021 she manages to identify the dead body at the hospital to be the body of Wankyo, her daughter through the way it was dressed. To the contrary,

PW6 a clinical officer who examined the body of deceased informed the court that the body was introduced to him by Masatu Msendo and Robert Augustino. The mother of the said deceased was not among them.

One must wonder if the body which was rescued from the bush is the same body which was recognised by PW2 on 22/10/2021 (if at all she went to hospital on that day) and the one identified by Masatu Msendo and examined by PW6. Am asking myself how Masatu identified the body and claim to be his relative while it had no head and he did not saw her for a couple of days before death. Am asking myself further how can this court be convinced that the deceased in this case was murdered by the accused person while the body of deceased was not properly recognised and identified to be the body of Wankyo whose mother is PW2. The contradictions arose in PW2, PW5 and PW6 evidence are not minor, they go to the root of the case as it must be known who is dead so as to implicate accused in the murder of that person.

PW2 relied on the clothes she last dressed her daughter. Type of clothes worn by her daughter are so common to claim that they are the only set in this world. Because the body of deceased in this case was found without head, then there is possibility that dead person was not Wankyo. It might

be any other girl child and prosecution failed to prove that the body was of Wankyo and not of any other girl child. The only profession identification which could left this court without doubt is DNA. PW6 informed this court he knows about the existence of DNA technology and that its accuracy is of high degree but he did not conduct one. Am asking myself if it is real the body which was handled to Masatu Msendo for burial after its examination was his relative.

It is my opinion that the dead body in this case was not clearly recognised to give an affirmative answer to the third element that, was the accused who killed the deceased while it was not known who was identified to be the dead person.

As I mentioned earlier that there are four elements to be proved in offence of murder, the third one was not proved by prosecution and I find no need to analyse the last element. It is the trite law that the burden of proof always lied on prosecution shoulders as was decided by the Court of Appeal in **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 CAT at Mbeya where it was held as follow;

*'It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. In the case of **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika** [2002] T.L.R. 296 the Court held that: "A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt'*

In case the evidence leaves the court with any reasonable doubt as to the accused person's guilt, the court must acquit the accused person even though it believes the accused to be guilty. In that premises, the acquittal of an accused person does not always mean the accused person is innocent; it simply means that a case against accused has not been proved to the required standard; that is, beyond reasonable doubt. See the case of **Nkanga Daudi Nkanga vs. The Republic**, Criminal Appeal No. 516 of 2013 CAT at Mwanza.

In the upshot, through evidence analysed, I find without any scintilla of doubt that prosecution has failed to prove the offence of murder beyond



reasonable doubt and therefore, the accused person **NEEMA MARATU JOHN @ SHIDA** is hereby acquitted from the charge.

It is so ordered.

**Dated at TARIME** this 28<sup>th</sup> day of February, 2023.



  
**M. L. KOMBA**

**Judge**

**28<sup>th</sup> February, 2023**

Right of appeal is fully explained.

  
**M. L. KOMBA**

**Judge**

**28<sup>th</sup> February, 2023**