

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA SUB-REGISTRY
AT CHATO**

(ORIGINAL JURISDICTION)

CRIMINAL SESSION CASE NO. 122 OF 2020

**THE REPUBLIC.....PROSECUTOR
VERSUS
ZANZIBAR KALEGEA.....ACCUSED**

JUDGMENT

Date of Last Order: 07.03.2023

Date of Judgment: 10.03.2023

M. MNYUKWA, J.

The accused person, one Zanzibar s/o Kalegea stand charged with the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16 [RE: 2002] now [RE: 2022]. The Accused Person denied the charge hence the full trial which involved calling of six (6) prosecution witnesses and one for the defence.

The prosecution alleged that Zanzibar s/o Kalegea on the 9th day of September 2018 at Ihanga Village within Chato District in Mwanza Region, did murder one Semeni d/o Masumbuko. The accused Zanzibar s/o Kalegea denied the charge hence the conduct of the full trial. During the trial, the prosecution side, thus the Republic was represented by Mr.



Anosisya Erasto, learned Senior State Attorney and Clemence Mango, State attorney while Mr. Innocent Kaijage represented the accused person.

The prosecution called a total of six witnesses and tendered exhibits which are the post-mortem report (Exhibit P3), the sketch map of the scene of crime (Exhibit P1) and the cautioned statement of the accused (Exhibit P2).

PW1 G2068 Coplo Daniel testified that he is a police officer and on 21.09.2018 while stationed at Buziku police station, he received information that at Ihanga village in Buziku ward there was a person surrounded by the villagers who wanted to kill him over the murder of the girl child which took place on 09.09.2018. He went to the scene with other police officers and find people throwing stones to the accused and they shot bullets in the air and chipped in to save the accused and took him to Buziku police station at around 15.30 hrs. He testified further that he took the accused into the interrogation room to take his statement and he received information that the villagers were on the way to invade the police station for the accused. He declines writing the accused statement who had orally admitted to have killed the child with the aid of his uncle Pombe and Nkalango Masanyiwa. That, himself, that is PW1 and PC Ally



took the accused to Chato police station where they reached at around 20.15 hrs at night. The accused led them to the home of the persons he named that they committed the murder together at Ikokwa and they could not find them and returned to Chato police station at around 7.00 am. He left the accused and returned to his police station.

When cross-examined, PW1 stated that, he was involved in arresting the accused but did not witness the accused killing the deceased. he stated that on 13.09.2018 he draw the sketch map.

PW2 G 1038 D/ Coplo Kassim testified that he is a police officer working at Lubambagwe police station and in 2018 he was working at Chato police station. On 22.09.2018 at around 9.05 am he was assigned to take the caution statement of the accused, Zanzibar s/o Kalegea who was alleged to commit the offence of murder. He testified further that he introduced himself to the accused and informed the accused of his rights and proceeded to record his statement from 09.05 whereas the accused admitted to have murdered Semeni d/o Masumbuko. He read over the statement to the accused who then appended his signature. PW2 prays to tender the accused's caution statement to be used as an exhibit whereas the defence counsel objected and after the enquiry by the court, the accused person's caution statement was admitted as exhibit P2.



In the cross-examination, he maintains that the accused was arrested on 21.09.2018 and his statement was taken on 22.09.2018.

PW3 Alexander Christopher Mpondabuzi testified that he is a medical doctor working at Chato District Hospital. On 13.09.2018 at around 10,00am he was informed that there was a body to be examined at Buziku and accompanied by police officers to the scene. He found the body of the deceased in the water pond which lie at the back. He testified that he investigated the body of the deceased and found that it was a body of a young girl and in her private parts, the clitoris was removed and the cause of death was due to *Cordial pulmonary arrest secondary to air circulation*. He stated further that after his examination he prepared a post-mortem examination report (PMR) which he prays to tender as exhibit before this court and it was admitted and marked as exhibit P3 after the objection was overruled.

PW4 Masumbuko Katangilwa testified that he is a farmer and the father of the deceased who is now living at Buchosya Sengerema, Mwanza and before he shifted to Sengerema, he was living at Buziku, Ihanga village at Chato district. On 09.09.2018 at around 17.25hrs in the evening, he sent his daughter Semeni Masumbuko who at that time was 16 years old to the milling machine at Ihanga centre for milling and also to buy



some foodstuff (meat). He gave her a bicycle he borrowed from Juma Mhangaiki but Semeni did not return home. PW4 stated further that, in the following morning, that was on 10.09.2018 he informed relatives and neighbours who told him that they saw the deceased at the centre the other day with maize flour and some other foodstuffs and that she told them that she was heading back home.

PW4 testified further that he informed the village leaders and the meeting was called and started searching for his daughter. On 12.09.2018 afternoon he received information that the bicycle was found in the water pond by children who went swimming. The meeting was convened and went to the scene and PW4 could identify the bicycle which was taken and kept in the office. On 13.09.2018 people went again to the Pond where the bicycle was found and upon search, they recovered the body of the deceased. He identified her and he also saw that her private parts were removed.

PW4 went on that he saw the accused 2 days after the burial of the deceased who went to his home for condolences, suddenly villagers gathered and arrested the accused and they told PW4 that he was the one who killed the deceased. After a while police went to the scene and rescued the accused who was beaten by the villagers.



When cross-examined, he stated that the accused did not participate in the search of the deceased and PW4 did not ask him where he was as he once was his neighbour.

PW5 Emanuel Michael testified that he is a resident of Ihanga village and was a leader of Sungusungu. On 10.09.2018 while at his home, he was informed that the daughter of Masumbuko Katangilwa disappeared on 09.09.2018. He went to join the villagers who were searching for the child and since it was late and the search was postponed to the other day. He went on that, the other day that's on 12.09.2018 he called over all people to search for the child but they were unsuccessful. During the evening he was informed that the bicycle that was used by Semeni d/o Masumbuko on the day of incidence was found in the water pond and people gathered and took the bicycle to the office. On the next day that was on 13.09.2018, the search continued and people from three villages gathered and went to the water pond and that upon search they recovered the body of the deceased.

PW5 testified further that, the accused person who he identified also at the dock, was present and when asked to help to fetch the daughter of the deceased from the water pond refused and disappeared from the scene on the day when the body was recovered and he did not participate



in the burial for he left claiming that he was going to nurse his brother in law who was sick in another village.

On 21.09.2018 he received a call that villagers have arrested the accused in the house of Masumbuko, the father of the deceased. He went there and found people beating the accused and shortly, the police intervened and took the accused. They know the accused killed the deceased after the accused father told the villagers that the accused went to a witch doctor while the accused informed PW5 that he went to attend his sick brother-in-law.

When cross-examined, he stated that he did not witness the accused killing the deceased. He stated that the accused was arrested around 7 to 8 days after the body of the deceased was found. When the emergency meeting is called (mwano) is called all villagers must attend and non-attendance leads to payment of a fine. The last meeting was of three villages.

PW6 Katangilwa Mrefu an adult 74 years, a resident of Ihanga sworn and testified that, he lived in Ihanga since 1971 and the deceased was her grandchild. On 09.09.2018 at around 19.30hrs when he was going to the centre for stuff he heard a child raising an alarm but he did not intervene for he thought the children were playing. On his way he found

a person laying down and alongside there was a bicycle and when he asked as to who was he, that person beat him and he run to the accused as it was near and her wife told him that the accused went to the market. The other day he was informed that the child had disappeared and on search after the emergency meeting of three villages was called, the body was recovered and on that particular day, the accused left claiming that he went to see a sick person. He stated further that, the father of the accused told people that the accused went to the witch doctor and did not go to attend a sick person.

The prosecution case was marked closed and this Court ruled in terms of section 293(2) of the Criminal Procedure Act, (CPA), [Cap. 20 R.E. 2019], that the prosecution managed to establish a prima facie case against Zanzibar s/o Kalegea the accused person and therefore the accused has a case to answer. In line, the accused was addressed in terms of section 293(2)(a) and (b), (3) and (4) of the CPA and Zanzibar s/o Kalegea chose to defend himself on oath without calling witnesses

DW1, Zanzibar s/o Kalegea adult 45 years a peasant and a businessman, a resident of Ihanga Buziku swore and testified that he is a peasant and also a businessman who was buying and selling maize. On 21.09.2018 at around 14.00hrs he was at the house of Masumbuko paying



his condolences since her daughter died. Then Mr. Emmanuel Michael came and who asked him why he did not participate in the burial of the deceased and he told him that he was at Kabindi within Biharamuro in Kagera to make follow up of his maize cargo. He testified further that, he was imposed a fine of Tsh 150,000/= which he denied paying and that Mr. Emmanuel Michael called the police who came and arrested him.

He went on that after his arrest on 21.09.2018 he was sent to Buziku Police station and after 30 minutes he was sent to Bwanga police station then on 22.09.2018 he was transferred to Chato police station. he testified further that he was sent to the investigation room and found three police officers and one of them was communicating with a person unknown to him by using his mobile phone and that he was writing down a statement based on that communication. DWI added that, he was asked to sign and he refused. He was beaten and forced to sign and the other day he was sent to Chato District Court.

He testified further that, on 09.09.2018 he was at Kabindi making a follow-up of his maize cargo and returned back on 11.09.2018 and went to his mother where he was residing and her mother informed him of the disappearance of the deceased. That, on 13.09.2018 he went to the home of the father of the deceased and told them that he was not around and



also he will leave to find money for his condolences. He left to Kabindi where he sold his maize cargo to get money for condolence and on 21.09.2018 he went to the home of Masumbuko to pay his condolences where he paid Tsh 1000/=. He further stated that he did not admit orally to having committed the offence with the aid of Deo Pembo and Masumbuko Masanyiwa in killing the deceased. He denied being beaten by the villagers.

When cross-examined, he admitted to have been arrested by villagers in the house of Masumbuko and in the presence of Emanuel Michael. He denied knowing Masumbuko Katangirwa PW4 the father of the deceased and he also denied that he is not his neighbour. He also denied knowing Katangirwa Mrefu, PW5 the grandfather of the deceased.

He testified further that as he told villagers that he was going to find Tsh 1000/= for condolence, he paid a bus fare of Tsh 2500/= from Ihanga to Kabindi. He maintained that when he came home on 13.09.2018 her mother told him that in the house of Masumbuko they were mourning their dead daughter. He testified further that he was severely beaten and could not walk properly and was treated in the prison but he was not given a PF3.



He stated that maize at Buziku is very expensive and he was selling at a price of Tsh 5000/= and he doesn't remember the price he used to buy at Kabindi.

When re-examined, he maintained that he doesn't know Masumbuko Katangira before he only knew him after the incident.

After the testimonies from both the prosecution and defence, PW3 evidence and exhibit P3 the post-mortem report proved that the death of the deceased person namely Semeni d/o Masumbuko, which was not disputed by either party and her death was unnatural. In the process, of determining who caused the death of Semeni d/o Masumbuko, I will address my mind to the predominant legal principles which cover both aspects of criminal law as well as the law of evidence to ensure that no innocent person is convicted based on flimsy evidence.

First, the law under section 3(2)(a) of the Law of Evidence, Act Cap 6 RE 2019 (now RE. 2022), the prosecution side is required to prove the case against the accused person and the standard is beyond reasonable doubt. The court of Appeal of Tanzania in the case of **Mohamed Haruna @ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) that: -



"...in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

Therefore, the accused is not placed with a duty to prove his innocence but to raise doubt over the prosecution evidence as reflected under Section 110 and Section 112 of the Evidence Act, Cap 6 [RE: 2009], now [RE: 2022]. See also the principle underlined in the case of **Joseph John Makune v R** [1986] TLR 44 where the Court of Appeal held that:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."

The accused person, in this case, is faced with murder charges whereas, in the process, the law requires that the prosecution must prove the act of killing and connect the act of killing with the evil intention of the dourer (malice aforethought). The law is settled under Section 196 of the Penal Code, Cap. 16 [RE: 2019] which provides that: -



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

PW3 a medical doctor tendered a post-mortem examination report that was admitted as part of exhibit in this case. The defence side objected as the same does not bear the name of the medical doctor who examined the body of the deceased since PW3 testified that, he could have identified the PMR by his handwriting, his signature and his name while his name was not there.

At the time when I was admitting the PMR, I stated that the weight of the PMR will be determined at the composition of Judgement. Upon carefully going through the PMR, I find the error committed by the medical doctor to state that the PMR bears his name is the slip of the tongue as the PMR which is the standard form bears the signature of PW3 and the said signature was not disputed by the defence counsel. Again, it is not disputed that, Semeni d/o Masumbuko died and her death is unnatural as reflected in the PMR and accordingly, I find the PMR deserves to prove the death of the deceased.

Thus, as PW3 confirmed the death of the deceased and gave reasons that the cause of death was due to *Cordial pulmonary arrest secondary to air circulation*. and on investigating the body of the deceased



he found her private parts were cut and removed. Therefore, based on the findings of the medical doctor PW3, the assailant did it with malice aforethought and there is no disagreement that the assailant planned and intend to kill. To that point, it is my findings that whoever strangle the deceased and cut and removed the private parts of the deceased did it with malice aforethought in terms of Section 200 of the Penal Code, Cap. 16[RE: 2002] now [RE: 2019].

Before me now is to weigh whether the prosecution managed to prove to the standard required that it was the accused person Zanzibar s/o Kalegea who killed Semeni d/o Masumbuko, the deceased.

The prosecution case is built on circumstantial evidence and the accused caution statement for the reasons that all the 6 prosecution witnesses, none testified to have seen the accused committing the offence of murder of the deceased. In the case of **Tumuheire vs. Uganda (1967) ECA 328 AT 331** the Court stated that: -

"It should be observed that there is nothing derogatory in referring to evidence against an accused person as circumstantial. Indeed circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person..."



Assessing the circumstance underpinning the commission of the offence, the law is settled that for a conviction to be based on circumstantial evidence, the circumstances must be fully proved to the extent that all facts must be consistent with the hypothesis of the guilty of the accused person. Circumstantial evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence. The Court of Appeal in **Sadiki Ally Mkindi vs The D. P. P**, Criminal Appeal No. 207 Of 2009 the Court of Appeal set out the general rules regarding circumstantial evidence in criminal cases as elucidated in **SARKAR ON EVIDENCE**, Fifteenth Edition, Reprint 2004 at pages 66 to 68 that: -

- 1. In a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.*
- 2. All the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise, the accused must be given the benefit of doubt.*
- 3. The circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.*



4. *Where circumstances are susceptible of two equally possible inferences the inference favouring the accused rather than the prosecution should be accepted.*
5. *There must be a chain of evidence so far complete as not to leave the reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.*
6. *Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise, the very concept of proof of circumstantial evidence would be defeated.*
7. *Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify a conviction, even though the party offers no explanation of them. If the combined effect of all the proven facts taken together is conclusive in establishing the guilt of the accused, a conviction would be justified even though any one or more of those facts by itself is not decisive.*

From the principles enunciated above I now subject the prosecution evidence to the principles stated to find out whether the circumstances are fully proved against the accused person capable of establishing his guiltiness.

First, the evidence of PW4, PW5, PW6 and DW1 shows that they both lived at Ihanga village in Buziku ward and their evidence together with that of PW1, PW3 and the exhibits P1, P2 and P3 confirms that the



murder of Semeni d/o Masumbuko took place at Ihanga village in Buziku ward.

Secondly, the evidence of PW4 and PW5 stated that the accused did not fully participate in searching of the body of the deceased which was conducted by the villagers from 09.09.2018 till 13.09.2018 when the search involved the three villagers is when he was seen on the scene when the body of the deceased was recovered from the water pond. In his defence, the accused admitted that he did not participate in the search of the deceased body fronting the defence of alibi that he was at Kabindi where he made follow-up of his business of maize and he stated that he went to the house of Masumbuko on 13.09.2018 the day the body was recovered but he left and could not involve in the burial of the deceased. The same evidence was given by PW4 and PW5 that the accused left.

Based on the circumstances that the incident involved three villages the accused could not justify his absence in searching for the body of the deceased and his disappearance in the middle of the search particularly on the day in which the body of the deceased was recovered. Again, the accused testified that he left before the burial to find money Tsh 1000/- to pay as condolences and he went to sell his maize at Kabindi where he used a bus fare of Tsh 2500/- to Kabindi and when he returned to the house of Masumbuko he paid Tsh 1000/- as condolence. The surrounding

circumstances do not justify the accused defence of miss-involvement in the burial of the deceased for he had no reason to go to find Tsh 1000/- while at the time he had Tsh 2500/- which he paid as a bus fare to Kibindi. As stated in **Samson Daniel vs Republic**, (1934) E.A.C.A. 154, each link in the chain of events must be carefully tested as to the accused's guilt. In testing the reasons for the accused miss- involvement, he did not give a tangible reason and on record, PW5 testified that the accused asked him for permission to attend his brother-in-law and when the father of the accused was consulted he told PW5 and other villagers, that the accused left to witchdoctor while in his defence he testified that he went to Kibindi for his maize business, and he did not mention at all the issue of nursing his brother in law .

Thirdly, the accused defence is neither coherent nor consistent as it contradicts. In his defence when he testified in chief he admitted to knowing PW4 the father of the deceased and he went to his house on 13.09.2018 to pay his condolences and left to find money and returned on 21.09.2018 where he went again to the house of Masumbuko and pay his Tsh 1000/= as condolence. The same evidence was given by PW4 and PW5. When the accused was cross-examined, he denied knowing PW4, the father of the deceased and denied that they were neighbours. The



Court of Appeal in **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 held that:

"Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence or the evidence has been materially contradicted by a witness or witnesses."

The accused person's evidence, in this case, contradicts as he gave two versions of circumstances in the defence of the accusation of the murder of the deceased. In normal circumstances, the accused who testified that he went to the house of PW4 and pay his condolences could not at the same time when cross-examined denied knowing PW4 and even in re-examination he maintained that he doesn't know PW4.

The evidence of PW1, PW4, PW5, PW6 and DW1 confirms that the accused was arrested while he was at the home of PW4 but the accused declined to know PW4, PW5 and PW6. Again, in his evidence, DW1 testified that PW5 made a call to the police and that he was arrested following that call for his refusal to pay a fine of Tsh 150,000 for his nonattendance in the *mwano*. In the circumstance, testing the circumstances from the evidence adduced by the parties supports the exclusive hypothesis that the accused is guilty of the crime with which he is charged. The circumstances did establish the involvement of the accused in the murder of the deceased. The prosecution evidence which



implicates the accused person and the DW1 defence in examination in chief tall suggesting that it was the accused person who committed the offence of murder.

The prosecution also tendered documentary evidence and exhibit P2 is the accused person's documentary evidence. When the statement was tendered in court, the accused did not deny making the statement and he stand no position to deny the statement during the defence. Going through exhibit P2, the statement is detailed. The statement is in the narrative shows that the accused was instructed by the witchdoctor to bring him a young girl genital parts and genital hair. It narrates how on 09.09.2018 he murdered the deceased and cut her genitals and take the body of the deceased to the water pond where the body was later discovered. The content of exhibit P2 tally with Exhibit P3 and the evidence of PW1, PW2 PW4, PW5 and PW6. As I go through exhibit P2, I am content that PW2 who recorded the statement did not invent the story and recorded it from a person who knows the details as recorded.

As long as DW1 did not deny making the statement during its admission and did not state how PW2 knew of his details, it is my holding that the statement was voluntarily made by the accused who confessed to the commission of the murder of the deceased. As stated in **Chande Zuberiingayaga & Another**, Criminal Appeal No. 258 of 2020 quoted



with authority the case of **Emmanuel Stephano v. Republic**, Criminal Appeal No. 413 of 2018 the Court stated that: -

*'We may as well say it right here, that we have no problem with that principle because in a deserving situation, **no witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess.***
" [Emphasis added].

Furthermore, it is a trite position of the law that the best witness in a criminal charge is the accused who confesses complicity voluntarily. See the case of **Godfrey Kitundu @ Nalogwa and Another vs Republic**, Criminal App. 96 of 2018 (unreported) and **Republic vs. Khamis Said Bakari**, Criminal Sessions Case No. 119 of 2016 (unreported) where this Court, Hon. Korosso, J. as she then was, observed that: -

"It is trite law that the best evidence in a criminal trial, is that of an accused person who confesses to have committed the crime."

Besides, even though in his defence, the accused didn't give a formal notice of alibi, this court is not precluded from taking cognizance of the same and analyze it if the same is watertight. In his testimony



DW1 stated that on the day in which the offence was committed that is on 9/9/2018 he was at Kibindi and he returned back on 11/09/2018 and that he was informed by his mother that *mwano* was called since the daughter of Masumbuko was murdered. Even if the accused although is not required to prove his alibi, he is required to at least make a reasonable doubt by calling person (s) whom he alleges he was with him at the place he was at the time of commission of the crime like for example the one to whom he used to buy maize. This was the holding in the case of **Anangisye Masendo Ng'wang'wa vs Republic (supra)** where the Court of Appeal held *inter alia* that: -

"The appellants' defences of alibi did not raise any reasonable doubt on the prosecution case and were properly rejected."

In our case at hand, the accused failed at all to raise a reasonable doubt on his defence of alibi against the circumstantial evidence proved against him.

After the analysis above, I find the prosecution managed to prove their case beyond reasonable doubt against the accused person Zanzibar s/o Kalegea. The caution statement and the circumstantial evidence managed to establish the guilt of the accused person.

I have therefore reached the following conclusion. I am satisfied that the prosecution's evidence is credible and reliable against the accused person Zanzibar s/o Kalegea. I do not think that the positive evidence of PW4, PW5, PW6 and the cautioned statement of the accused person is shakable. I find that the prosecution has proved their case beyond reasonable doubt against Zanzibar s/o Kalegea, the accused person. In the event, I find that Zanzibar s/o Kalegea is guilty of murder as charged.

I, therefore, convict him of murder contrary to sections 196 and 197 of the Penal Code Cap. 16 [R.E 2019] now [R.E 2022].

DATED at CHATO this 10th March 2023.




M. MNWYUKIA

JUDGE

10/03/2023

SENTENCE

Since Zanzibar s/o Kalegea, the 1st accused has been convicted of murder, I hereby sentence him to death by hanging.,




M. MN YUWA

JUDGE

10/03/2023

The right of Appeal in terms of Section 323 of the Criminal Procedure Act
RE 2019 is fully explained.



M.MNYUKWA

JUDGE

10/03/2023