

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB REGISTRY OF KIGOMA**

AT KIGOMA

ORIGINAL JURISIDCTION

CRIMINAL SESSIONS CASE NO. 26 OF 2022

REPUBLIC

VERSUS

SAMWEL S/O OCTAVIAN

Date of Last Order: 21/02/2023

Date of Judgement: 10/03/2023

JUDGEMENT

MAGOIGA, J.

The accused person, SAMWEL S/O OCTAVIAN stand charged with murder of AGNES BIGORA contrary to sections 196 and 197 of the Penal Code [Cap 16 R.E. 2022]. The court was told that on 15th day of June, 2020 at Mkarazi village within Kibondo district in Kigoma region, the accused murdered AGNES BIGORA. The accused pleaded not guilty to the charge of murder.

Facts parternig to this homicide are simple to comprehend that; on 14th day of April 2020 accused's son by the name of Beckham Samwel died by falling on small river. The accused suspected the deceased to have caused the death by witchcraft. On 15th day of June, 2020 while the deceased was on her way to the shamba, the accused followed her with a machete (Panga) for revenge and invaded her and managed to cut the neck of the



deceased causing her immediate death. The accused, then, run back to the village with the Panga, washed it and hide it inside his house.

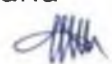
The body of the deceased was found by his husband who was on the shamba and reports of murder were communicated to local leaders and the police. Police came with the doctor who examined the body of the deceased and concluded that the deceased died due to excessive bleeding.

On 19/06/2020 the accused was arrested and upon questioned confessed on his cautioned statement that he was the one who killed the deceased. Consequently, the accused was charged of murder, hence, this judgement after hearing both parties relating to this offence.

During trial, the Republic was represented by Shaban Juma Masanja, learned Senior State Attorney and Mr. Raymond Kimbe, learned State Attorney, while the accused person was represented by Ms. Edina Aloyce, learned Advocate.

Full trial was the held whereby the Republic called a total of 3 witnesses and tendered 1 physical exhibit and 3 documentary exhibits. The accused person fended himself and had no exhibit to tender. The substance of both sides testimony was follows:-

PW1- G5471 D/CPL MUSA- a police officer and an investigator of the case under oath told the court that he was involved in the arrest and



interrogation of the accused person under caution who confessed to have killed the deceased and identified the accused person in dock. The reason for the killing was a revenge following the death of his son Beckham, which the accused suspected the deceased to have done through witchcraft.

PW1 successfully tendered in court contested cautioned statement of the accused person in court as **exhibit P1**. According to PW1, it was during the interview, the accused told him where the panga used for execution of murder was and they immediately went back to retrieve it from the home of the accused person hidden under the bed.

Under cross examination by Ms. Aloyce, PW1 told the court when and where he arrested the accused and later recorded his cautioned statement. PW1 denied allegations of torture to the accused person. PW1 went on telling the Court that, through informer/whiles blower were able to know it was the accused who killed the deceased and before that they had arrested three other people from the same village but who were not charged because the accused told the police that he was alone when killing.

PW2-DR. SALEHE OMARY SIMTENDA- A medical doctor who told this court that, on 15th day of June, 2020 in accompany with policemen went to Mkarazi village, where they found a body of the deceased lying dead




at the bush and he examined the body and established that the deceased died of haemorrhagic shock due to severe cut injury on the neck inflicted by sharp object. PW2 tendered in evidence a Report of Post-Mortem Examination as **exhibit P2**.

Under cross examination by Ms. Aloyce, PW2 told the Court that the incident occurred on 15/06/2020 and that the big wounds were at the neck and in the hand.

The learned Senior State Attorney had nothing to re-examine PW2.

PW3-ASP JULIUS AARON SHAYO- A police officer and OCS of Mabamba Mpakani police post by then, and now stationed at Mbozi district within Songwe region told the Court that, on 15/06/2020 he received a phone call from Cpl. Ladislaus who told him that in the village of Mkarazi, there was murder. PW3 in accompany of other fellow policemen and a doctor (PW2) went in the scene of crime and found a dead body of a woman. Under his order, the body was examined and went on with undercover investigations and on 19/06/2020 managed to arrest the accused person at his home. Upon interrogating, the accused person confessed and told them he is ready to show them the panga he used to inflict the wounds. According to PW3, they went back to the village and were able to retrieve a panga from the bottom of the bed in the house of the accused person.



PW3 tendered a seizure certificate and a panga which were admitted as **exhibits P3 and P4** respectively.

PW3 went on telling the Court that, the murder in question was agitated by witchcraft believes that the deceased was bewitching the whole family of the accused person and the death of the child was the source.

Under cross examination by Ms. Aloyce, PW3 told the Court that the accused gave his cautioned statement as free agent without being forced.

Nothing was re-examined to PW3

This marked the end of the prosecution case and same was dully marked closed.

That was all about prosecution case and this Court guided by the provisions of section 293(2) of the Criminal Procedure Act, [Cap 20 R.E.2022] found that the evidence on record suffices to call the accused person to enter defence.

DW1- SAMWEL S/O OCTAVIAN under oath told the Court that, on the material day and date of 15/06/2020 was at the village drinking local alcohol. According to DW1, he joined the local club at 10:30 am and spend the day there until at 12:30 am when they all received information of the death of Agness Bigora. DW1 insisted they were more than 15 people at the local club. Not only that but also that he spent all the material time in the home of the deceased and participated in burial ceremony.



DW1 went on telling the court that, on 18/06/2020 was arrested at his home by police who told him he was being suspected of killing the deceased and taken to Mabamba Mpakani police post where he was tortured and locked up for 18 days and then came police with papers which he was forced to sign. DW1 admitted to have signed exhibit P1 but was quick to say he signed it under duress, torture and was not a free agent. DW1 went on defending himself that, after signing exhibit P1, police told him that they will take him to justice of peace and he was supposed to tell him/her exactly what is written in the papers he forcefully signed the previous days.

On inspection and retrieve of the panga exhibit P3, DW1 distanced himself from the panga and insisted that since his arrest, he has never gone anywhere and was lock up at all material time.

DW1 denied to have any conflict with the deceased nor his husband and equated the charges as false and fabricated by police because his son died of water and not witchcraft as said by police.

On that note, DW1 prayed that this Court be pleased to find the charges against him not proved beyond reasonable doubt, hence, acquit him and consequently set him free.

Under cross examination by Mr. Masanja, DW1 admitted that Beckham was his son and now is dead. Asked why he did not call any of the people



he mentioned to have been together drinking alcohol, DW1 said he did not know the procedure to call them. DW1 distanced himself from the panga and questioned why the prosecution failed to bring people who witnessed the search and again said he signed exhibit P3 by force. DW1 when asked on details of the cautioned statement replied that police have many sources and it was not difficult for them to collect the details in the cautioned statement. DW1 denied that the deceased was a witchcraft. Nothing was re-examined to DW1.

DW1 when asked for clarification if ever he said at any time in these proceedings whether he was in the village at all material time and never went to the shamba, he clarified that he has never said such a statement in these proceedings.

This marked the end of defence case and same was well dully marked closed.

The learned counsel for parties never made any closing submissions.

In the circumstances, the noble task of this court now is to determine whether the prosecutions have discharged their legal burden of proof which is always beyond reasonable doubt that, it was the accused person before this Court and not somebody else who killed the deceased and was with malice aforethought.

However, before going into that task, having heard the rivaling stories of both sides in this case, I have noted some facts not in dispute between parties. These are; **one**, it is not in dispute that Agnes Bigora died on the day of 15/06/2020 and did not die a natural death but due to excessive haemorrhage resulting from brutal fatal wounds inflicted on her neck and hand. **Two**, it is not disputed that the accused person in this case was arrested, investigations mounted and was consequently charged with the murder of the deceased.

But what are in serious dispute between rivaling parties', in my own opinion are two issues; **one**, whether the accused person was the one who inflicted the injuries with malice aforethought leading to the death of the deceased, and **two**, is whether the cautioned statement of the accused was procured by torture and his defence of alibi raises serious doubt to the prosecution's case.

Equally important to note in this case, is that the whole case of the prosecution hinges on the caution statement of the accused person. No eye witness saw what happened. In the circumstances, I will start with the second issue which is that, whether the cautioned statement of the accused person was procured by torture and his defence of alibi raises serious doubts to the prosecution case. During trial, and in particular, trial within trial, the accused person had two versions on the cautioned



statement; **one**, that it was brought already written and was forced to sign it; **two**, that the same was written while he was not free agent and was tortured to give the detailed accounts of the incident. It should quickly be noted that, no other evidence was given to support the torture alleged inflicted on the accused person, including the scar which the accused alleged that a 4 inches nail was pressed into his back. In the absence of any evidence of physical torture, is my considered opinion that, the accused gave his cautioned statement as free agent and as correctly argued by the prosecution, the police could not know the details of his family as stated in the cautioned statement.

Another reason I deny to associate with the torture of the accused person is the fact that he never complained to court ever since he was taken and charged for murder. In my own respective opinion, the defence of torture has cropped up as an afterthought on his part and I declined to agree with him.

Furthermore, the certificate of seizure (exhibit P3) dully signed by the accused person was another indication that he was present when the same was filed and it corroborates the prosecution testimony that he was the one who led the police to go and procure it.

Further, the accused as well raised a defence of alibi that at the material date and time the deceased was slaughtered, he was at the village

drinking alcohol as such could not be available where the killing was carried. This defence was raised during defence case, hence, no formal notice of alibi was given and no particulars were provided as required under sections 194(4) and (5) of the CPA. In my own discretion, I have assessed the circumstances of this case and much as the accused was represented by learned advocate, I find this defence out of order and the provisions of section 194(6) of the CPA cannot apply here because he had a trained lawyer and who was given this brief two weeks before and had an opportunity to file notice or provide particulars immediately. To allow this state of affair will prejudice the prosecution case. On that note, I reject the defence of alibi in this case.

On the totality of the above reasons, I find and hold that based on the evidence on record, the cautioned statement of the accused person was freely procured and his defence of alibi fails in this suit and is rejected.

Having held that the cautioned statement of the accused person was freely procured and having had time to go through it, I find it very elaborative and detailed of the reason and the way the killing was executed. It corroborates exhibit P2 findings that the blow was on the neck. The manner and part which the blows were inflicted, gives one conclusion that the accused intended that the deceased was to die. Not



only that, but guided by the evidence on record, the accused person did execute the killing with malice aforethought.

In any case, I am entitled to hold that the defence case did not raise any doubt to prosecution case at all.

For the above reasons, therefore, I am satisfied that the prosecution has dutifully discharged their burden beyond reasonable doubt that it is the accused and not someone else who brutally murdered the deceased and was with malice aforethought given the kind of weapon used and the part of the body targeted.

Consequently, I convict the accused person of murder contrary to section 196 and 197 of the Penal Code as charged in this court.

Order accordingly.

Dated at Kigoma this 10th day of March, 2023.



A handwritten signature in blue ink, consisting of a series of vertical lines followed by a horizontal line and a small flourish.

S. M. MAGOIGA

JUDGE

10/03/2023