

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

CRIMINAL SESSIONS CASE NO. 45 OF 2021

REPUBLIC

VERSUS

- 1. LUNEMYA WILLIAM MASHIMBA**
- 2. JULIANA LUNEMYA**

JUDGMENT

23rd March & 23rd March, 2023

Kilekamajenga, J.

The first accused is the son of the second accused; both were arraigned before this court for the offense of murder contrary to **section 196 and 197 of the Penal Code, Cap. 16 RE 2019**. It is alleged that, due to perennial conflicts between the deceased and the second accused, the later agreed with the first accused to procure a murderer to kill the deceased. On 29th January 2020, at around 08 pm at Chanika Village within the District and Region of Geita, the deceased was attacked in the kitchen while preparing dinner for her family. After the attack, she was left in a pool of blood fighting for her last breath. People gathered and attempted to rush her to hospital but she, unfortunately, died on the way. On the next day, the accused persons were arrested and taken to Geita Police Station for further interrogation where they confessed to plan the murder of the deceased.



The case was finally scheduled for hearing and the accused persons entered plea of not guilty to the information of murder. In proving the charge against the accused person, the prosecution summoned eight witnesses and tendered three exhibits. Also, during the fair trial, the first accused enjoyed the legal services from the learned advocate, Forget Mongi whereas the second accused was represented by the learned advocate Yulitha Hezron. On the other hand, the learned State Attorneys, Ms. Monica Matwe and George Masero appeared for the Republic.

The prosecution evidence shows that, on 29th January 2020, the deceased's son PW6 (Maneno Ndungile) was sleeping inside the house while his mother was in the kitchen cooking. He heard two people being welcomed by his mother before hearing his mother screaming and calling for help. He quickly ran outside the house; he had a glimpse of one of the attackers wearing a red T-shirt inside the shirt. Being afraid and perplexed, he hid at the neighbour's place for a while before retreating to the crime scene where he found her mother seriously wounded. The attempt to save her life did not bear fruits as his mother died on the way. In his testimony, though he did not recognise the attackers, he believed that his mother was killed as a result of conflicts with the second accused.

At that time, Ezekiel Charles (PW1) who was the deceased's husband, had gone to the centre to enjoy soccer through the TV at the village centre with his friends before his joy turned into a mourning as Lukombwe came raising an alarm. PW1 was informed that his family was attacked. He immediately ran towards his home and found his wife fighting for her last breath; she was cut and fallen on the ground near the kitchen. He tried to rush her to Nzera dispensary but she died on the way. On the next day, the police came and he informed them on a land dispute between his wife and Juliana Lunemya (2nd accused). According to his testimony, the deceased, who owned a plot, frequently quarrelled with the second accused over a plot boundary. The dispute reached the hamlet chairman (Josia Luteja) who failed to resolve it and finally reached the village chairman where the second accused was ordered to pay a fine and empty the pit dug by the deceased that the second accused filled it with soil. But, in 2019, another dispute arose, the second accused alleged that, her cow was poisoned by the deceased. The second accused took the matter to the hamlet chairman (Josiah Luteja) where they were advised to live in harmony. The information from PW1 to the police led to the arrest of the second accused on 30th January 2020 at 08 am. The second accused was taken to the crime scene where the first accused was also arrested after he attempted to run away.

Josiah Zacharia Luteja (PW2), who was the erstwhile hamlet chairman informed the court that, on 29th January 2020, he was watching football in a hall owned by Boniphace Kabegi before the TV was switched off due to the alarm signalling danger in the village. He went to the crime scene and found the deceased wounded with a panga on the left arm. They tried to rush the deceased to hospital but she died on the way. On 30th January 2020, the police came and commenced investigation leading to the arrest of the accused persons. PW2 further confirmed the existence of the disputes between the deceased and the accused persons. The first dispute concerned plot boundaries which he tried to resolve but failed. The second dispute was about the mysterious death of the second accused's cow, which he advised them to live in harmony and it was resolved.

Also, Mgeta Tabora (PW3) who was the hamlet chairman of Nyabuhuli in 2020 told the court that, on 29th January 2020, he was phoned by Matendo Stanslaus and informed about the murder in their hamlet. He immediately informed the village chairman and Village Executive Officer before proceeding to the crime scene. The village chairman informed the police at Kakubiro Police Station who arrived at the crime scene on the next day and arrested the accused persons.

PW4 (G. 5659 Corporal Samwel) worked at Kakubiro Police Station; he received the information about the murder on 29th January 2020, through the Village Executive Officer. He went to crime scene on 30th January 2020, accompanied with other police officers where he interrogated some witnesses and drew the sketch map of the crime scene which was admitted as exhibit P1.

On 30th January 2020, at around 11:00 to 12 noon, PW7 (G.8206 D/C Said) interrogated the first accused, who confessed to plan the death of the deceased due to the existing conflict between his mother and the deceased. PW7 prayed to tender the first accused's cautioned statement which was admitted as exhibit P2. Furthermore, on 30th January 2020, PW8 (WP 5619) interrogated Juliana Lunemya (second accused) who also confessed to have planned the murder of the deceased as they had a long land dispute. PW8 tender the second accused cautioned statement which was admitted as exhibit P3. The accused persons were taken to the justice of the peace (PW5) on 30th January 2020 where the first accused confessed to have been assigned by his mother to hire a murderer hence he found Simon who agreed to kill the deceased at the price of Tshs. 500,000/=. However, the admission of the extra judicial statement was rejected for being too brief to gauge the accused's voluntariness.

In the defence, the first accused (DW1) confirmed to have been arrested at the crime scene but he consistently denied to have been involved in the murder as he was at the village centre watching soccer with his friends called Doto Ndagu and Samata Bahame until they heard the alarm and moved towards the crime scene. The second accused (DW2) though confirmed the existence of the land dispute with the deceased, vehemently denied the allegation of planning the murder of the deceased. She consistently blamed PW8 for concocting the information contained in the cautioned statement.

In this case, certain information is not contested and I do not find any better reason to address them at length because both the prosecution and the defence evidence present the common facts. The two sets of evidence are in agreement on the demise of the late Manugwa Malemi; her life was forced to expire on the evening of 29th January 2020. Her body was found in a pool of blood after the evil act from the attackers. PW1 confirmed that, the deceased sustained fatal wounds from the unknown attackers. He found the deceased struggling to punch the breath. She was rushed to the hospital but died on the way. PW2 went to the crime scene after hearing the alarm and found the deceased lying on the ground wounded with a sharp object. The struggle from villagers to save the deceased's life ended in vain. PW3 also witnessed the fatal wounds on the deceased. He also confirmed that, Manugwa Malemi was attacked and later died. PW6 was

inside the house when he heard the wanting screaming from the deceased. He rushed outside and glanced on the attackers before they left with the motorcycle leaving the deceased fighting for her life. He also confirmed that the deceased died on the way to the hospital.

After considering the evidence from both sides, it is pertinent to address certain issues in this case. The major issue however is whether the prosecution proved the case beyond reasonable doubt that the accused persons murdered the deceased. The law requires a criminal case to be proved beyond reasonable doubt. This requirement is established under **Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2002**. The section provides:

"A fact is said to be proved when—

(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;"

The above position of law is well founded and fortified through case law. The case of **Hemed v. Republic** [1987] TLR 117 for instance provides among other things that:

"...in criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance or probabilities."

While the standard of proof in criminal cases is on proof beyond reasonable doubt, the onus lies on the prosecution. The accused simply raises doubt on the prosecution case. This position is fortified in the case of **Mohamed Matula v. Republic** [1995] TLR 3, thus:

"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."

I have already indicated, the accused persons are facing the charge of murder under **section 196 of the Penal Code, Cap. 16 RE 2019**. The section provides:

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

In deciding whether or not the accused persons committed the offense charged, the prosecution case is hinged on the cautioned statements of the accused persons. The two confession statements, however, were retracted/repudiated before being cleared for admission. Furthermore, the confessions have narrated the motive behind the murder of the deceased. The confession statements show that, the deceased had a land dispute with the second accused. The first

accused, being the son of the second accused, was also bothered with the dispute. Finally, the second accused instructed the first accused to look for a hired murderer to take away the life of the deceased. The first accused secured Saimon for the murder deal. The first accused confessed that, he accompanied Saimon to the crime scene. However, before going to execute the evil intention, the first accused tracked the deceased's husband who went to watch soccer at the village center. Being certain that the deceased's husband could not return to his family before the intended onslaught, the first accused went back and accompanied the murderer. The first accused's confession statement further shows that, the hired murderer came in the village with a motorcycle.

The information in the first accused's confession squarely fits the testimony of PW6 who caught a glimpse of two attackers who later left with their motorcycle. Furthermore, the testimony of PW1 corroborates the fact that, he went to the center to watch soccer and his family was later attacked. On that day, even the hamlet chairman went to enjoy soccer in the TV hall at the center. Nonetheless, the motive for murder, to wit, recurrent conflicts between the deceased and the second accused was confirmed by PW1, PW2 and PW6. The erstwhile hamlet chairman (PW2) recalled how the land dispute reached his officer before being resolved by the village chairman. The second dispute which accused the

deceased for poisoning the second accused's cow though was resolved but in the words of PW6, the second accused vowed for vengeance.

Besides, in their testimony both the accused persons confirmed that, they were interrogated on 30th January 2020, that means, few hours after their arrest. The first accused was interrogated by PW7 and PW8 interrogated the second accused. They were both taken to the justice of the peace for extra judicial confession where they also confessed. Both accused persons were not tortured nor forced to confess; however they just alleged that, they did not know the information contained in their cautioned statement. They both insisted that, after being inquired about their personal particulars such as names, age and religion, the rest of the information was authored by the interrogator. In other words, they never confessed to the murder but only gave their personal particulars to the interviewer.

I understand the risk of relying on the caution statement which has been retracted/repudiated as stated in the case of **Tuwamoi v. Uganda (1967) EA 84** thus:

"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that 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 act on the confession if corroborated in some material particular by independent evidence accepted by the court. **But corroboration is not necessary for law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.***"(Emphasis added).

Also, 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 same stance was taken in the case of **Hatibu Gandhi and others v. Republic** [1996] TLR 12 where the Court of Appeal held that:

"A conviction on a retracted uncorroborated confession is competent if the court warns itself of the danger of acting upon such a confession and if fully satisfied that, the confession cannot but be true."

I have gone further to warn myself that in absence of the extra-judicial statement of the accused persons, the court may be taking a risk on relying on the confession made before the police. In the case of **Ndorosi Kudekei v. R,**

Criminal Appeal No. 318 of 2016, CAT at Arusha (unreported) where the Court stated that:

"With the absence of the extra-judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant had confessed to having killed the deceased or not."

Furthermore, at hand, the court was availed with evidence surrounding the death of the deceased. No any person witnessed the murder of the deceased. Before applying circumstantial evidence to ground a conviction against the accused persons, the court must warn itself on the danger ahead. The law is already settled on this area of the law. For instance, in the case of **Bahati Makeja v. The Republic**, Criminal Appeal No. 118 of 2006, Mwanza (unreported), the Court of Appeal of Tanzania observed that:

"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 application 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 case of **Sadiki Ally Mkindi v. DPP**, Criminal Appeal No. 207 of 2009, CAT at Arusha, (unreported).

In conclusion, the case at hand is solely rests in the two pieces of evidence. As already stated, it may be very risk for the court to bank on a repudiated/retracted confession especially where there is no corroborative evidence. The extra judicial statement which could have corroborated the confession before the police raised a lot of uncertainties on whether or not the accused persons confessed before the justice of the peace. As a result, the same was rejected hence the confessions before the police remain unsupported. Furthermore, the circumstantial evidence at hand was not sufficient to back up the confessions made by the accused person before the police. The court cannot convict a person relying on suspicion and it always safe to acquit the accused than convict on doubt. I find the prosecution failed to prove the case beyond

reasonable doubt that the accused persons murdered the deceased. I hereby acquit them unless held for other lawful reasons.

DATED at **Geita** this 23rd day of March, 2023.



Ntemi N. Kilekamajenga.
JUDGE
23/03/2023



Court

Judgement delivered this 23rd March 2023 in the presence of the learned State Attorney, Mr. George Masero; the counsel for the accused persons, Mr. Forget



Mongi and Yulitha Hezron and the accused persons present in person. Right of appeal explained to the parties.



Ntemi N. Kilekamajenga
JUDGE
23/03/2023

