

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

**CRIMINAL SESSIONS CASE NO. 09 OF 2021**

**REPUBLIC**

***VERSUS***

**EMMANUEL KULWA**

**JUDGMENT**

*22<sup>nd</sup> & 23<sup>rd</sup> March, 2023*

***Kilekamajenga, J.***

The accused, Emmanuel Kulwa, stands charged with two counts of murder contrary to **section 196 and 197 of the Penal Code, Cap. 16 RE 2019**. He is accused of killing Donald Kasika and Kalekwa Kazwenge on 25<sup>th</sup> Day of March 2020 at Shilungile area within the District and Region of Geita. Before this court, the accused pleaded not guilty to the information of murder obliging the prosecution to prove the case to the required standard. During the trial, the learned State Attorneys, Ms. Monica Matwe and Mr. George Masero represented the Republic whereas the accused enjoyed the legal services of the learned advocate, Mr. Laurent Bugoti.

The first prosecution witness PW1 (Faida Doto) who was the hamlet chairman of Shilungile, testified that, on 28<sup>th</sup> March 2020 while coming from the farm at



around 1 pm, the accused called him and informing him about the intention of selling a piece of land. PW1 became suspicious because, the accused did not own any land within their village because he just stayed with the deceaseds. On 29<sup>th</sup> March 2020, PW1 was informed by Musa Mashauri about the deceaseds' clothes and identity cards being found at Bukori Primary School. The clothes were stained with blood. PW1 went to the place and witnessed the clothes and the identity cards. He instructed the village militia man to raise an alarm. They immediately suspected the accused because he stayed with the deceaseds. By that time, the accused had stayed in the deceaseds' house for almost two weeks after shifting from Kahama. They handcuffed the accused who insisted that, the deceaseds went to Ushirombo to look for another place of living. PW1 instructed some people to go to the deceaseds' house for search. The deceaseds' daughter accompanied some people to the deceaseds' house. When they opened the door, they were welcomed with stains of blood. They finally found the deceaseds' in the pit around the house. The police were informed and arrived at the crime scene at around 5:30 pm and arrested the accused.

The second prosecution witness (PW2) Sefu Buhembo who was the secretary of the hamlet chairman testified that, on 29<sup>th</sup> March 2020 he was informed by Musa Mashauri about the existence of the deceaseds' clothes and identity cards at Bukori Primary School. He moved to Bukori Primary School and found the

accused arrested. He also witnessed the clothes and identity cards and identified them to belong to the deceased persons. They interrogated the accused about the whereabouts of the deceaseds but his story kept on changing. PW2 together with other people, including Elizabeth Mashauri (PW3), went to the deceaseds' house. Upon opening the door, they were preceded with a stink before they noticed that, the deceaseds were dumped into a pit near the house. The bodies were recovered and he witnessed the cuttings on the deceaseds' bodies.

The third prosecution witness (PW3) Elizabeth Mashauri, who was the daughter of the second deceased and a step daughter of the first deceased, testified that, on 29<sup>th</sup> March 2020, three people informed her that the clothes of the deceaseds were found near the school. He went to the school and found the clothes of the deceaseds with stains of blood. She immediately questioned the accused on the clothes being found at school but the accused denied knowing anything. PW3 took the keys of the deceaseds' house from the accused because he was the only person staying with the deceaseds. PW3 further confirmed that, the accused was the son of her sister called Anna Juma who lived in Bulambo. Before the incident, PW3 found the accused with the second deceased at the shamba. After taking the keys from the accused, she went with other villagers to her mother's house. She opened the door and immediately saw stains of blood and felt a reek. She also saw an axe, panga and spear which belonged to the first deceased

painted with blood. She could not hold the sorrow and slumped on the ground in tears. The deceaseds were recovered from the pit around the house. PW3 was content that, the accused killed the deceaseds in order to sell the land for purchasing a motorcycle. She got such information from the persons approached by the accused on the land deal. Her sister Anna from Kahama, came the next day after the burial but ran away when she saw the police who came for further investigation. Thereafter, her sister never returned back.

The fourth prosecution witness (PW4) Dr. Joseph Francis was assigned to go to Bukori for post mortem examination. At the crime scene, he found two bodies who were identified as Kalekwa Kazwenge and Donald Kasiga. Upon examination, he noticed that, the body of Donald Kasiga had three wounds on the head and right side. The biggest wound disconnected the veins leading to severe bleeding whereas Kalekwa Kawenge was wounded on the face and on the right side below the ear. Also, her right vein was cut leading to severe bleeding. PW4 concluded the cause of the deceaseds death to be excessive bleeding. She filled-in two post mortem examination reports which were admitted without objection as exhibit P1 and P2.

The last prosecution witness (PW5) PF 20980 Assistant Inspector Robson testified that, he arrived at the crime scene on 29<sup>th</sup> March 2020 and drew a

sketch map under the guidance of Sefu Buhembo. He tendered the sketch map which was admitted as exhibit P3. He further testified that, on the same day, 29<sup>th</sup> March 2020, he interrogated the accused at Bukori police station. Before the interrogation, he informed the accused about his rights. During the interview, the accused confessed to participate in the murder of the deceaseds because he believed the second deceased was a witch. He had bewitched the accused's brother called Juma Kulwa. Therefore, the accused sought the company of James Kiduha, Ramadhani, Erick John and Joseph to kill the deceaseds. PW5 tendered the accused's cautioned statement which was objected but upon conducting trial within trial, the statement was admitted as exhibit P4.

In his defence, the accused informed the court that, his mother is Anastazia Juma and his father is Kulwa Lugwisha. His mother is the daughter of Donald Kasiga and Kalekwa Kazwenge who lived at Shilungile within Bugogo village in Bukori Ward. He visited the deceaseds in 2019 but left in November 2019 and went to live with his father at Nyarugusu. He further told the court that, on 29<sup>th</sup> March 2020, he was phoned by Faida Doto to go Shilungile hamlet to collect his money. He informed his father and was allowed to go to Shilungile. Upon arriving, he found three people including Faida Doto and he was arrested and handcuffed. He was taken to Bukori Primary School and identified the deceaseds' clothes. He further stated that, the keys of the deceaseds' house were stashed in

the bag found at Bukori Primary School. He further confirmed that, her aunt Elizabeth Mashauri (PW3) identified the keys to belong to the deceaseds' house. He consistently denied killing the deceaseds. At around 3pm, he was taken to Bukori Police Station. Throughout his testimony, the accused confirmed that he was interrogated by PW5; he was told to disclose his personal particulars such as name, religion and age. Thereafter, he was requested to sign the statement (exhibit P4) which he signed under the promise of being released.

I have carefully considered the evidence from both sides and I am obliged to address the pertinent issue(s) in this case. In the instance case, the accused is facing two counts of murder; however it must be established beyond reasonable doubt that the accused, and not any other person(s), committed the offences charged. Murder is one of the criminal cases which, under the requirement of the law, its proof must be beyond reasonable doubt. This principle of the law, apart from being provided under the law, it is also amplified in several case laws. See, **Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2019** and the case of **Hemed v. Republic** [1987] TLR 117. Based on the above principle of the law, for an accused to be convicted of any offence, the prosecution must clear reasonable doubts in order to sustain a conviction. Mere suspicion cannot ground a conviction. See, the case of **Nathaniel Alphonse Mapunda and Benjamin Mapunda v. R** [2006] TLR 395. It is from the above backdrop that the

prosecution bears the burden of proving beyond reasonable doubt that, the accused committed the offence charged. The accused, on the other hand, has the mere obligation to shed doubts on the prosecution case. See, the case of **Mohamed Matula v. Republic** [1995] TLR 3.

In the instant case, the accused was arraigned with murder contrary to **section 196 and 197 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"* (emphasis added).

Four elements of the offence of murder which may be extracted from the above provisions of the law are; **first**, there must be **death** of a person; **second**, the death was occasioned or caused by an **unlawful act** or **unlawful omission**; **third**, the accused was responsible for the death of the deceased; **fourth**, the murder was motivated with evil intent or **malice aforethought**.

In the instance case, there is no doubt that, the two named deceased persons died on 25<sup>th</sup> March 2020. Their death is not impugned by defence but also proved by the prosecution witnesses. PW1, PW2 and PW3 not only witnessed the bodies of the deceased persons but also attended their funeral. PW4 conducted medical examination on the bodies of the deceased persons who died as a result

of excessive bleeding. There is no evidence suggesting the contrary rather than the fact that, the deceased persons were brutally killed and dumped in the pit near their house. Moreover, the evidence at hand does not leave any doubt that the death of the deceased persons was unnatural.

The major issue for determination is whether the accused before this court was responsible for the death of the two deceased persons. In proving the offense against the accused, the prosecution evidence relied on the accused's confession and circumstantial evidence. The circumstantial evidence tends to prove that, the accused murdered the deceased persons with a motive of selling their land to enable him purchase a motorcycle. The evidence shows that, PW1 was approached by the accused on the land deal; he became suspicious on the sale of the land because the accused did not own any piece of land within the same village. PW3 also confirmed that, the accused had approached other people within the village on the sale of the deceaseds' land. Furthermore, when the deceaseds' clothes and identity cards were found near Bukori Primary School, the accused was immediately suspected of the murder because, the deceaseds only lived with the accused within their family. The deceaseds' daughter (PW3) who lived within the same village also confirmed that, the accused lived with the deceaseds few days before the brutal murder. PW1 went further confirming that, he met the accused one day before the discovery of the deceaseds bodies. On



that day, as already stated, the accused offered the piece of land for sale to PW1.

Moreover, when under arrest in the presence of the villagers, the accused was asked on the whereabouts of the deceaseds. His response raised more suspicion; the accused told the village gathering that, the deceaseds went to Ushirombo to look for another place of living. The accused remained content that, the deceaseds could not be found. PW3 appeared at the village gathering and questioned the accused about the presence of the deceaseds' clothes and identity cards at the primary school compound, but the accused denied knowing anything. While the community believed the accused to be the murderer, PW3 requested the keys of the deceaseds' house and the accused surrendered them to her from his pocket. PW2 also witnessed the handling of the keys from the accused to PW3. The deceaseds' daughter (PW3), PW2, together with other villagers went to the deceaseds house; upon opening the door, they were welcomed with clear evidence that the deceaseds were murdered. **First**, they spotted dots of blood within the house. **Second**, they saw an axe, spear and panga with blood. **Third**, they were welcomed with a bad smell. They finally found the deceaseds in a pit around the house. In their conclusion, the accused could not have remained within the same compound without knowing the death of the deceaseds. As a result, the accused was directly linked with the death of

the deceased persons. I also believe that, the accused was aware of the murder of the deceased.

I have always been hesitant to apply the rare doctrine of law on the last person to be with the deceased becomes the murderer in absence of any plausible explanation to the contrary. This principle of the law was stated in the case of **Mathayo Mwalimu and another v. The Republic**, Criminal Appeal No. 147 of 2008, CAT at Dodoma (unreported) thus:

*"...if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer."*

I know the danger behind the application of the above principle of the law but certain circumstances may compel its use. In this case, despite sufficient evidence suggesting that, the accused was the only person who stayed with the deceased until their death, the accused alleged to have been in Nyarugusu before he was summoned by PW1 to collect his money in the deceaseds' village. According to his evidence, in Nyarugusu, he stayed with his father and his step-mother. He further alleged that his father died after he was arrested and that he did not know where his step-mother relocated after the death of his father. Overall, despite being a motorcyclist, the accused was not willing to summon any of

his friends to couple his testimony. In his testimony, he alleged that, he left the deceaseds' village some months before the death of the deceaseds. However, his testimony seemed to be a pure lie because his biological mother attended the funeral of the deceaseds a day after the burial. According to the testimony of PW3, the accused's mother and father are still alive. Of course, the lies of the accused may fortify the prosecution case especially where the prosecution has already advanced strong evidence. This principle of the law was stated in the case of **Nkanga Daudi Nkanga v. R**, Criminal Appeal No. 316 of 2013, CAT at Mwanza thus:

*"As the rule goes, we wish to point out that lies of an accused person may corroborate the prosecution case as we think it has."*

See, also the case of **Felix Lucas Kisinyila v. R**, Criminal Appeal No. 129 of 2002, CAT (unreported).

I am fully aware, before applying the above circumstantial evidence to ground a conviction against the accused, 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 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 case of **Sadiki Ally Mkindi v. DPP**, Criminal Appeal No. 207 of 2009, CAT at Arusha, (unreported).

Furthermore, the case at hand is not solely based on circumstantial evidence. As already intimated, the accused was arrested within the deceaseds' village because he was the only person who lived with them. He was immediately handed-over to the police for further interrogation. Before the police officer, he

confessed to have planned and executed the murder of the deceaseds in assistance with his friends. During the trial, the accused retracted/repudiated his confession. I understand the risk of relying on the caution statement which has been retracted/repudiated. In the land mark case of **Tuwamoi v. Uganda** (1967) EA 84 the court stated that:

*"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."*

In this case, I have taken all the precautions on relying on circumstantial evidence and confession to ground a conviction. I have gone further to assess the demeanour of the accused which is the exclusive privilege of the trial court. I am convinced that the evidence at hand is sufficient to ground a conviction. The accused who possessed the keys of the deceaseds' house until his arrest could

not have known about their whereabouts. There is strong evidence to suggest that, he attempted to sell the deceaseds' land immediately after the murder.

Being a commercial motorcycle rider, his motive was to procure a motorcycle after selling the land. I am satisfied that the prosecution proved the case beyond reasonable doubt that the accused killed the two deceased persons who were his grandmother and step-grandfather. I hereby convict the accused for the offense of murder as per section 196 of the Penal Code, Cap. 16 RE 2022.

**DATED** at **Geita** this 23<sup>rd</sup> day of March, 2023



**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**23/03/2023**



## **SENTENCE**

Having convicted the accused for the offense of murder, I hereby sentence him (Emmanuel Kulwa) to be hanged until death as the law requires. Right of appeal explained to the parties.



**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**23/03/2023**

