

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 73 OF 2018

THE REPUBLIC

VERSUS

ERNEST JOHN @ MBOLELA.....THE ACCUSED

JUDGMENT

24th February & 5th April 2023.

MWANGA, J.

The accused, **ERNEST JOHN @ MBOLELA** is charged of murder contrary to Sections 196 and 197 of the Penal Code, Cap. 16 R.E 2002. According to the particulars of the offence; it is alleged that on the 31st day of September, 2016 at Kibudi Village, Mkuranga District within Coastal Region the accused named above murdered his step son **Selemani Ramadhani @ Juma**.

The circumstances surrounding death of the deceased are that; on 31st August, 2016 at Kibudi Village the accused person came back to his home from Mbulani Village and found his wife absent. He was told that she had gone out looking after him as well. As a result, the accused left home for a while and came back later. The accused told his nephew one

Pilisi Joseph Namalila that, he had found out that his wife went to guest house to make love with another man.

While being angry, the accused grabbed the deceased and told him to show whereabouts his mother. The deceased, however poor little he was, refused to accept the accused's demand. The accused then slapped the deceased. Afterwards, the deceased person led the way while crying. The accused also followed him behind while carrying a bush knife "panga". A half an hour or so, the accused came back alone while shirtless and told his nephew Pilisi Joseph Namalila that: -

"Mke wangu yeye ni mshenzi hivyo nimemuonyesha kuwa mimi ni nani, yule mtoto nimeshamuua"

It followed that, on 3rd September, 2016 the villagers accompanied by the said Pilisi Joseph Namalila discovered the deceased's body buried in a shallow grave at Kibudi bush which had a leg protruding on the surface. The said Pilisi Joseph Namalila informed the villagers about involvement of the accused in the murder of the deceased. Hence, the accused was then arrested on 3rd September, 2016.

On 4th September, a team of investigators and a medical doctor arrived at the crime scene. The body of the deceased was recovered from the grave where it was found with deep cut wounds on the head, back, hands, stomach and intestine protruded outside. Also, the deceased's

body was burnt but the same was capable of being identified as well. The sketch map of the scene of crime was drawn.

The post mortem examination was conducted and the report revealed that, death of the deceased was caused by haemorrhagic shock due to multiple cut wounds.

In an effort to prove the charge against the accused, the prosecution produced a total of five (5) witnesses. PW1 was XD 8530 D/SGT Ayubu. He was amongst team of investigators who accompanied Dr. Grace from Mkuranga Health Centre to Kibudi village where the incident of murder occurred. He testified that, when they arrived at the place on 4th September, 2016 they passed over to the Chairman of Local Village Mr. Hamadi Ibrahim Mussa and relatives of the deceased. Then, they accompanied together to the scene of crime.

According to him, when they arrived at the bush, they saw a leg of child protruding outside in a shallow grave. They dug in and removed body of a male child with an average of four (4) years old. It was his testimony that, the body had cut wounds on the head, hands, abdomen and intestines protruded outside. The mother of the deceased identified him to be the body of her son who got lost on 31st August, 2016.

Above all, PW1 also testified that he interviewed nephew of the accused one Pilisi Joseph Namalila who was living together at the home of the accused. He informed him that, the accused was the one who murdered the deceased. His interview revealed further that, the accused warned his nephew not disclose it to anybody, otherwise, he would also be decimated. On the other hand, PW2 was F. 2741 D/SGT Medes who also visited at the scene of crime. He added that, he drew the Sketch Map of the scene of crime which was also tendered and admitted in court as exhibit PE1.

In addition to that, PW3 was Grace Fabian, a medical doctor who on 4th September, 2019 also visited the scene of crime. She conducted postmodern examination of the deceased's body and established that, the cause of death was due to excessive bleedings. It was also her taken note that, the deceased's body undergone a superficial burn but the cut injuries were seen on the head, hands, stomach, beside the ribs and the intestines protruded outside. The post-mortem examination report was tendered and admitted as exhibit PE2 without objection.

In referencing to the evidence of PW4, his name was Pilisi Joseph Kitunguu Namalila, a resident of Mbulani Village within Mkuranga District in Coastal Region. He is the accused's nephew and he lived together with him, the wife of the accused called Belinda and the deceased. The accused

confessed before him that he was the one who killed the deceased. According to him, the circumstances pertaining to the confession were that; on 30th August, 2016 the accused left his home and came back in the next day of 31st August, 2016. Upon his return, he found PW4 and the deceased alone. The accused then asked PW4 whereabouts his wife. He was told that, she had gone to look after him at Mbulani Village. Then, the accused left home in an attempt to locate her but, later on, he came back home as his effort was in vain. The accused told PW4 that, he has been informed that his wife went to guest house to make love with another man. Shortly after, the accused slapped the deceased and told him to show whereabouts his mother. While crying, the deceased left with the accused who was carrying a 'panga'. According to PW4, a moment later, the deceased stopped crying and the accused came back home alone shirtless. PW4 also testified that, the accused told him that, he has killed the deceased because his mother has gone with another man to make love at the guest house. He was thereafter told to put his mouth shut or else he would also be killed.

On 1st September, 2016 the accused and his wife reported the incident of his lost son. In the course of looking after the deceased, PW4 decided to tell the truth to the villagers that the accused was the one who killed the deceased. Thus, they conducted search at the bush and found

the deceased's body in a shallow grave. The matter was then reported to the Police whereby a team of investigators arrived including a medical doctor who conducted post-mortem examination. He also witnessed the body of deceased being recovered from the grave and it had cut injuries on the head, back, hands, stomach and the body was burnt. PW4 identified the accused at the dock.

PW5 was Yahaya Selemani Jiko, a resident of Kibudi village within Mkuranga District. He was a chairman of Kibudi village. He told the court that on 1st September, 2016 at around 09:00 a.m, while at his home, the accused and mother of the deceased reported the lost incident of the deceased. When they started conducting search, PW5 revealed to them that it was the accused who murdered the deceased. As a result of that, the accused was arrested in connection with the murder. Thereafter, they conducted search at the bush where they discovered a shallow grave where they saw a leg of the deceased protruded on the surface. That marked end of the prosecution case.

On his part, the accused **Ernest John @Mbolela** who testified under oath as DW1 denied the charges levelled against him. He testified that; he is the resident of Kibudi village within Mkuranga District. Before his arrest, he was living with his nephew (PW4), his step son (the deceased) and his wife since 2014. He told the court that, as a family,

they were living happily as there was no any quarrels amongst them. It was his assertion that, he could not recall what happened on 31st August, 2016 because he was not at home on the respective date. The version of his defence was that, he was at Mbulani area to look after the needs (food) and he returned home on 1st September, 2016 in the morning, only to be informed of the lost step son by his wife and PW4.

On cross examination, the accused stated that he had not informed the court and prosecution of his defence of *alibi*. Further that, he has not adduced any evidence to show that he was not at home on that particular day. The accused also acknowledged that, he had no quarrels with PW4, his wife, deceased and the Hamlet Chairman (PW5).

After full trial, parties made final submission which availed this court with relevant authorities regarding this matter, which I am very grateful. However, I will not reproduce them here, but the same shall be applied wherever necessary.

After thorough evaluation of evidence on record and respective submission by the parties, there is no dispute that this case is based entirely on circumstantial evidence. On cases of this nature, the court must satisfy itself that the point of guilt of the accused is irresistible. That means, the evidence points no one other than the accused himself. In the case of **Said Bakari Vs Republic**, Criminal Appeal No 422 of 2013

(unreported) quoted with approval in the case of **Sikujua Idd Vs Republic**, Criminal Appeal No. 484 of 2019 [2021] TZCA 427 the court took the view that: -

"It is established law that a charge of murder can be fully proved by circumstantial evidence. In determining a case centred on circumstantial evidence, the proper approach by the trial court and appellate court is to critically consider and weigh all circumstances established by the evidence in their totality and not consider piecemeal or cubicles of evidence or circumstance."

It is also a well-settled principle of law for decades that, in criminal cases, the burden of proof lies upon the prosecution and it is beyond reasonable doubt. In the celebrated case of **Pascal Yoya @Maganga Versus Republic**, Criminal Appeal No. 248 of 2017(Unreported), it was held that: -

"It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence"

I am citing all these authorities to show that, even if the accused failed to raise proper defence for his case, it does not relinquish the prosecution with the noble duty to prove its case to the required standard. In conjunction with that, in the case of **Mohamed Haruna @ Mtupeni**

& Another Vs Republic, Criminal Appeal No. 25 of 2007 (unreported), the court had held that: -

"... 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."

Likewise, in the case of **Mwita and Others Vs Republic** [1977]

TLR 54 the court, when hearing a criminal appeal, emphasised that: - "

"The appellants' duty was not to prove that their defense was true. They were simply required to raise a reasonable doubt in the mind of the magistrate and no more."

Apart from the outlined principles above, in murder cases, the prosecution must prove the existence of actus reus and mens rea. According to Section 196 of the Penal Code, Cap. 16 R.E 2022 the actus reus is unlawful killing and the mens rea is the intention. Such elements of the offence of murder were clearly also stated in the case of **Anthony Kinanila & Enock Anthony VR**, Criminal Appeal No. 83 of 2021(Unreported).

Therefore, for the court to mount conviction on the accused on murder charges, the prosecution has a duty to establish the following: -

- i. whether the deceased is real dead;
- ii. whether the death was caused by someone unlawful;

- iii. whether there was malice aforethought that the accused person directly or indirectly took the position in the commission of offence; and
- iv. whether the prosecution proved its case beyond reasonable doubt.

In addressing the first issue, PW4 was at home with the deceased. The accused asked whereabouts his wife and, subsequently forced the deceased to locate her. Then, the accused slapped the deceased forcing him to show whereabouts his mother in the presence of PW4. The accused left home with the deceased while holding a "panga" and, later he came back alone while shirtless. After his return, he immediately confessed to PW4 that: -

"Mke wangu yeye ni mshenzi hivyo nimemuonyesha kuwa mimi ni nani, yule mtoto mimeshamuua"

The above quotes can be unofficially translated that, his wife is uncouth, therefore, he has shown her who he is. Thus, he has killed the deceased. Under the circumstances, PW4 has established that the accused was the last person to be seen with the deceased. In the relevant case of **Mark Kasmir Vs Republic**, Criminal Appeal No. 39 of 2017 (Unreported) it was stated that the accused person before convicting on

circumstantial evidence must be the last person to be seen with the deceased.

Furthermore, PW3 conducted post-mortem examination of the deceased body. The report revealed that the cause of death was due to excessive loss of blood as a result of multiple cut wounds in different part of the body. In that regard, it is uncontroverted fact that the deceased **Selemani Ramadhan @ Juma** died unnatural death. As it was stated in the case of **Tomola Vs Republic** (1980) TLR 254: -

"proof of death in homicidal cases is through medical evidence and or circumstantial evidence"

From the above authority, and in consideration of the evidence on record, there is proof beyond doubt that; **Selemani Ramadhani@Juma** is dead. Therefore, the first issue is answered in the affirmative.

Likewise, in respect of the second issue, the accused was the last person to be seen with the deceased by PW4. He left with the deceased while angry and when holding a "Panga". He also slapped the deceased before they left together with a view to force him to show whereabouts his mother. Most importantly, on his return, the accused confessed before PW4 to have killed the deceased.

On top of that, PW3 conducted post-mortem examination where she found the deceased's body with multiple cut wounds on the head, hands,

stomach and besides the ribs and intestines protruded outside. That was also the evidence of PW1, PW2, PW3 and PW4.

In light of the above, I have no reason to disbelieve the testimony of PW4. He is a credible witness entitled to credence. **First**, PW4 is the nephew of the accused and the same was confirmed by the accused in his defence. **Second**, as also confirmed in his defence, there was no quarrels with his family member including PW4. **Third**, it was the accused who invited PW4 to live together in his home out of love and affection. All these circumstances point out irresistibly that the accused was the one who murdered the deceased.

As a matter of law, evidence of oral confession is admissible against the accused. PW4 registered his evidence that the accused confessed before him that he killed the deceased. Furthest to that, the accused gave reason as to why he committed such heinous crime against an innocent boy who could not even defend himself from such cruelty. The authority in the case **of Posolo Wilson@Mwalyego Vs Republic**, Criminal Appeal No. 613 of 215 (unreported) it was held that: -

"Oral confession made by the suspect before or in the presence of reliable witness, be the civilian or not may be sufficient by itself to found conviction against the suspect".

From the above authorities, nothing else could be inferred other than the fact that, it was the accused who murdered the deceased.

In his submission, the counsel for the accused raised some notable contradictions on the prosecution witnesses. He told the court that, there was evidence that, the incident took place on 30th August, 2016 while in actual fact the incident took place on 31st August, 2016. It was also noted that, PW5 stated that the accused was arrested on 2nd September, 2016 instead of 3rd September, 2016.

Be that as it may, such contradictions found are minor and, as such, cannot affect credibility of witnesses. There are several decisions on that point, amongst them, is the case of **Bakari Hamisi Ling'ambe Vs Republic**, Criminal Appeal No. 161 of 2014, where the court held that variation in dates and time do not flop the prosecution case.

For the defence of alibi raised by the accused, that he was not present at home during the occurrence of the incidence do not meet the requirements of the law as stipulated under the provision of Section 194 (1) (5) and (6) of the CPA. As rightly observed by the learned State Attorney, to raise such issue during the defence hearing was an afterthought, as the accused did not give due notice prior to closure of the prosecution case.

The last and final issue for determination is whether the accused criminal action was accompanied by malice aforethought. The ingredients of malice aforethought relate to the circumstances under Section 200 of the Penal Code, Cap. 16 R.E 2022. There are also number of cases to that effect, to mention a few, **Fadhili Gumbo@ Malota and 3 Others Vs Republic** (2006) TLR 50 and in the case of **Tunutu Mnyasule Vs Republic** [1980] TLR 204 and **Zabron Msua Vs R**, criminal Appeal No. 7 of 1979. The authorities in both cases stipulate for the elements or the test of the malice aforethought in murder cases.

Accordingly, there is evidence that the accused had an intention to present an unlawful purpose. Such series of events done by the accused constitute nothing but intention to commit the crime of murder. His actions shows that he has no concern for law and life of a very little young boy who remained undefended from such brutal actions because of jealous love which the deceased is not fond of.

In the circumstances, I hereby find the accused, **Ernest John @Mbolela** guilty of the offence of murder of **Selemani Ramadhamni@Juma** as charged and, therefore, convict him of murder.

SENTENCE

Murder attracts only one sentence. My hands are tied to my oath to safe guard the law in accordance with the constitution of the laws of Tanzania. I do sentence you the accused **Ernest John@ Mbolela** to death. I direct that you shall suffer death by hanging.



A handwritten signature in black ink, appearing to read "H. R. Mwanga".

H. R. MWANGA

JUDGE

05/04/2023

Right of appeal explained as required under section 323 of CPA.



A handwritten signature in black ink, appearing to read "H. R. Mwanga".

H. R. MWANGA

JUDGE

05/04/2023