IN THE HIGH COURT OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT GEITA

CRIMINAL SESSIONS CASE NO. 43 OF 2021

THE REPUBLIC

VERSUS

1. **SILVESTER S/O MASALU @ MISALABA**
2. **SABO S/O MAKOJA @ PAUL**

JUDGMENT

Date of Last Order: 04/04/2023
Date of Judgment: 28/04/2023

KAMANA, J:

The two brothers in the names of Silvester Masalu @Misalaba (the first accused) and Sabo Makoja @Paul (the second accused) were arraigned before this Court to answer Information of Murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [RE.2019]. It was alleged by the Prosecution that on 19th September, 2020 at Lyulu Village, Nyangh'wale District within Geita Region, the brothers murdered Ngubagu Mtonyongo @Masai Masolwa.

Facts gathered from the evidence adduced by the Prosecution are to the effect that in the wee hours of 19th September, 2020 at Lyulu Village, the brothers killed their step father Ngubangu Mtonyongo. It was alleged that the duo around 0200hrs lured their step father to leave

his matrimonial bed for a glass of local liquor famously known as *gongo.* In a bid to quench his never-ending thirst, the deceased doubtless left his house in the company of the accused to where the liquor was sold. It was further alleged that after some distance from his home, sagacity overpowered his thirst as he refused to go further with his step sons. From that point, the deceased was dragged to some more distance while severely beaten by his step children.

The assailants, after unleashing their anger toward their step father, left him helpless and returned to their homes. Upon sunrise, the deceased was found in a vegetative state. When good Samaritans were loading him on a motorcycle so as to take him to the hospital, Ngubagu Mtonyongo drew his last breath. What followed thereafter was the arrest of the brothers and their sister Regina Makoja @Mayala who before the hearing of this matter was discharged under section 91(1) of the Criminal Procedure Act, Cap. 20 [RE.2019].

From the evidence adduced by the Prosecution, the brothers and their sister were arrested after being mentioned by persons who gathered at the scene of the crime as culprits on the account that the trio had a feud with their step father. It was alleged that the deceased

had the unbecoming behaviour of laziness which caused him to mistreat their mother and steal her harvests and sell them to secure money for buying booze. Out of that feud, it was suspected that the accused and their sister decided to neutralize their mother's husband.

When the Information as to the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [RE.2019] was read over to the accused, they pleaded not guilty. Given that, the full trial was held to prove the guiltiness or otherwise of the accused.

At the hearing of this case, the Prosecution had the services of Ms. Winifrida Ernest Mpiwa, learned State Attorney. The first and second accused, respectively, enjoyed the services of Ms. Dorine Narcis and Mr. Gaston Thomas, both learned Counsel.

In a bid to prove its case, the Prosecution fielded six witnesses. These were Francis Estomihi Mboya (PW1), Cpl. Safari (PW2), Sekelwa Dotto (PW3), Det.Cpl. Yusuph (PW4), Det.Cpl. Nicholaus (PW5) and Det.Cpl. Denis (PW6). Further, the Prosecution tendered exhibits that were admitted. The exhibits were the Search Order and Certificate of Seizure (Exh.PE1) the stick (Exh.PE2), the Chain of Custody Record (Exh.PE3), the Cautioned Statement of the first accused (Exh.PE4), the

Statement of Dr. Frederick Kambona who performed an autopsy (Exh.PE5), the Sketchy Map of the scene of the crime (EXh.PE6) and the Cautioned Statement of the second accused (Exh.PE7). Both accused had neither witness save for themselves nor exhibits. Having heard the Prosecution's witnesses and gone through the admitted exhibits, this Court found both accused with a case to answer.

As part of the preliminaries, I think it is logical and relevant to, albeit, briefly visit some of the guiding principles through which I will navigate in the determination of this case. It is a cardinal principle of law that the Prosecution has a burden to prove the guilt of the accused beyond a reasonable doubt, and the burden is never shifted to the accused unless otherwise stated by statute. According to section 3(2) (a) of the Tanzania Evidence Act, Cap. 6 [RE.2019], a fact is considered to have been proved if the Prosecution satisfies the Court beyond reasonable doubt that the alleged fact exists. This position has been enunciated in innumerable cases including the case of **Mohamed Haruna @ Mtupeni and Another v. Republic**, Criminal Appeal No. 25 of 2007 (Unreported) where the Court of Appeal had this to state:

"Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt.'

See: Woodmington v. DPP [1935] AC 462; **Jonas Boniphas Massawe v. Republic**, Criminal Appeal No. 52 of 2020 (Unreported); **Pascal Yoya Maganga v. Republic**, Criminal Appeal No. 248 of 2017 (Unreported); and **Julius Mbwilo v. Republic**, Criminal Appeal No. 351 of 2009 (Unreported).

Further, in homicide cases like this one, the Prosecution is under the obligation to prove beyond reasonable doubt the following:

(a) There is a person who is dead.

(b) The death of that person is unnatural.

(c) The death of the person was premeditated in the sense that there was malice aforethought attributed to the accused.

(d) There is credible and cogent evidence that the accused is a perpetrator of the alleged killing.

See: Anthony Kinanila and Another v. Republic, Criminal Appeal No. 83 of 2021 (Unreported).

Commencing with the first ingredient of the offence of murder which is the existence of death, it is indisputable that Ngubagu Mtonyongo is no more. This is proven by the evidence adduced by the Prosecution's witness Sekelwa Dotto (PW3) who is the Village Executive for Lyulu Village, Det.Cpl. Nicholaus (PW5) and Det.Cpl. Denis (PW6). The witnesses testified to having seen the deceased body at the scene of the crime. Their evidence is supported by the Statement of Dr. Kambona (Exh.PE5) who examined the deceased's body which was identified to him by the persons present at the scene of the crime to be of Ngubagu Mtonyongo. This fact is also not disputed by both accused. Given that, I hold that the Prosecution has proved beyond reasonable doubt that Ngubagu Mtonyongo has breathed his last breath.

As to the death of Ngubagu Mtonyongo being unnatural, the evidence of PW3, PW5 and PW6 was to the effect that the deceased's body had wounds on various parts of his body, including on his head and back. According to Exh.PE5 which is the statement of Dr. Kambona, the cause of death of Ngubagu Mtonyongo was a fracture of his skull

which led to a brain haemorrhage. In the said Statement, the Medical Practitioner stated to have seen wounds on the deceased's head, legs, back and left arm whereby the one on the head was inflicted with a heavy object.

In his defence, the first accused refuted allegations that the deceased's body had marks that indicated that he was beaten. On his part, the second accused did not testify as to the condition of the deceased's body though he was present in response to *mwano* after Ngubagu Mtonyongo was found in a vegetative condition.

Without further ado, I am inclined to agree with the testimonies of the PW3, PW5 and PW6 and the statement of the medical practitioner who performed the autopsy (Exh.PE5). I hold so since I find no reason for the witnesses to lie so far as the condition of the deceased's body is concerned. Further, there is no evidence adduced by both accused of the existence of bad blood between them and the witnesses to the extent of those witnesses to plot against them so far as the deceased's body is concerned. That being the case, it is my holding that the Prosecution has proved beyond reasonable doubt that the death of Ngubagu Mtonyongo was unnatural.

Coming to the third ingredient as to the existence of malice aforethought on the part of the assailants in the commission of the murderous act, I think it is pertinent to have a look at section 200 of the Penal Code, Cap. 16. The section reads:

> *'Malice aforethought shall be deemed to be established by evidence proving anyone nor more of the following circumstances—*
>
> > *(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
> >
> > *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.'

The then East African Court of Appeal had the opportunity to consider what constitutes malice aforethought in the case of **Republic vs. Tubere s/o Ochen** [1945] 12 EACA 63 where it stated:

'That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used and the part of the body injured, and the conduct of the Accused before, during, and after the attack.'

Similarly, the Court of Appeal of Tanzania in the case of **Mark Kisimiri v. Republic**, Criminal Appeal No.39 of 2017 (Unreported)

quoted with approval its observation in the case of **Enock Kipera v. Republic**, Criminal Appeal No. 150 of 1994 (Unreported) by stating:

> *'...usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained by various factors including the following: The type and size of the weapon used, the amount of force applied, part or parts of the body or blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances if any made before or after killing, and the conduct of the attackers before and after killing.'*

The deceased's body was found with wounds on various parts of his body including on his head. Further, the Statement of Dr. Kambona who performed the autopsy (PE5) clearly states that he found the deceased's body with a wound on his head which was caused by being inflicted with a heavy object to the extent of fracturing his skull. From

this evidence, I entertain no doubt that whoever the assailant was, he or she, intended to cause grievous harm or death to the deceased. The head in itself is a sensitive organ. Hitting it by using a heavy object to the extent of fracturing the skull implies that the attacker used excessive force intending to cause grievous harm or death. In that case, it is my conviction that the Prosecution proved beyond reasonable doubt the existence of malice aforethought on the part of the assailant.

On whether there is credible and cogent evidence that both accused are responsible for the killing of Ngubagu Mtonyongo, the Prosecution did not bring any eye witness. Its evidence relied substantially upon the Cautioned Statements of both accused, the Search Order and Seizure Form and the stick alleged to have been found in the first accused's home.

Det.Cpl. Yusuph (PW4) tendered the Cautioned Statement of the first accused which was admitted after a trial within trial as Exh.PE4. In his evidence, PW4 testified that the first accused confessed to him that he, the second accused and Regina Makoja planned and executed the murder of their step father Ngubagu Mtonyongo. According to this witness, the trio was aggrieved by the way their step father was treating

their mother including selling her crops and using the money accrued for buying liquor.

Det.Cpl. Denis (PW6) tendered Cautioned Statement of the second accused which was admitted as Exh.PE7. This witness testified that the second accused confessed to having a hand in the killing of Ngubagu Mtonyongo and that he, the first accused and their sister Regina Makoja killed their father for the reasons I have already stated hereinabove.

Before I proceed with other pieces of evidence, I think it is pertinent to visit the principles governing cautioned statements. As a matter of practice, it is unsafe to convict a person for an offence based solely on a retracted Cautioned Statement. As a general principle for an accused person to be convicted on the retracted Cautioned Statement, there must be a shred of independent and cogent evidence to collaborate what is contained in the Statement.

The Cautioned Statement of the first accused was retracted. Likewise, the Cautioned Statement of the second accused though was not objected to before its admission, was retracted during the Defence. It is trite law now that a Cautioned Statement retracted after admission ought to be treated with caution by the Court. This position was stated

by the Court of Appeal in the case of **Ndalahwa Shilanga and Another v. Republic**, Criminal Appeal No.247 of 2008 (Unreported) as follows:

> *Having considered all the evidence on record, and the submissions of the learned counsel, we are certain in our minds that the only evidence against the appellant (his confession, Exh P6), although admitted without objection, ought to be treated with circumspection, and in the peculiar circumstances of this case we think there ought to be some corroboration and we could find none. Therefore the appellant's conviction is not safe.'*

Fortified by that position, it is my considered view that the Cautioned Statements of both accused to sustain a conviction against both accused were supposed to be corroborated by cogent and independent evidence. I hold so while I am aware that none of the Cautioned Statements qualifies to corroborate the other as it is an established principle that the evidence which in itself needs to be corroborated cannot corroborate the other evidence.

I hesitate to use the evidence regarding the seizure of the stick that is alleged to be used by the first accused to beat the deceased as corroborating what is stated in the Cautioned Statements for some reasons as elucidated hereinafter.

Francis Estomihi Mboya (PW1) who was the Officer Commanding the Criminal Investigation Department in Nyangh'wale District testified that he led the investigation team which went to the scene of the crime on 21st September, 2020 after the first accused volunteered to take them there. The witness narrated how the first accused showed him, his team and Sekelwa Dotto (PW3) how they took the deceased from his home to the scene of the crime. The witness testified further that the first accused led them to his home where he said there was a stick that was used to beat the deceased to his death. At his home, the witness testified to having found the stick in the corner of the sitting room. The stick, according to this witness, was seized by him. To substantiate his evidence, the witness tendered the Search Order and Seizure Form (Exh. PE1) and the seized stick (Exh.PE2).

The testimony of this witness was supported by the evidence adduced by Sekelwa Dotto (PW3) who was an independent witness who signed the seizure form, Det.Cpl. Nicholaus (PW5) who drew the

Sketchy Map (Exh.PE6) and Cpl. Safari (PW2), an exhibit keeper, who tendered the Chain of Custody Record (Exh.PE3).

This piece of evidence looks impressive. However, I find the same wanting. The Chain of Custody Record (Exh.PE3) when read together with the Search Order and Seizure Form (Exh.PE2) raises doubts as to their authenticity. The Search Order was issued by the Officer Commanding District (OCD) on 21st September, 2020 at 1420hrs whilst the Chain of Custody Record states that the stick was seized on 21st September, 2020 at 1420hrs. I have failed to understand how the police officers managed to get the search order at Kharumwa Police Station, search the first accused's home at Lyulu Village and seize the stick at the same time.

Further, according to the Seizure Form, the officer who seized the stick was SP Francis Estomihi Mboya who happened to be PW1 and the one who tendered such an exhibit during the trial. However, the seizing officer according to the Chain of Custody Record is G.5570 D/C Nicholaus. My perusal of the Seizure Form does not indicate how G.5570 D/C Nicholaus came into possession of the stick.

For the above reasons, I am constrained to hold that I doubt the truthfulness of Exh.PE1 and Exh.PE3. It further goes without saying that Exh.P2 (the stick) also falls within the fate of Exh.PE1 and PE3.

Having found that, I doubt the testimonies of PW1 and other witnesses so far as their testimonies regarding the act of the first accused to show them how he, his brother and sister took the deceased from his home to where they killed him. I hold this view while I am mindful of the fact that both witnesses testified that they went to the scene of the crime with the first accused on 21st September, 2020 while the sketchy map to that effect was drawn on 19th September, 2020. This creates a hole in the Prosecution's case despite PW5's assertion that the discrepancy as to the dates was human error.

I further doubt the Prosecution's story that the first accused told police officers that he has the stick at his home. This is due to the following reason. The testimony of PW1, PW3 and PW5 is to the effect that the first accused told them about the stick when they were at the scene of the crime. If that is the case, how come the Search Order which was issued at the Police Station states that according to the information from the accused, the stick that was used to beat the

deceased was likely to be found in his home? This to me is ridiculous as the said Order was issued before the visit to the scene of the crime.

Assuming that what is stated by the witnesses is incorrect and that Police Officers had the information from the first accused that he had the stick used to commit the offence in his home, why they did not record an additional Cautioned Statement to that effect before issuing the search order? For the foregoing reasons, I find the evidence of PW1, PW3 and PW5 regarding the search and seizure of the stick not credible.

Reverting to the Cautioned Statements, I am aware that the accused person may be convicted on the retracted confession if the Court is satisfied that the Cautioned Statement contains nothing but the truth. However, before convicting an accused on the uncorroborated retracted confession, the Court must warn itself of the danger of convicting an accused without corroborative evidence. In the celebrated case of **Tuwamoi v. Uganda** [1967] EA 84 it was stated as follows:

> *'**In assessing a confession the main consideration at this stage will be, is it true?** And if the confession is the only evidence against an accused then the court must decide*

whether the accused has correctly related what happened and whether the statement establishes his guilt with the degree of certainty required in a criminal case. ***This applies to all confessions whether they have been retracted or repudiated or admitted, but when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession is true****.'* *(Emphasis added).*

Dispassionately, I considered the circumstances of this case which was characterized by no eye witness. In that case, I expected that the Prosecution would tender the extra-judicial statements of both accused as indicated during the Preliminary Hearing. The extra-judicial statement would put this Court in a good position to verify the truthfulness of the Cautioned Statements.

The absence of the Extra-Judicial Statement in a serious case like this one creates doubts in the Prosecution's case so far as the

truthfulness of the Cautioned Statements is concerned. I hold so while mindful of the decision of the Court of Appeal in the case of **Ndorosi Kudekei v. Republic**, Criminal Appeal No. 318 of 2016 (Unreported) where the Court of Appeal of Tanzania held that:

> *What was placed before the court in evidence was the cautioned statement only (exhibit Pl), whereas the whereabouts of the extra-judicial statement which was made to the Justice of peace was nowhere to be seen. 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 really confessed to have killed the deceased or not.'*

In his defence, the first accused categorically denied participating in the killing in question. He further denied volunteering to take the police team to the scene of the crime as alleged by PW1. The accused also denied showing the police officers and others present how they took the deceased from his place to where he was found in a vegetative condition. This witness denied telling the police that he had in his house a stick used to kill the deceased. He told this Court that the seized stick

was at his home for *kupigia mahindi.* He complained to have been beaten by police officers who were pressurizing him to admit that the said stick was the one used to end the life of Ngubagu Mtonyongo. The second accused, in his defence, categorically denied killing his step father.

I have gone through the evidence adduced by both accused. They successfully managed to raise considerable doubt in the Prosecution's case. One, none of the Prosecution's witnesses testified to have seen the accused committing the offence. Two, the Prosecution's evidence so far as police officers being led to the scene of the crime and to the first accused's home is tainted with doubts as shown hereinabove. Three, the retrieval of the stick (Exh.PE2) allegedly seized in the first accused's home is also tainted with doubts when the Search Order and Seizure Form (Exh.PE1) and the Chain of Custody Record (Exh.PE3) are taken into consideration.

With the weakness of the Prosecution's case against both accused, it is my conviction that the accused's evidence however weak cannot sustain a conviction against them. I am aware that however weak the defence is, the same cannot be used as a ladder by the Prosecution to attain a conviction if the latter's evidence is in shambles. In the case of

Kiroiyan Ole Suyan v. Republic, Criminal Appeal No. 114 of 1994 (Unreported), the Court of Appeal stated:

> *'The weakness of the defence did not substitute for the burden cast on the prosecution to prove the charge beyond reasonable doubt.'*

In the upshot, it is my considered view that the Prosecution has failed to prove beyond reasonable doubt that the accused are responsible for the murder of Ngubagu Mtonyongo.

Consequently, Silvester Masalu @Misalaba and Sabo Makoja @Paul are hereby acquitted of the offence of murder. I forthwith order their immediate release from prison unless they are held for other lawful causes. It is ordered.

Right To Appeal Explained.

DATED at **GEITA** this 28th day of April, 2023.

KS KAMANA

JUDGE