

IN THE HIGH COURT OF TANZANIA
(IN MWANZA SUB-REGISTRY)
AT GEITA
CRIMINAL SESSIONS CASE NO. 39 OF 2021
REPUBLIC
VERSUS
1. SIMON BUSUMBA BUTEMI
2.ELIAS BUSUMBA BUTEMI @NDEMA
JUDGMENT

Date of Last Order: 25/04/2023

Date of Ruling: 28/04/2023

KAMANA, J:

Simon Busumba Butemi and Elias Busumba Butemi @Ndema, the two brothers and Renatus Charles @Mazoya were arraigned before this Court accused of murdering Vumilia Enos, who was the wife of Elias Busumba Butemi. It was alleged by the Prosecution that on 30th January, 2020 at Idosero Village within the District and the Region of Geita, the trio murdered Vumilia Enos.

Before the Information was read over to the accused, the Prosecution withdrew the Information against Renatus Charles @Mazoya under section 91(1) of the Criminal Procedure Code, Cap. 20 [RE.2019]. Further, after the closure of the Prosecution's case, it was the Ruling of this Court that Elias Busumba Butemi @Ndema had no case to answer and forthwith he was released from remand.

Briefly, facts gathered from the records had it that the accused Simon Busumba Butemi formed a decision to kill his young brother's wife Vumilia Enos on the allegation that his sister-in-law was bewitching his son Faustine Simon to the extent of experiencing erectile dysfunction. His decision was cemented by the deceased's child Sauda Elias who told him that her mental problems were orchestrated by his mother who was bewitching her. Besides, the accused ostracized Vumilia Enos as he believed that she was responsible for his wife's illness following swallowing a fly. Suffices to state that all these beliefs against the deceased were founded by the accused upon "*certification*" by witch doctors that Vumilia Enos was a witch.

Facts reveal further that Elias Busumba Butemi @Ndema was mentioned by his brother to concede to the proposal of eliminating his wife and during the attack on her life, he played a passive role to ensure that the plot is accomplished. The readiness of Elias to have a hand in the killing of his wife was communicated to the accused by Elias's child Sauda.

Concerning Renatus Charles @Mazoya, he came to feature in the episode as he held a grudge against the deceased after the latter used his fallen tree for firewood without his permission. He registered his

complaints to the accused who informed him of the deceased's witchcraft.

The alleged witchcraft and the firewood issue precipitated the meeting to plot the death of Vumilia Enos. The attendees of the meeting were the accused, his son Faustine and Renatus Charles @Mazoya. The execution of the planned activity took place on 30th January, 2020 when Vumilia Enos was cut with a machete on various parts of her body by the accused in the company of the other two plotters.

During the trial, the Prosecution paraded three witnesses. These were Det.Cpl. Philemon (PW1), Det.Cpl. Said (PW2) and Assistant Medical Officer Daniel Sabuni Masesa (PW3). Further, the Prosecution tendered the Sketchy Map of the scene of the crime (Exh.PE1), the Cautioned Statement of the accused (Exh.P2) and the Post Mortem Report (Exh.PE3). The Defence has two witnesses who were the accused (DW1) and his son Zakaria Simon (DW2) with no exhibit. The Prosecution was led by Ms. Winifrida Ernest Mpiwa, learned State Attorney whilst the Defence has the services of Mr. Simeone Yesse, learned Counsel.

It is trite law that in criminal proceedings, the onus to prove the alleged facts lies with the Prosecution. The Prosecution is placed under

the duty to satisfy the Court that the alleged facts are proven beyond a reasonable doubt. 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 accentuated in multitudinous cases including the case of **Mohamed Haruna @ Mtupeni and Another v. Republic**, Criminal Appeal No. 25 of 2007 (Unreported), 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).

That being the case, I am of the expectation that for the Prosecution to attain a conviction, it will prove cumulatively the ingredients of the offence of murder beyond a reasonable doubt. The ingredients are:

- (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).

It is indubitable that Vumilia Enos is no more. According to Assistant Medical Officer Daniel Sabuni Masesa (PW3) who performed the autopsy, he found the deceased's body covered by the canvas. That testimony is supported by Det.Cpl. Philemon (PW1) who drew the Sketch Map of the scene of the crime (Exh.P1) that shows where the deceased body was at the scene.

Further, according to the Post Mortem Report (Exh.PE3), the body that was examined was of Vumilia Enos which was identified to PW3 by Elias Busumba Butemi and Samwel Elias. The Defence did not dispute this fact. In that case, it is my conviction that the Prosecution has proved beyond reasonable doubt that Vumilia Enos is dead.

As to whether the cause of death was unnatural, the autopsy report (Exh.PE3) states that the cause of death was hypovolemic shock due to severe hemorrhage caused by multiple cut wounds on the head. Further, as per his evidence, PW3 found the deceased's body with wounds on various parts including on the head. This testimony is supported by the evidence of PW1 who saw the body at the scene of the crime with wounds including on her head. This fact was not doubted by the Defence. Given this, I do not hesitate to conclude that the deceased's death was not natural as the same was caused by her being assailed.

Concerning the existence of malice aforethought before the murder of Vumilia Enos, I wish to reproduce the contents of section 200 of the Penal Code, Cap. 16 as follows:

'Malice aforethought shall be deemed to be established by evidence proving any one 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.'

It is my considered view that the one who attacked Vumilia Enos intended to kill her. I hold this view taking into consideration that according to Exh.PE3, the wound on her head was 16cm in length whereby an object with sharp edges penetrated to the skull bone.

Further, the autopsy report states that the deceased was found with a wound on the right temporal through the ear whereby an object with sharp edges went deep into the skull. Besides, the report states that the deceased was found with multiple wounds on both arms.

Given that, and taking into consideration that this fact was not disputed by the Defence, it is my view that by using an object with sharp edges to inflict blows on sensitive parts of the body including the head to the extent stated herein, the assailant did intend to kill Vumilia Enos. That being the case, the Prosecution has successfully proved beyond reasonable doubt that whoever killed Vumilia Enos had malice aforethought.

The last issue for my consideration is whether there is credible and cogent evidence that the accused is a perpetrator of the murder in question. In this regard, the Prosecution did not field an eye witness. This means that no witness among the three who testified saw the accused killing the deceased. The only evidence that the Prosecution thought credible and cogent to nail the accused is his Cautioned Statement (Exh.PE2).

In his defence, the accused testified that he was forced to sign the Cautioned Statement whose contents he did not know as he does not how to read and write. Further, DW1 told this Court that on the material time and date, he was at his home when he heard *mwano* and that he went to the scene of the crime with his son Zakaria Simon (DW2). While at the scene of the crime, he was arrested on the allegations of having a

hand in killing his young brother's wife. In his evidence, DW2 reiterated what was testified by his father DW1.

Reverting to the Cautioned Statement (Exh.PE2), though the same was not retracted before its admission, it is trite law that the Court ought to judiciously consider the same as to its truthfulness. In so doing, the Court is obliged to take into consideration the circumstances of the case before it. In other words, the Cautioned Statement that was not retracted should not be taken as the truth of what transpired before subjecting the same to the Court's scrutiny. This position was elucidated in multitudinous cases including the case of **Ndalahwa Shilanga and Another v. Republic**, Criminal Appeal No.247 of 2008 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.'

According to the Cautioned Statement, the accused stated to hide the machete that was used to kill Vumilia Enos under his bed. If the Prosecution believed that the Cautioned Statement states the truth, why the same failed to adduce evidence regarding the machete which the accused stated to hide under his bed? It is my considered view that under normal circumstances the investigators after such confession would have conducted a search and retrieved the machete to fortify the case against the accused. In the absence of such evidence, I entertain doubts as to the truthfulness of the Cautioned Statement.

It is common practice in our jurisdiction that when the accused confesses to committing a crime before a police officer, he is taken to the justice of the peace to record his extra-judicial statement. The extra-judicial statement serves as a supplement to the Cautioned Statement recorded by the police officer. I understand that during the Preliminary Hearing, the Prosecution indicated that it will use the extra-judicial statement of the accused as part of its evidence against the accused. However, the extra-judicial statement of the accused was not tendered by the Prosecution during the trial.

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), the Court of Appeal of Tanzania held that:

'What was placed before the court in evidence was the cautioned statement only (exhibit P1), 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.'

Regarding the defence case, in the absence of any eye witness and any corroborative evidence to nail the accused, I do not hesitate that on the balance of probabilities, the accused managed to prove that he was at his home during the killing of Vumilia Enos.

In conclusion, I am of the considered opinion that the Prosecution failed to prove beyond reasonable doubt that the accused is the one who killed Vumilia Enos on the fateful date. I forthwith acquit the accused from the charge of murder. I further order his immediate

release from prison unless he is held for other lawful cause. Order accordingly.

Right to Appeal Explained.

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



A handwritten signature in blue ink, appearing to read "KS Kamana", written in a cursive style.

KS KAMANA

JUDGE