

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA DISTRICT REGISTRY**

SITTING AT TABORA

CRIMINAL SESSIONS CASE NO. 38 OF 2022

THE REPUBLIC

VERSUS

JUMA S/O NDEMBI @ LUTAJA

JUDGMENT

Date of Last Order: 15/03/2023

Date of Judgment: 24/04/2023

KADILU, J.

The accused person stands charged with the offence of murder contrary to Sections 196 and 197 of the Penal Code, [Cap 16, R: E 2019]. It is alleged that on the 11th day of March 2021, the accused murdered one Kwezi Kulwa at Kisanga Hamlet, Muungano village, Tutuo ward within Sikonge District in Tabora Region. The facts leading to this murder case go this way. One Juma Ndembi @ Lutaja (the accused person herein) and the deceased person, Kwezi Kulwa are relatives whereby the deceased was a grandmother to the deceased.

The prosecution alleges that on the 11th day of March 2021, the deceased was seating outside her house during the night with her granddaughters. While at the fire-place, suddenly a person who could not be identified instantly appeared holding a bush knife and cut the deceased

on her neck leading to excessive bleeding and subsequently, death. By that time, the deceased's husband was inside their house. When he got out, he found his wife cut with bush-knife on the neck.

The husband raised an alarm and the neighbours gathered. When the neighbours arrived at the deceased's house, her grandchildren had already escaped to the deceased person's house. The incident was reported to the police and investigation was conducted, but the murderer could not be identified immediately. The accused person is said to have confessed to his father and mother a few months later that he was the one who killed his deceased grandmother. The parents did not disclose the accused person's confession to anyone.

They decided to remain silent until two months later when a conflict between the accused and his father arose. The father condemned the accused of having stolen his (father's) rice. The misunderstanding led the father to report the accused person's confession to the police. The accused was arrested and arraigned to the court facing the charge of murder. When the charge was read over and explained to him, he pleaded not guilty, hence the full trial commenced after preliminary inquiry was conducted.

The prosecution called seven (7) witnesses and tendered one (1) exhibit in an effort to establish that it was the accused person who killed the deceased, Kwezi Kulwa. The accused defended himself without calling any other witness on his defence or tendering any exhibits. Throughout the hearing of this case, Ms. Lucy Kyusa and Mr. Joseph Makene learned State Attorneys represented the Republic while Mr. Frank Kavishe learned

Advocate represented the accused who was also present in person under custody. When the prosecution case was opened, the prosecution evidence was presented as hereunder.

Rehema Gabriel (PW1), was a Medical Assistant who conducted the post-mortem examination of the deceased's body on 12/3/2021. PW1 told the court that at the scene of the crime, she found the body of the deceased like kneeling down with the face directed downward. The examination revealed that the cause of death was excessive bleeding which resulted from the cutting on the neck with a sharp object. The postmortem examination report was admitted as exhibit "P1" during the trial.

Weja Mnungula Mlumba testified as PW2. He stated that the deceased was his wife. She was killed on 11/5/2021 at 21:00 hours when PW2 was in the bathroom. According to PW2, the deceased was outside their house at the fireplace. She was with their grandchildren. He said after bathing, he went into the house, but when he got out, he found his wife was cut with a bush-knife on the neck. He raised an alarm and the neighbours went to their house. By that time, the assailant had escaped as a result, PW2 and the neighbours reported the incident to the police who arrived in the next day accompanied by the doctor.

PW2 stated further that after two (2) months, his nephew (his sister's son) named Juma Ndembi stole his father's rice. He was arrested. His father called PW2 and informed him that it was the accused, Juma Ndembi who killed the deceased. PW2 explained that before quarrelling with his father, the accused was living in his father's house. After the misunderstanding, the

accused left their home and went to live alone in a rented house. PW2 told the court that before the year 2021, Juma had no problem with anyone. He was a good person.

PW3 was Fatuma Mayunga Hundi who testified that on 12/3/2021, she was called by her son named Masanja and informed her that the accused was arrested. PW3 told the court that the accused had a quarrel with his father. In 2020 the accused left home and went to live alone in a rented house in which he started a rice business. He used to purchase rice from Masanja. PW3 narrated that in one incident, the accused purchased stolen rice from Masanja. His father reported to the police that Juma had stolen the rice. Juma was arrested and sent to Sikonge Police Station alleged to have killed the deceased.

PW3 testified further that she was once called on phone by the accused and told her that he was the one who killed his grandmother because she was bewitching him. It was about two (2) months after the death of Kwezi Kulwa. PW3 asked Juma if he had told his father about this information and the accused replied that he did. but his father did not say anything in response. During cross-examination by Advocate Frank Kavishe, PW3 explained that she did not know the name of a person who was killed by Juma. She was just informed that Juma was responsible for the killing.

According to PW3, Ndembi was angered so much and that is why he reported to the police that Juma had killed Kwezi. She however said that, most of what happened was narrated to her by other people. It is the same that she has testified before this court. She explained that she did not

upbring Juma. He was upbrought by his step-mother so, PW3 does not know his behaviour.

PW4 was Mathias Weja, a chairman of Kisanga Hamlet. He testified that on 11/3/2021, he was called through the phone by his father. His name is Weja Mnungula. PW4 was told by his father that his mother was killed by an unknown person. He went back home. On arrival, he found his mother dead. The neighbors started to gather and they reported the matter to the police. The police came on 12/3/2021 at about 11:00 hours and inspected the body of his deceased mother. Then they allowed them to preserve her body and prepare for burial services. After two (2) months, PW4 met his cousin-brother, Ndembi Lutaja who is the accused person's father.

PW4 was later informed by Ndembi Lutaja through a phone-call that, he was searching for a police officer to arrest Juma as he has stolen his rice. In the next day, Juma was arrested, but the police said the rice was his. Thereafter, Ndembi told PW4 that the reason for detaining Juma was not only rice theft, but also the killing of his grandmother alleging that she was bewitching him. PW4 narrated that Ndembi said he was silent for all that long because he was finding a way of arresting Juma, the accused. Since he had then stolen his rice and provoked him, he had decided to disclose it and arrested Juma.

In addition, PW4 stated that after Ndembi had informed the accused that he would report the matter to the police, the accused replied that may be the police from Regional Offices because other police officers could not

arrest him. Having responded so, Ndembi said he wanted to teach him a lesson.

PW5, G4186 DC Yuda testified that on 20/7/2021, he recorded the statement of Juma Ndembi after having been instructed by the then OC-CID. In the interrogation with the accused person, he admitted that he killed the deceased as she was bewitching him. PW5 prayed to tender caution statement of the accused as part of his evidence. The prayer was objected by the accused and his Counsel on the ground that the same was not obtained voluntarily. After trial within a trial, the court was satisfied that the contested caution statement was not made voluntarily by the accused person consequently, it was not admitted.

PW6 Neema Joseph, her testimony was, on 11/3/2021 at night, they were sitting outside the house beside the fireplace with their grandmother. Suddenly, one person came and cut her grandmother on the neck and disappeared. That person came from a maize farm and his face was covered with a cloth. PW6 said she could not recognize the assailant since only his eyes were left uncovered. She did not see what the person was holding. After the attack, PW6 and her fellow ran into the house and called their grandfather. They then got out and found the grandmother shouting. A lot of people gathered.

PW7, Amando Kasian Nyami, in essence, his testimony was to the effect that he is the Magistrate of Sikonge Primary Court and justice of the peace. He stated that on 23/7/2021 in the afternoon, he was in his office when he received the accused person who wanted to record his confession.

as they lied to the court. He prayed the court discharge him because he did not kill any person.

On the basis of the evidence on record as herein above reviewed, it is my turn to scrutinize the herein evidence for both sides and determine whether the prosecution case has been proved beyond reasonable doubt against the accused and/or the defense case has in any way cast any reasonable doubts to the prosecution case in line with the ingredients of the offence of murder. To start with, it is undisputed that from the evidence of PW1, PW2, and the Postmortem Examination Report (P.1), the deceased person's death was brutal.

PW1 and PW2 gave uncontradicted evidence that they witnessed the dead body of the deceased person in question. The body was medically examined as revealed in Post mortem examination report, exhibit P1 that the cause of death was excessive bleeding due to wounding. According to this exhibit, the doctor who examined the body established the deceased's neck was cut by a sharp object. Therefore, there is no doubt that the prosecution side has sufficiently and beyond reasonable doubt proved the death in question and that the same was not natural.

Also, in the circumstances of the evidence of the prosecution as herein above reviewed, it is undeniable fact that whoever caused the death in question, caused it unlawfully and with malice aforethought because by cutting the deceased on her neck at the back side the intent cannot be interpreted otherwise than killing. The only issue is therefore, on who killed the deceased person. It is a settled position of the law that in murder cases,

the prosecution has burden to prove not only that the offence was committed, but also that it was the accused herein who had actually committed it.

In the case of ***Mariki George Ngendakama v R., Criminal Appeal No. 353 of 2014***, the Court of Appeal stated that:

"It is the principle in law that in criminal cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the accused person who committed it."

The same position was also stated in the case ***of Mohamed Matula v R. [1995] TLR 3*** where the Court had the following observation:

"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."

In ***Paschal Yoya @ Mganga v R., Criminal Appeal No. 248 of 2017***, the Court of Appeal reiterated this stand and had this to say:

"An accused only needs to raise some reasonable doubt on the prosecution case and he needs not to prove his innocence."

In the instant case, the prosecution case is built on the evidence of PW2, PW3, PW4, and PW6 who are however, not eye witnesses as none of them actually saw the assailant cutting the deceased. It is a well-known position in law that, oral evidence must be direct as it is provided for under Section 62 of the Evidence Act, [Cap 6 R.E. 2022]. That is to say, if the evidence refers to a fact which is capable of being seen like in the case at hand, it should be evidence of a witness who says he saw it.

It is also a settled principle of law that, evidence of a third party which is commonly known as hearsay evidence is generally not admissible as it denotes the type of evidence which is derived from what is spoken by another person which goes contrary to the provisions of Section 62 cited above that requires oral evidence to be direct. Reverting to the case at hand, evidence of PW2, PW3, PW4, and PW6 was narrated to them by persons who did not themselves witness the act. The law is very clear in our jurisdiction that, hearsay evidence is inadmissible unless it is corroborated by other pieces of evidence. (See the case ***of Daimu Daimu Rashid @ Double D v R., Criminal Appeal No. 5 of 2018***).

In the instant case, evidence of PW2, PW3, PW4, and PW6 lack corroboration as all are hearsay evidence. PW2 testified that he was told by the father of the accused person that, it was the accused who killed the deceased. However, his evidence was not corroborated by the said father who contended to have been told by accused who told his father that he was the one who killed the deceased person. Turning to the evidence of PW3, PW4 and PW6, they also narrated that they were told that, it was the accused who killed the deceased but no evidence to corroborate their testimony. This leaves a lot of doubt in the prosecution case.

The postmortem examination report which was admitted as exhibit P1, established the cause of death to be excessive bleeding. The report does not however go further in building up the prosecution case by for example, linking the unnatural death of the deceased with the accused who is before this court. It is true that the cause of death was not natural as it was caused by excessive blood loss being a result of cutting on the deceased's neck, but

up to the end of the trial the question as to who committed such brutality remained unanswered.

I hold that view because PW6 who was with the deceased during the incident, testified that she did not recognize the assailant as his face was covered with a cloth and he disappeared immediately after the attack. This piece of evidence creates a possibility that the deceased might have been killed by other person than the accused and who is still at large. There is no doubt that the assailant had malice and contemplated the killing yet, the said exhibit did not by any chance implicate the accused person who is before the court.

Before I wind up, I find it pertinent to refer to the case of ***Siaba s/o Mswaki v R.***, Criminal Appeal No. 401 of 2019, in which the Court of Appeal pointed out as follows:

"... it is upon the prosecution to call material witnesses to prove a case beyond reasonable doubt and in exercising this noble task, they are not limited in terms of the number of witnesses whom they should call. Section 143 of the Evidence Act provides in dear terms that there is no particular number of witnesses that is required in proving a case. What is important is the credibility of a witness and weight of evidence."

As highlighted above, evidence is never counted, but weighed. In the present case, the prosecution called seven witnesses whose evidence was hearsay evidence which resulted into failure to prove the case against the accused to the required standard. The prosecution evidence was not concrete enough to compel this court to convict the accused person for the offence of murder. In other words, the prosecution failed to call the material witnesses to prove the case against the accused person.

I did not find in the prosecution case any evidence negating the accused person's explanation that his father just wanted to teach him a lesson following the misunderstanding between them. Therefore, it is the finding of this court that the charge of murder against the accused person, Juma Ndembi @ Lutaja has not been proved beyond reasonable doubt. Consequently, I acquit him of the offence and order his immediate release from custody unless otherwise held for some other lawful cause. The right of appeal is hereby explained to any aggrieved party.

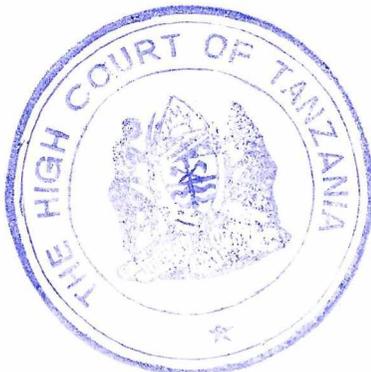
It is so ordered.


KADILU, M.J.,

JUDGE

24/04/2023

Judgement delivered in open court on the 24th Day of April, 2023 in the presence of Mr. Joseph Makene, State Attorney and Mr. Frank Kavishe, Advocate for the accused, also present under custody.




KADILU, M. J.,

JUDGE

24/04/2023