

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

SITTING AT TABORA

CRIMINAL SESSIONS CASE NO. 54 OF 2022

THE REPUBLIC

VERSUS

1. SAMWEL S/O KAPANDE @ SHUMUU

2. JUMA S/O MABULA

JUDGMENT

Date of Last Order: 24/04/2023

Date of Judgment: 15/05/2023

KADILU, J.

The 1st accused person is **Samwel Kapande @ Shumuu** and the 2nd accused is **Juma Mabula**. The two accused stand charged with Murder contrary to Sections 196 and 197 of the Penal Code, [Cap. 16 R.E. 2019]. It is alleged that on 27/12/2019 at Urafiki Village, Usunga ward within Sikonge District in Tabora Region, the accused persons jointly and with malice aforethought did kill one female person named **Regina Mkambu**. When the charge was read over and explained to the accused, they both pleaded not guilty. The prosecution called eight (8) witnesses and tendered five (5) exhibits to establish that it was the accused persons who had killed the deceased.

A brief background of this case is that in the night of 27/12/2019, the deceased person's neighbour known as Masanja Mihayo returned home drunk. At the mid-night, he woke up and went out for a short-call. Near the

deceased's house, Masanja found her talking to the accused persons. Masanja greeted the deceased and accused persons in Sukuma language; but the accused persons did not respond. He heard the 1st accused telling the deceased, "*Mjomba, funga twende*," literally meaning, uncle, shut the door and let us go.

Masanja did not bother to ask as to where they were going. He went to the washroom but when he came back, he did not find the deceased, 1st and 2nd accused persons where he had left them. He however, saw a torch light along a narrow path leading to a place away from the Village. He got back to his room and sleep. At around 5:00hrs in the morning, he heard the deceased person's brother called Bilali knocking on the deceased's door, but there was no response. The brother asked Masanja if he knew where the deceased was.

Masanja replied that he heard her talking to some persons at night, perhaps she had left with them. Then Masanja went to his farm. After a while, he was called and informed that Regina Mkambu was killed by being cut in different parts of her body. The incident was reported to the Village leadership and later to the police. The accused persons were arrested in connection to the murder of Regina Mkambu and arraigned to this court. The prosecution tendered postmortem examination report of the deceased body, sketch plan of scene of the crime, the machete which was allegedly used in killing the deceased, caution statement of the 1st accused and the certificate of seizure.

When the prosecution case opened, Masanja Mihayo testified as PW1. He told the court that at the time of the incident, he was not living in the same house with the deceased but they shared a compound. He said during the fateful night he managed to see the accused persons clearly as there was solar light in their compound. He stated further that on 10:00hrs of 28/12/2019, he went back home from his farm and saw a motorcycle with two militia (*askari mgambo*) known as Maganga Peter and Ezekia Ukongo. They asked him about who had killed Regina Mkambu and he replied that he did not know.

PW1 testified that he was arrested by the militia, but he told them that he did not see the people who killed Regina. When PW1 was cross examined by the defence Counsel, he said he did not know where the deceased and the accused went after they left the Village in the night of the incident. According to PW1, the accused and the deceased did not tell him that they were going to the store. He also testified that he did not know the deceased's store until the day when he was arrested. PW1 explained that he does not know Juma's second name, but he is familiar with Samwel Kapande as they lived together in the Village.

The incident was reported to the Police whereby H.6024, D/C Patrick (PW8) went to Urafiki Village to investigate that crime. He was accompanied by the Officer Commanding Station (OCS) ASP. Sodoka, E.6650, D/C PL. Magori (PW7) and Paschal John Ndega, a Medical Doctor who testified as PW6. It was the testimony of PW8 that in the scene, they saw the signs on the ground indicating that the deceased's body was dragged from somewhere else to the tobacco store where they found it. He stated that the

deceased's body was soiled. PW8 drew a sketch plan of the scene of the crime which was admitted as exhibit P4.

According to PW8, the 1st accused was arrested on 27/12/2019 whereas the 2nd accused person was arrested on 28/12/2019. On arrival to the police station on 27/12/2019, PW8 recorded cautioned statement of the 1st accused. PW8 told the court that during an interview with the 1st accused, he admitted to have killed the deceased because the 2nd accused and the deceased had a maize store which was shared between them. The 2nd accused sold all the maize in the store when the deceased was on safari. To avoid confrontation, the 2nd accused hired the 1st accused to kill the deceased in agreement that the 2nd accused would pay the 1st accused Tshs. one million (1,000,000/=) for the assignment.

When cautioned statement of the 1st accused person was sought to be tendered, Mr. Frank Kavishe, learned Advocate for the accused objected to its admission on the ground that his client was beaten severely and he never signed any statement as he does not know how to read and write. The court conducted trial within a trial to ascertain the allegation by the 1st accused. However, after trial within a trial, the alleged beating was not established. The court admitted cautioned statement of the 1st accused as exhibit P5 so as to consider it during the composition of judgment.

PW6 stated that on 27/12/2019, he went to Urafiki Village to conduct postmortem examination of the deceased's body after being called by a police officer, Ass/Insp. Jumapili. He testified that he saw the deceased's body having injuries on the head, cheeks and on the left-hand side.

According to PW6, the wounds were a result of cutting by a sharp object. It was revealed that the cause of death was excessive bleeding which resulted from the injuries. PW6 prepared a postmortem examination report which was admitted as exhibit P2.

The 1st accused was also interrogated by E.6650 D/C Magori (PW7). PW7 stated that during the interrogation, the 1st accused admitted to have used machete in killing the deceased. The 1st accused informed PW7 that the machete was at his home in Urafiki Village. PW7 testified that after such information, on 30/12/2019 he went to take the said machete from the 1st accused's home. PW7 was accompanied by the VEO (PW5), the Ward Councilor and other police officers. Some villagers participated in the search of the 1st accused person's house whereby the alleged machete was found. PW7 told the court that the machete was new and the 1st accused told PW7 that he cleaned it after the killing.

It was further stated by PW7 that Ass/Insp. Jumapili filed certificate of seizure which was signed by him, the accused and three witnesses who participated in the search. The machete was taken to the police station and handed to WP. Mwanaidi who recorded it in the chain of custody report form. She labeled it as exhibit No. 14 of 2019, thereafter she took it to SGT John. It was testified by PW7 that he got an exhibit movement form of the said machete from the investigation department to enable him to bring it to the court as an exhibit. He did not however, tender the alleged form though the machete was admitted as exhibit P3 after an objection from the defence side was overruled by the court.

When the defence case was open, the 1st accused testified as DW1. He told the court that he was arrested on 29/12/2019 by Mr. Kizito Kigoma (a militia), the then VEO (PW5) and the Ward Counselor. He was taken to Sikonge Police Station and on 30/12/2019 at about 9.00hrs, he was taken to the interrogation room. He was ordered by Shadrack, D/C Maalim, PC Yuda and inspector Jumapili to take off his clothes. They arranged the tables therein and made him lay on the tables. According to DW1, he was forced to admit that he killed the deceased, but he did not admit. He was beaten very hard until his knee was dislocated.

They stopped beating him and PW8 took him to another room where PW8 recorded some information on a piece of paper. He was then taken back to the lock up without knowing what was recorded as he does not know how to read and write. DW1 continued to testify that on 31/12/2019, he was taken to the Justice of the Peace in Sikonge Primary Court. She recorded DW1's statement after having called a man who inspected DW1's body and found that he was injured. DW1 explained that he requested to be treated whereby Justice of the Peace said she would inform the police to give him PF3, but he was not given any. He said, on 1/1/2020, the statement that was recorded by the Justice of the Peace was taken to the police station and was handed over to D/C Magori.

DW1 explained more that on that day, D/C Magori was in the police counter but he followed DW1 to the lock-up and uttered to him that, "*Umejidai kukataa eeh? Tutaonana tu,*" meaning, "you have refused to admit but we shall see." DW1 refuted to have known the deceased. He also stated that he did not know the 2nd accused person before the day they met at the

police station alleged to have committed murder jointly. DW1 prayed the court to acquit him as he did not murder anyone and that, he was just wondering as to why he was associated with the killing of the deceased.

The 2nd accused testified as DW2 and informed the court that he used to work in Leonard Hamadi's tobacco farm for three years before 27/12/2019 when he was arrested accused of having murdered one Regina Mkambu. DW2 explained that the day he was arrested, they were five of them, Masanja Mihayo, himself and three women whose names he could not know immediately. After two days, all other persons who were arrested together with him were released, but DW2 was taken to Sikonge police station. He said at the police station, he was taken to the investigation room in the next day where he was beaten and induced to admit that he killed Regina Mkambu, but he refused.

He narrated that after being beaten, he asked for treatment but the OCS told him, "*Pambana na hali yako,*" meaning, "*fight/cope with your situation.*" When he was cross examined as to whether he can prove that he was beaten at the police station, DW2 replied that it is difficulty for the court to believe that he was beaten because he is now healed. DW2 as well denied to have known DW1 who they are charged together in this case. He prayed the court to discard any information recorded when he was at police station since they are completely falsehood. He stated that he was not doing any business and he did not have any maize store.

Having appraised the evidence of both sides carefully and upon considering the submissions by the learned Counsel, the issues for

determination are **firstly**, whether the accused persons killed the deceased. If the first issue is answered in affirmative, the **second** issue is whether the accused killed the deceased with malice aforethought. I should state from the outset that, there is no dispute that Regina Mkambu is dead and indeed, the death was violent. According to the postmortem examination report, the death was due to excessive bleeding. PW6, Dr. Paschal John Ndega who conducted physical inspection of the deceased's body before the autopsy observed that, the body had injuries on the cheeks, shoulder and the head. According to PW6, the wounds were a result of being cut with a sharp object.

Admittedly, nobody testified in court to have seen the accused persons killing the deceased. Therefore, it is common ground that there is no direct evidence in this case. As such, the whole prosecution case is dependent on circumstantial evidence. Whereas circumstantial evidence is acceptable, it should meet certain conditions in order to be relied upon to justify conviction of the accused. In the case of *Awadhi Gaitani @ Mboma v R.*, Criminal Appeal No. 288 of 2017, the Court of Appeal laid down six conditions to be fulfilled before basing conviction of the accused on circumstantial evidence.

Firstly, the circumstances from which an inference of guilty is sought to be drawn must to be cogently and firmly established. Those circumstances should be of a definite tendency precisely pointing towards the guilty of the accused and that, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else. **Secondly**, the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable

hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no existing circumstances which would weaken or destroy the inference.

Thirdly, the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. **Fourth**, each link in the chain must be carefully tested and, if in the end it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. **Fifth**, the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. **Sixth**, the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred.

In the case at hand, the prosecution evidence is to the effect that the offence was committed on 27/12/2019 and the 1st and 2nd accused persons were arrested on 27/12/2019 and 28/12/2019 respectively. However, it is on record that the accused persons were charged on 8/6/2022. No reason was assigned to explain why it took that long to arraign the accused persons to the court. Failure to do so contravened the provisions of section 32 (2) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] which provides that, where any person has been taken to custody without a warrant for an offence punishable with death, he should be brought before a court as soon as practicable.

Further, it was asserted by the prosecution that the accused persons murdered the deceased during the night of 27/12/2019. Surprisingly,

evidence of PW6 and PW8 indicated that the 1st accused person was arrested and taken to Sikonge Police Station on the same date, PW8 recorded cautioned statement of the 1st accused and drew a sketch plan of the scene of the crime on the same day of 27/12/2019. This is practically not possible and the story was contradicted by DW1 who testified that he was arrested on 29/12/2019. On the other hand, postmortem examination report of the deceased's body shows that it was prepared on 18/12/2019, nine days before occurrence of the incident for which the accused persons are charged.

From the record, the 1st accused admitted the offence in his cautioned statement recorded by PW8. It was the testimony of DW1 that after the alleged statement was recorded, he was taken to the Justice of the Peace in Sikonge Primary Court and recorded a statement explaining that he was tortured while at police station. However, the prosecution side never produced the alleged confession of the accused person so as to avail the court with an opportunity to see what the 1st accused had confessed to the Justice of the Peace.

Moreover, no prosecution witness testified that the 2nd accused's caution statement was recorded after the arrest. It infers that the 2nd accused was not cautioned and his statement was never recorded by the police. This is in contravention of Section 53 (c) of the Criminal Procedure Act which stipulates that, where a person is under restraint, a police officer should not ask him any questions, or ask him to do anything for a purpose connected with the investigation of an offence, unless the person has been cautioned

by a police officer by informing him in a language in which he is fluent, in writing in accordance with the prescribed form.

Exhibit P5 shows that both the accused persons cut the deceased by using machete. The machete alleged to be used by the 1st accused was admitted in court as exhibit P3 and its certificate of seizure was admitted as exhibit P1. PW7 narrated that he handed the machete to the exhibits' care taker at Sikonge Police Station where it was recorded in exhibits register as Exhibit No. 14 of 2019. According to PW7, Exhibit No. 14 of 2019 was recorded in the chain of custody report form. Nevertheless, the said form was not brought to the court for it to see its description when it was received at the police station. Worse still, the prosecution evidence was completely silent about the machete which was used by the 2nd accused to cut the deceased.


The case against the accused persons herein being a criminal offence, its standard of proof is supposed to be beyond reasonable doubt. This is a requirement of the law under Section 3 (2) (a) of the Evidence Act, [Cap. 6 R.E. 2019] and numerous decisions of the Court of Appeal. In addition, the burden of proof lies to the shoulders of the prosecution as the accused is never convicted basing on the weaknesses of his evidence; rather the strength of the prosecution evidence.

In the case of ***Antony Kinanila & Another v R.***, Criminal Appeal No. 83 of 2021, the Court of Appeal held that in any criminal trial, the prosecution bears the burden to prove beyond reasonable doubt not only that the offence was committed, but also it was committed by the accused person or that he

participated in the commission of the offence to the extent and degree as prescribed by the law.


Testing the six factors which have to be considered by the court before convicting the accused person based on circumstantial evidence, I have shown that in the present case the prosecution evidence is tainted with several doubts which cannot justify conviction of the accused persons. The doubts, in my humble opinion, have to be resolved in favour of the accused persons. When all is said and done, the cumulative effect of the foregoing is that I find both accused persons not guilty of the offence they stand charged. Consequently, I acquit both **Samwel s/o Kapande @ Shumuu and Juma s/o Mabula** of murder. Right of appeal is open to any aggrieved party.

Order accordingly.


KADILU, M.J.,
JUDGE,
15/05/2023.

Judgement delivered in open court on the 15th Day of May, 2023 in the presence of Ms. Tunosye Luketa, State Attorney for the Republic and Mr. Kanani Chombala, Advocate for the accused persons who are also present in court.




KADILU, M. J.
JUDGE,
15/05/2023.