

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA SUB-REGISTRY
MWANZA

(ORIGINAL JURISDICTION)

CRIMINAL SESSION CASE NO. 120 OF 2020

THE REPUBLIC.....PROSECUTOR
VERSUS
SHIJA D/O MHOJA.....ACCUSED

JUDGMENT

Date of Last Order: 28.04.2023
Date of Judgment: 30.05.2023

M. MNYUKWA, J.

The accused person, one **SHIJA D/O MHOJA** stand charged with the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16 [RE: 2002] now [RE: 2022]. The prosecution alleged that, **SHIJA D/O MHOJA** on the 14th day of April 2019 at Isaka Village within Sengerema District in Mwanza Region, did murder one Mariam d/o Musa. The accused **SHIJA D/O MHOJA** denied the charge hence the conduct of the full trial. During the trial, the prosecution, that is the Republic was represented by Ms. Sabina Choghogwe and Ms. Jaines Kihwelo learned



Senior State Attorneys and while Mr. Steven Kitale and Mr. Linus Amri, learned advocates represented the accused person.

The prosecution called a total of 12 witnesses and tendered exhibits which are the PF3 (exhibit P1), Certificate of seizure (exhibit P2), clinic card (exhibit P3) and the sketch map (exhibit P4). On the part of the defence, the accused filed a notice of alibi and testified on oath. She also tendered exhibits D1, D2 and D3 respectively.

Stephano Deus Msabila testified as **PW1**. He was an adult of 48 years a resident of Isaka Nyehunge Sengerema, a Christian by faith sworn and testified that, he was a farmer and a pastor. That, in 14.04.2019 morning while at home, he received a call from a ten cell leader informing him of incidence of murder. He went to the scene of crime where he saw a body of a diseased which was half buried. He reported the incident to Nyehunge police station who came and started an investigation. He testified further that, there was a sign of drugging an object "miburuzo" from the place where the accused used to live with her husband. He went on that, inside that house there were blood stains on the mattress and on a saflet sack. He went on that, the accused was living in that house and PW1 identified her on the dock. He went on testifying that, in that house the accused used to live with her husband who is a fisherman and, in



many occasions, the accused used to live alone and at the day of the incident the house was empty.

When cross examined, PW1 testified that he used to see the accused and her husband and he did not know when he went back to the island. He testified that, he did not see the husband of the accused at the scene of the crime and he saw the skull of the deceased and one hand was not there. He testified to have seen the deceased pregnant before her death in 2019. He further testified that, he was not able to identify whether the blood stains he saw was of a human being or of an animal and the accused was arrested at the scene of crime. Further he testified that the body was discovered on 14.04.2019 and it could not be identified by face.

PW2: Sister Doctor Maria Yose Voeten, 66 years old, Doctor in charge of Sengerema Designated District hospital sworn and testified that, on 15.04.2019 while at her duty station, she was assigned to examine a woman to identify if she recently gave birth and she examined her by touching her stomach and her breasts if were full and she discovered that there was no sign in her stomach if she gave birth and her breasts were dry. She made her opinion that, the woman did not gave birth recently and she filed a PF3 which she tendered as an exhibit and was admitted as exhibit P1. She pointed at the accused at the dock that



she was the woman she examined and whom she was told that she gave birth 3 days before.

When cross examined, she testified that she used her hands to examine the woman and did not use the medical and laboratory equipment in her examination. She further testified that, she did not take DNA samples for examination for the equipment were not in the hospital.

PW3: Kurwa Nkende, living at Kasongwa, Sengerema, a farmer, 80 years Christian, sworn and testified that, the accused is her daughter and on 14.04.2019 she was arrested together with the accused. She was told that, the accused stole a child whom she saw her carrying and she was taken to the police station. She testified that she did not know if accused was pregnant.

When cross examined, she testified that she visited the accused home on 11.04.2019 and her neighbors told her that, the accused left her home to her house and she did not know that there was a problem. She testified further that before the incident she did not meet the accused in a long time.

PW4: Makoye Petro Ngereja, 61 years a farmer and a chairman of the Mwabasabi, Ndagula small village, Christian, sworn and testified that, he was informed that, there was a body buried at the accused home and went to the scene and the police exhumed the body. After the body was examined by the medical doctor, he accompanied the police to PW3's home, who is the mother of the deceased and upon reaching there, they were informed that PW3 went



to the bus stand to pick her daughter who gave birth from the hospital. They went to the bus stand and met the accused who was carrying a child accompanied by her mother (PW3) and police arrested them and sent them to the police station.

When cross examined, he testified that, he did not see the body which was exhumed but only saw people carrying the body. He went on that, he did not see anything else in the house of the accused. He further testified that he did not write a statement in the police station.

PW5: Anna Mussa, a resident of Isaka, a farmer, 34 years, pagan affirm and testified that, the accused is her neighbor and the deceased was her sister. The deceased had two children and PW5 was informed that, the deceased died on 14.04.2019. She further testified that she was living with the deceased from 2018 who was pregnant and on 14.03.2019 she gave birth to a girl child and after two weeks she left to live at Martha's house who is their elder sister who lived at Nyehunge. She went on that on 14.04.2019 she went to the resident of the accused and saw the dead body skull, with artificial hairs (rasta) and suspected that it was her sister's body. She testified that, she went to the resident of Martha where the deceased was living who informed her that the deceased left on 10.04.2019 with the accused and one Mama Leah. She went back to the scene and when the body was exhumed, she was able to recognize her as she has long legs and short toes and a scar on her left leg near the ankle. She further testified that, after the accused was arrested, she was called to



Sengerema hospital and was shown four children and she was able to identify the child of the deceased based on her body and face which was black.

When cross examined, she testified that before her death she had a quarrel with the deceased who left home because she had a habit of leaving at night with the child to the accused and she does not know the father of the child. She testified further that she did not witness the murder of the deceased and she was at the scene of crime when the body was exhumed where she identified her and also her sister identified the clothes the deceased wore. She further stated that it was not possible to identify the face for it was a skull.

PW6: Inspector Emily Sadick Mbura, 48 years, Police Officer, a resident of Kahunda, Buchosya, Sengerema, Christian, Sworn and testified that, on 14.04.2019, he was informed about the incident of murder and with other police officers they went to the scene of crime where they saw the body which was half buried. The body was exhumed and a medical doctor examined the body and it was identified by relatives based on the scar on the body. He went on that ,they broke the accused's house and found a pair of slippers which were also identified to belong to the deceased and there was blood stains on the floor.

He went on that, they started searching for the accused and went to her mother's resident at Nyakasungu where they found them at the bus stand and arrested both of them and took them to Sengerema police station and upon



search of the accused handbag they found a clinic card of the child she was carrying at the time she was arrested and he prepared a certificate of seizure. The certificate of seizure was admitted as exhibit P2 and the Clinic card admitted as exhibit P3 respectively.

When cross examined, he testified further that, no person testified to have witnessed the commission of the offence and as he was informed that the accused's husband was away in his fishing activities, they see no reason to include him as a suspect. He testified further that the body of the deceased had an injury on the stomach but it was complete and no part was missing. He went on that the body of the deceased was rotten and it was not possible to conduct a DNA test and the body was buried approximately 4 to 5 days before it was discovered and it was difficult to identify the deceased. He testified that, he wrote a statement at a police station and when asked by the prosecution if the statement could be admitted as exhibit he conceded and prays the court to admit the statement and was admitted as exhibit D1. He further testified that, he did not investigate the blood whether it was of a human or an animal, and they did not take the slippers as exhibit and they did not take DNA samples.

PW7: Mary Msengi, 48 years, a resident of Sengerema, a nurse at Nyamazugo dispensary, Chirstian, sworn and testified that on 12.04.2019 she attended the child who was brought by the accused who told her that, the child was sick and her clinic card was lost. She observed the child and discovered that the child was not born recently and she wrote to her another clinic card for



the child to get treatment and instructed the accused to return to the hospital where she gave birth for the particulars to be filed.

PW8: Happiness Ngoni Gervas, 11 years, a resident of Nyehunge, and a standard six student at Mwabasabi primary School, Christian sworn and testified that, in April 2019 while at home where the deceased was living with her infant child, the accused came with her fellow and called the deceased and told her grandfather that the deceased was going to work at Chato and they left together with the accused.

PW9: Martha Mathias, a resident of Nyehunge, peasant, 48 years, Christian, sworn and testified that, the deceased was her sister who went to live in her home with her infant child. On 07.04.2019 the accused and another woman went to her home asking for the deceased and the deceased was not at home and they left. On 10.04.2019 when she left home and upon arrival she was told that the deceased left with the accused and another woman. On 14.04.2019 while at home she was informed that there was a body buried at the accused's house and went at the scene and when the body was exhumed she could identify that, it was the body of her sister Mariam based on the clothes she wore and the slippers which were found in the accused's house which were identified to belong to the deceased. She was also taken to Sengerema hospital where she was able to identify the child of the deceased.



When cross examined, she testified that they had no quarrel with the deceased and she saw the body had no scars.

PW10: F. 2476 D/SGNT Henry, a resident of Nyehunge, Sengerema, Buchosya, 44 years, a police officer, Christian, sworn and testified that, on 14.04.2019 he was among of the police officers who went to the scene of crime and exhumed the body. They broke the door of the accused house and found a pair of slippers and blood stain. The body was identified by the relatives and also the artificial hair "rasta" and the pair of slippers. He testified further that he drew a sketch map of the scene of crime which was tendered and admitted as exhibit P4. He went on that from the house of the accused to where the body was buried, it was about 15 paces and the distance from her neighbor is 20 paces. After the examination of the body, they searched for the accused who was arrested together with a baby and her mother and sent to Sengerema police station.

When cross examined, he testified that upon investigation he noticed that the neighbours had shifted and he do not know when the murder took place. He went on that the neighbours and the husband of Shija were not apprehended and since they did not take blood samples, he does not know if the blood seen in the house was of the human being or an animal. He testified further that, when the body of the deceased was exhumed, he found a machete which he took as exhibit and the body was already rotten and hard to identify. PW10's statement was tendered and admitted as exhibit D2.



PW11: WP 6020 Coplo Rahima, 34 years, a resident of Sengerema, a police officer, Muslim, affirm and testified that, before she was working at Nyakato police station she was at Nyahunge police station. On 14.04.2019 she was informed of the incident of murder and she met other police officers to arrest the accused who they managed to arrest. The accused was carrying a baby and was arrested together with her mother and sent to Sengerema police station. On 16.04.2019 she led the relative of the deceased in the identification of the child as that of the deceased and after identification the child was handled over to the relatives of the deceased.

When cross examined, she testified that when the accused was asked about the child, she claimed that it was her child. On the identification, she stated that the child was kept with other children and since the child was black it was easy to identify her. Also while cross examined PW11's statement was tendered and admitted as exhibit D3.

PW12: F. 5939 D/Coplo Mathew, 42 years, Police Officer, a resident of Sengerema, Christian sworn and testified that, on 15.04.2019 he was given a task to investigate the death of the deceased and the accused told her what happened and she went on that it was the accused who killed the deceased because she was the last person seen with the deceased and she was found with the deceased child. She went on that, the accused gave them a number of a person alleged to have killed the diseased but they could not trace him.



When cross examined, he testified that the person who gives the true account of the death of the deceased is a medical doctor.

The prosecution case was marked closed and this Court ruled in terms of section 293(2) of the Criminal Procedure Act, (CPA), [Cap. 20 R.E. 2019], that the prosecution managed to establish a prima facie case against the accused person Shija d/o Mhoja and she has to enter her defence. The accused person was addressed in terms of section 293(2)(a) and (b), (3) and (4) of the CPA and the accused person Shija d/o Mhoja chose to rely on the notice of Alibi filed under section 194(5) of the Criminal procedure Act Cap: 20 RE 2022 and defend herself on oath without calling witnesses.

DW1: Shija d/o Mhoja, 29 years old, Christian, Resident of Nyehunge Isaka sworn and testified that, she lived in Nyehunge Isaka with her husband who is a businessman and her child Loveness Nagile Massa. She went on that on 01.04.2019 while at home with her husband she was directed by her husband to send maize at Sengerema. She took two tins of maize and send them to Sengerema and stayed to her brother in law until on 14.04.2019 while at the bus stand she was arrested and take in the police motor vehicle were she saw her mother and were both sent to Sengerema police station.



She testified further that she was arrested together with her child and she had a handbag which inside there were a clinic card with the name of Loveness Ngaile Mussa, a phone model, itel and the child's clothes. She was searched and sent to the interrogation room and wrote her statement and beaten by the police officers on allegation of stealing a child. She went further that, on 15.04.2019 she was sent to Sengerema Mission hospital where she was asked to undress and doctor touched her stomach and inter fingers in her private parts and then she was returned to the police station. She went on that, she does not know Mariam Mussa and she left home and left her husband in the house.

When cross examined, she testified that her child was born on 01.07.2014 and when she was arrested the child was 3 years old and she was not breast feeding her. She went on that she doesn't know how to read and write and she did not tell her advocate that on 01.04.2019 to 14.04.2019 she was at Sengerema and she did not call her husband to testify because she does not have communication with them. That marks the end of both prosecution and defence testimony.

After the testimonies from 12 prosecution witnesses and the accused defence, the evidence of PW1, PW4, PW5, PW6, PW9 and PW10 who saw the body of the deceased and taking into consideration that the defence side did not object to the death of the deceased, I find that the

deceased Mariam d/o Mussa died and in absence of an expert opinion to establish whether her death was unnatural, its determination will base on the analysis of the evidence gathered during the trial.

Since the charge against the accused person is that of murder contrary to section 196 and 197 of the Penal Code, Cap.]16 [RE: 2002] now [RE: 2022], the prosecution must prove the act of killing and connect the act of killing with the evil intention of the perpetrator (malice aforethought) as provided for under Section 196 of the Penal Code, Cap. 16 [RE: 2019] now RE: 2022 which provides that: -

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder".

In proving the charge against the accused, prosecution side as required by law is duty bound to prove beyond a reasonable doubt as provided under section 3(2)(a) of the Law of Evidence, Act Cap. 6 RE 2019 (now RE 2022). (See also **Mohamed Haruna @ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007). The law is clear as provided for under Section 110 and Section 112 of the Evidence Act, Cap. 6 [RE: 2002], now [RE: 2022], the accused is not placed with a duty to prove his innocence but to raise doubts on the prosecution evidence. This principle was



emphasized in the case of **Joseph John Makune v R** [1986] TLR 44 the Court of Appeal held that:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."

I now proceed to determine whether the prosecution managed to prove to the standard required that it was Mariam d/o Musa who actually died and whoever ended her life did it with malice aforethought in terms of Section 200 of the Penal Code, Cap. 16[RE: 2019] now [RE: 2022] and whether it was the accused persons Shija d/o Mhoja who killed the deceased Mariam d/o Mussa.

First, from the testimony of 12 prosecution witnesses, no one testified to have witnessed the commission of the offence or identified the assailants. The accused is linked to the offence of murder of the deceased, based on the circumstances in which the body was found, in which it was 15 paces from her house. According to the testimony of PW10, the blood stains and the pair of slippers of the deceased was found in the house of the accused and the evidence of PW8 and PW9 who testified that the



accused with another woman accompanied the deceased from the home of PW9 claiming to go to Chato. The accused in her defence denied having committed the offence as charged.

Based on the evidence on the record, the evidence implicating the accused is purely circumstantial. Guided by the principle on circumstantial evidence, the evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence. The above principle was highlighted in the case of **Hugo George Jim Son vs Director of Public Prosecutions**, Criminal Appeal No. 144 of 2018 which referred with authority to the case of **Mark Kasimiri vs Republic**, Criminal Appeal No. 39 of 2017, and the case of **Shilanga Bunzali v The Republic**, Criminal Appeal No. 600 of 2020 where the above-stated basic principles for consideration were outlined as follows:-

*"One, the circumstantial evidence under consideration must be that of surrounding circumstances which, undersigned coincidence is capable of proving a proposition with the accuracy of mathematics. See: **LUCIA ANTONY @ BISHENGWE VS THE REPUBLIC**, Criminal Appeal No. 96 2016 (unreported);*

Two, that each link in the chain must be carefully tested and, if in the end it does not lead to the irresistible conclusion of the accused's guilt, the whole chain must be



*rejected. See: **SAMSON DANIEL VS REPUBLIC**, (1934) E.A.C.A. 154];*

*Three, that the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. See: **SHABAN MPUNZU @ ELISHA MPUNZU VS REPUBLIC**, Criminal Appeal No 12 of 2002 (unreported);*

*Four, that the facts from which an inference adverse to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. See **ALI Y BAKARI VS REPUBLIC** (1992) TLR 10 and **ANETH KAPAZYA VS REPUBLIC**, Criminal Appeal No69 of 2012 (both unreported); and*

*Five, the circumstances must be such as to provide moral certainty to the exclusion of every reasonable doubt-see **SIMON MSOKE VS REPUBLIC** (1958) EA 715."*

Now, applying the above principles on the basis of the evidence adduced on trial, I proceed to determine whether the circumstantial evidence available met the standard required to prove the offence charged against the accused person.

First, the evidence on records indicates that, the deceased body was found buried about 15 paces from the house of the accused person. PW10's testimony was to the extent indicated on the sketch map (exhibit P4) that, the body of the deceased was buried on the accused compound



10 paces from the house in which the murder alleged to have been committed, then the body was dragged to where it was found buried. The evidence of PW6 shows that the house of the accused was closed and when they broke in, they saw blood stains on the floor. The evidence of PW6 suggests that, the blood stains was a result of the killing of the deceased but no prosecution witness testified to prove the fact that, indeed the blood in the house was that of the deceased to prove that the deceased was murdered and no explanation why the blood stains sample was not taken for DNA purpose . From the evidence of PW6, there is no an explanation of failure of prosecution to link the accused husband with the murder of the deceased or the neighbor who lived next to the accused.

Second, the evidence of PW8 that the accused was the one who left with the deceased alleging to have secured a job at Chato, suggests that the accused was the last person to be seen by the deceased. From the records, it was alleged by PW8 that the accused left with the deceased and another woman. The accused in his defence denied to have committed the offence and added that she left to her in law and left her husband in the compound. From the accused defence, she managed to raise doubt on who actually killed the deceased take into consideration



the fact that the accused's husband was not among the accused in this case.

Thirdly, the prosecution evidence specifically the evidence of PW2 who testified to have examined the accused and found that he did not recently give birth, on her defence, the accused testified that, she was arrested together with her child who was 3 years old and she was not breast feeding her. The accused defence did match the PW2 evidence that, the accused did not recently give birth. To prove that the child was not of the accused, but of the deceased, the prosecution was required to give evidence in that regard. To this modern world, scientific proof could serve the purpose to establish who was a real mother between the accused and the deceased as of now it is not settled, taking into consideration that the accused and the child are all alive and even the purported father of the child seems to be alive. Failure of the prosecution to prove beyond reasonable doubts that the child belongs to the deceased, it is therefore difficult to connect the accused with the death of the deceased. As stated in **Samson Daniel Vs Republic, (Supra)** that each link in the chain of circumstances must be carefully tested and, if in the end, it does not lead to the irresistible conclusion of the accused's guilt, the whole chain must be rejected.



Having heard and analyzed the evidence of 12 Prosecution witnesses, and the accused defence, I find no evidence to prove that the accused person did murder Mariam d/o Musa, the deceased. The law is settled that in a criminal case, the burden of proof is on the prosecution to prove the case against the accused person beyond a reasonable doubt. The burden never shifts (section 3(2) (a) of the Evidence Act, Cap 6, R.E. 2002). Equally, the accused cannot be convicted on the weakness of his defence.

In **R v Kartin Cameron** [2003] TLR 84 the Court of Appeal of Tanzania laid down a number of principles as the basis of grounding conviction on circumstantial evidence. It was stated among others that:-

"In murder cases, evidence should be cogent and compelling as to convince a jury, judge, or the court that upon no rational hypothesis other than murder can the facts be accounted for... "

Based on my findings above, cumulatively, all the defects in the prosecution case lead to the conclusion that the evidence did not measure up to the required standard for this court to base its conviction on the accused person Shija d/o Mhoja, over the murder of Mariam d/o Musa, the deceased.



In the event, I find that the prosecution failed to discharge their duty as required by the law under section 3 (2)(a) of the Law of Evidence, Act Cap. 6 RE 2019 (now RE 2022) and consequently, the accused person is acquitted. I order Shija d/o Mhoja, the accused person to be released from prison forthwith unless otherwise is lawfully held.

DATED at **MWANZA** this 30th May 2023.



M.MNYUKWA

JUDGE

30/05/2023

Court: The right of Appeal in terms of Section 323 of the Criminal Procedure Act, Cap. 20 R.E 2019 is fully explained.

M.MNYUKWA

JUDGE

30/05/2023