

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

**CRIMINAL SESSION No. 78 OF 2021
SITTING AT KAHAMA**

**REPUBLIC
VERSUS
STIMA MASANJA @ JUMA**

JUDGMENT

5th & 24th May, 2023

MASSAM J:

The accused person one Stima Masanja @ Juma (herein referred as accused person) was charged with the offence of murder contrary to Section 196 and 197 of the Penal Code (Cap 16 R.E 2022). It is alleged by the prosecution that on 12th day of November 2019 at Muhulidede village within Kahama District in Shinyanga Region, the accused murdered one Bundala s/o Daud Kasunga @Sande.

The facts giving rise to this trial is as follows: That on 12th day of November 2019 at about 20:00hrs night hours the deceased was at his home with his wife one Ester James and his sister seated outside their

house, two men approached them that they were looking for traditional healing/medicine from the deceased, the said men talked to the deceased and his wife went inside the house, soon the said wife came back and found the said visitors chasing the deceased, she raised an alarm and neighbors attended and started to run after those visitors.

It was alleged that when they followed toward the place they were running, accused fell down and found lying down on the ground with wound on different part of his body on the ground with wounds. The deceased was rushed to hospital but shortly after reached the hospital he died. The report on the death of the deceased was convened to the Police who rushed to the scene, they drew a sketch map of the scene, the body of deceased was examined and Postmortem conducted and the result revealed that the death caused by severe hemorrhage due to cut wounds in deceased head and hand.

It was again established that, investigation mounted and information disclosed that accused with ones Maganga Maziku @ Tinginya and Makeremo Maganga were connected in killing the deceased as the deceased had a land dispute with Maganga Maziku. Accused person was arrested and interrogated, he confessed at police Custody and at the

Justice of Peace that he was involved in killing the deceased, he was arraigned to court for the information of murder. When the matter was called for plea taking and Preliminary hearing the accused person pleaded not guilty to the information and maintained his plea when the matter commenced for hearing.

Following his plea of not guilty, the matter begun for hearing, Ms. Caroline Mushi and Jukael Jairo both Learned State Attorneys appeared for the Republic whilst the accused person enjoyed the service of Mr. Shaban Mackanjelo Ishengoma as a defence counsel

To prove the case in trial court, prosecution side called 5 witnesses who were, Regina Shija Maneno, Lea Emily Kyomushola, F 5276 D/CPL Shamsi, F.1689 D/SGT Steven No.G. 2111 D/CPL Rafael, the prosecution also tendered 5 exhibits. The defence side had one witness, the accused person without exhibit.

Regina Shija Maneno testified as **PW1**, who testified that, she is a doctor at kahama Government Hospital and on 13/11/2019 at about 11:00 she was called by a Policeman one Pius and being told that one dead body was at Kahama Hospital needed to be examined. She went to mortuary where she found a died body of the deceased one Bundala Daudi a male

with wounds on his head, and left hand. He noticed that the said wounds were caused by a sharp object. She later wrote a report and hand over to that Policeman. He tendered the Post Mortem Report which the court admitted it as exhibit P1.

When cross examined, she answered that the relative of the deceased were the ones who mentioned the name of the deceased, and the body of the deceased had wounds on his head and hand.

PW2 Leo Emily Kyomushula a Justice of Peace, testified that on 30/4/2020 he recorded the Extra judicial Statement of the accused person one Stima Masanja @ Juma. He testified that an accused person brought to her by one Rafael (policeman) for the recording the Extra judicial statement. She asked the accused if he was ready to give his statement accused responded that he was ready. Upon examined the body of the accused, she found him with a wound on his leg which he notified her he was wounded after he was fallen with motorcycle.

She further testified that she took the statement of the accused person and after she completed she read over to him to confirm what she wrote is what he said. After that she handle over the accused person and

the said statement to one Rafael. She then tendered the said Extra Judicial Statement which the court admitted it as exhibit P2.

In responding to cross examination, she said that she is a Magistrate at Ukune Primary Court and Kahama Urban court. Accused person told her that he was arrested on 27/4/2020 and went to her on 30/4/2020. She said that this accused told him that he conspired with his fellow to kill.

In re examination she answered that, she recorded the statement at kahama Primary court and she never knew the accused before.

PW3 F.5276 D/CPL Shamsi, a Police Officer at Nyamilangano Police Station at Ushetu, he contributed his evidence by evidencing that on 13/11/2019 he was with OC-CID at Molidede where they went to investigate the murder case which occurred on 12/11/2019 at the house of the deceased. He said at the scene he drew the sketch map and recorded some of the witnesses' statement. One of the witness Simon Joseph told him that the victim was attacked and was taken to hospital, on his way, he died and the body was taken to Kahama Hospital mortuary.

PW3 went on testifying that the body was examined and the report was prepared. On 19/3/2020 he was informed that one Maganga Maziku could help them on investigation. The said Maganga Maziku told them that

the murder committed by an accused person and one Makelemo Masanja. On 27/4/2021 they went to Ipongoholo- Ushetu, they arrested him and informed that he is charged with murder case of Bundala Daudi Kasunga @ Sande and they asked him to take them to the house of Makelemo Masanja. When they went to the house of the said Makelemo Masanja, they found no one in the house. Then went to Police at 23:45 pm. He said the distance from the Village to Nyamilangano Police Station is like 70 kilometers and it is a rough road, so they arrived there at 01:45hrs.

He ended his testimony by telling the court that they informed the OC-CID that they arrested one person and the other suspect was not arrested. Lastly he tendered the sketch map which the court admitted it as exhibit P3.

In cross examination, he responded that at the scene they found blood and a chair which deceased used to sit on and they were told that the said Makelemo shifted to another place after he committed this offence.

PW4 F. 1689 D/SGT Steven testified to the effect that on 28/4/2020 at 01:40 he interrogated the accused one Stima Masanja and told him his rights, on writing his statement he was alone. He said that the

accused stated that he don't know how to write and read, on 24:50hrs he started to record the accused statement after he finished he signed it. He later tendered the statement of an accused person which then admitted as exhibit P4.

In cross examination, PW4 responded that accused did admit to be connected in that murder and he was given Tsh. 150,000/= and he was with one Makelemo Mihayo and Maganga Maziku. He said he read over the statement to accused as he did not know how to read and write after that gave the said statement to CPL Shamsi.

PW5: G.2111 D/CPL Rafael was the last prosecution witness to testify, his testimony was that he was an investigator and on 13/11/2019 at 11:00am he was at his office, he was told by OC-CID that at the Village of Mulidede there was a murder happened, so he was told to go at the scene and is the one who wrote the statement of Ester James (deceased wife). He said he wrote the statement and the said Ester signed the same. He tendered the statement of the said Ester James which the same admitted as exhibit P5, as the said Ester was nowhere to be found.

He answered the cross examination put to him by the counsel for the accused by saying that, he was the one who took the statement of the said

Ester James, who did not mentioned the persons attacked her husband (the deceased). Again he told this court that he was the one who took the accused person to Justice of Peace as the accused was arrested on 27/4/2020 and taken to justice of peace on 30/4/2020.

The prosecution having closed their case and the court established the prima facie case, the case was open for accused to defend himself as follows;

DW1 Stima Masanja defended his case by testifying that, on 27/4/2020 at night hours, he was with his wife sleeping, at 01:00rs he was called outside with someone, he wake up and stand up in his room, later on he decided to open the door and three people entered, they introduced to him and he was handcuffed. He was told to take them to his father place which was not too far but, his father was not around, so he was taken to Nyamilango Police station and arrived at 01:00hrs and on the next day at about 9:00pm he was taken to the investigation room.

He added by saying that on the investigation room he found two sticks, then he was asked about the murder of the deceased called Bundala s/o Daudi they started to beat him until he decided to admit that he was connected in that murder. But he said that he did not know the deceased,

after he admitted, they stopped beating him and returned him to lock up. On 30/4/2020 he was taken to Kahama Police station, and later on to Kahama District court where he was charged with murder. Lastly he said that he don't know the charge against him and he did not know the deceased one Bundala Daudi. So he prayed the court to left him free.

When cross examined by Ms. Caroline Mushi, he said it is true that he was arrested on 27/4/2019 by three policemen and narrated the story but he did not know what happened to the deceased as he never knew him before. That was the end of the defence from the accused person Stima Masanja @ Juma.

Being both sides closed their case, the table is open for the court to determine the case to the conclusion, but the focus for the court is to determine the main issue of **whether the prosecution has proved the guilty of the accused to the standard required by law**, that is beyond reasonable doubt. To land to such determination, the following sub issues are very key for the court to determine:

- (i) **Whether the person one Bundala s/o Daudi alleged to have died is actually dead if yes;**

- (ii) **Whether the death was of unnatural causes,
if in affirmative,**
- (iii) **Whether it is the accused person one Stima
s/o Masanja @ Juma who killed Bundala s/o
Daudi who is subject to this trial, if in
affirmative,**
- (iv) **Whether his action was actuated with malice
aforethought.**

For the nature of this case, I will discuss and resolve the above raised questions in the light of evidence available and the law applicable. As to whether Bundala Daudi actually dead. The facts and evidence revealed and it is undisputed position that one Bundala s/o Daudi is demised. It is in the Prosecution evidence as adduced by PW1 and PW5. PW5 is witness who wrote the witness statement of the wife of the deceased one Ester James who confirmed that her husband was died. The evidence of the said witnesses was supported by the exhibit P5 which admitted in the court to support the prosecution evidence. the said exhibit is the statement of witness one Ester James who witnessed since the attackers come to their home, running after the deceased and when she

followed to place they ran, she found her husband was fallen down with wounds, they rushed him to hospital but shortly at about 22:00hrs he died.

In proving the death of the deceased, PW1 Regina Shija a doctor from Kahama Government Hospital informed the court that on 13/11/2019 at about 11:00 am she went to the mortuary of Kahama hospital where she found the body of the deceased one Bundala Daudi a male, the body had wound in his head and left hand which was caused by sharp object. She wrote a report and handed it to the Policemen. The report is a Post Mortem exhibit P1. In the said report it revealed that the body of the deceased had severe head injury and multiple cutting wounds. The general report told that the cause of death of deceased was due to severe hemorrhage.

That piece of evidence has never been challenged, the fact that the report on post mortem examination (Exhibit P1) indicates that the deceased person whom medical investigation was conducted by PW1 proved without doubt that the deceased Bundala Daudi is died, but as per the sub issue, whether his death was of unnatural cause.

In this issue the evidence disposed clearly that the deceased was attacked by a sharp object which wounded on the deceased's head and left

hand, the post mortem examination report (Exhibit P1) detailed that the deceased sustained multiple cut wounds on head and hand. The same exhibit P5 tendered by PW5 stated the same that the deceased was invaded by two persons they were running after him, soon when they reached him they found he was fallen down injured, those facts proves that the death of the deceased was unnatural under allegation that the said attackers who approached at the home of the deceased are the very one responsible for the death of Bundala s/o Daudi.

Now the crucial and contentions issue to be determined is **whether or not it is the accused person StimaMasanja @ Juma and nobody else responsible with the death of Bundala s/o Daudi who is the subject to this case.** In determining this issue and for the nature of this case, my arrival will be focused in general principle established in the case **of Mohamed Haruna @ Mtupeni & Another v The Republic**, Criminal Appeal No. 25 of 2007 (unreported) where it was stated that:

".....in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be

convicted on the strength of the prosecution case and not on the basis of the weakness of his defence'

In the light of the instant case in my evaluation the evidence of both side, I have observed that accused person always is in denial that he never committed the offence and he disowned the confession statement said to be admitted at Police Custody he said he admitted after he was forced to admit after beaten, after he decided to admit is when the Police stopped to beat him. In other side the weight of prosecution evidence are carried in PW3, PW4 with his exhibit P4 (caution statement of the accused person) and the statement tendered by PW5 which said to be stated by the wife of the deceased as detailed that she was present at the scene at the time when the culprits invaded the deceased, ran after him and they managed to wound on his head and hand which then caused death to the deceased.

I will start with the details stated in the statement said to be have wrote by Ester James (exhibit P5) it detailed to the effect that material time on 12/11/2019 about 19:00 the said Ester James was with the deceased and her sister, suddenly they were invaded by two persons, the deceased asked them what are you looking for, they answered they were sent by one Nzoza s/o?, a resident of Midede they were looking for

traditional healing. The deceased was a traditional healer, he told the invaders to call the said Nzoza, they called but his phone was not reachable. The deceased decided to call his neighbor one Kaseme if has any information about Nzoza, the said neighbor responded that the said Nzoza was on journey, being heard that, she said she entered inside, when she came out, she saw the deceased running away and those invaders running after the deceased, being seen so her and her sister decided to raise alarm calling people for help. When nzengo (neighbor) came they followed the direction were running and found the deceased fallen down in cassava farm with a cut and wounded on his head and on his left hand, she stated that the victim was rushed to hospital but at about 22:00hrs he passed away.

I have read between the lines the exhibit P5, my evaluation is in consideration that the statement's contents are clear that the said Ester James saw two persons invaded in their house but the said statement is silent if she managed to identify clearly those invaders and also no statement to prove if the accused was among those invaders. The detail is that the incident occurred at about 19:00hrs of which it was night hours the said Ester James had no statement to prove that she at least saw or

recognize them or one among them described on their prescription how they were look like. In thus, I am of the opinion that Ester James did not identify the accused person who have murdered the deceased.

More also, PW5 who took the statement of the said ester James he answered to cross examined that Ester did not mention the persons who attacked and killed the deceased. This is clear evidence that the evidential value of Ester James's statement is on only issue that she saw attackers without identified them.

Now I come to the testimony of PW3 who his evidence is to prove that after they got information on 12/11/2019 they went to the scene at the house of the deceased, and drew sketch map and found that the body was taken to hospital for treatment. He testified that on 19/3/2020 he got information that one Maganga Maziku could help them in their investigation, That Maganga told them that the murder was committed by accused person and one Makaremo Masanja. On 27/4/2020 they arrested the accused but they failed to arrest the said Makeremo Masanja as he was nowhere to be seen.

As in the record revealed that immediately after the incidence occurred no person knew the invaders until on 19/3/2020 when PW3 got

information that Maganga Maziku could help them in their investigation and the said Maganga Maziku was the one who told them that the murder was committed by the accused person and one Makelemo Masanja who they failed to arrest, the investigation machinery depended only from a mere words of the said Maganga Maziku that he got information from his informer that accused committed the offence, the story had nothing to clear on how and where the offence was committed and the informer how he managed to know that accused and one Makeremo Masanja were the very one killed the deceased.

Furthermore it is clear from the testimony of PW3 that accused person and one Makalemo Maganga were mentioned by the said Maganga Maziku in connection of murdering the deceased but the same in caution statement accused person mention Maganga Maziku was the one who hired makeremo Maganga to kill the deceased as they had land dispute. The said Maganga Maziku was supposed to be joined in the charge or otherwise he was supposed to be called to testify in the court to give evidence how he knew about the death of the deceased. In this course I find that if investigation failed to grasp information from the said Maganga Maziku on how the offence committed, it could be better

for the prosecution to call him as important witness to testify and inform the court how the said accused persons and one Makelemo Masanja were involved in murdering the deceased. In issue of calling a particular witness developed the principles which will assist the court to solve some issues in a particular fact. In **Mashimba Dotto @ Lukubanija V Republic**, Criminal Appeal No. 317 of 2013, CAT (unreported) it was stated thus: -

"We get the impression that the case was poorly investigated and prosecuted. We say so because in absence of any other evidence, the prosecution case was to stand or fall on the word of the appellant regarding the alleged events of the day. We think, in this case prudence deserved that the deceased's parents and investigating officer ought to have been summoned with the aim of hearing their version of the day..... perhaps, if summoned the evidence of these people would have helped lending credence to the appellant's story contained..... In the absence of the evidence of the above people it is not sage to believe whole heartedly that the conviction is sound.

Again, in **Amiri Hassan Kadura vs The Republic**, Criminal Appeal No. 271 of 2013 CAT at page the court stated that;

The law provides that adverse inference may be drawn when the persons omitted to be called as witnesses are within reach and no sufficient reason is shown by the prosecution. See - Aziz Abdallah v Republic (1991) TLR 71 and Yohana Chibwingu v Republic, Criminal Appeal No. 117 of 2015, CAT (unreported). In the instant case, no reason has been provided for not calling the sisters of the appellant. We are of the considered view that they are an important link in the sequence of events

In light of the above issue, for the failure of the prosecution to call one Maziku Maganga who gave the information to police about the involvement of an accused in committing the offence raises adverse inference to the doubt if accused person connected to the charged offence.

Now I turn to the accused's confession statement. As I have noted above that the caution statement of an accused person is among the evidence the prosecution side depended to prove their case. Exhibit P4 (the accused person Caution Statement) have a confession statement to prove that accused involved in killing the deceased accompanied by Makeremo Masanja and Maganga Manywele Maziku. It detailed that the said Maganga Mayele Maziku was the person who gave them money for

the purpose of killing the deceased Bundala Daudi @ Sande by a payment of Tsh. 600,000/=. The point of confession is quoted that,

"Tukio la mauaji tulilifanya tarehe 12/11/2019 saa 2:00hrs siku hiyo tulikutana kwa Maganga Manywele Maziku na kufanya safari kuelekea nyumbani kwa Bundala s/o Daudi @ Sande ambapo tulifika saa 19:00hrs hivyo Maganga s/o Manywele Maziku awali alikuwa akiishi Mlidede."

The said caution statement was disowned by the accused person at a trial, the accused person denied the commission of the offence and repudiated the confession. He testifying before the court that on 27/4/2020 night hours at 01:00 he was at home a sleep, he was called and wake up, he opened the door and three persons entered, after they introduced to him, he was handcuffed. They took him to his father and called him, they were taken to Nyamilongo where were put in the lock up. On the next day he was taken to the examination room.

He further defended that he was asked about the issue happened at Mwidede about the deceased one Bundala Daudi then they started to beat him until he decided to admit that he did that murder, they were forcing

him to know the deceased while he don't know him. He said after his admission, they stopped beating him. In other side he said he know one Maganga Maziku who is his neighbor but their relationship is not good. It is from that course the said caution statement repudiated/retracted by the accused to mean that the statement was obtained involuntarily as he was tortured that's why he decided to admit the charge.

It is settled law that it is the danger of convicting an accused person based on the confession which was retracted or repudiated. For me to avoid assumption of danger, I opt to test if the accused confession corroborated by the evidence of an independent witness, though in other circumstances the court may convict an accused person based on a repudiated or retracted confession where such confession contains true and not otherwise.

In searching the independence witness's evidence to corroborate with the confession statement in accused person's caution statement, at this point I disregard the evidence stated in Exhibit P5 as the same is well discussed herein above that the said statement have no material evidence to prove that Ester James saw the accused person murdering the deceased rather her evidence was only to see two persons invaded her husband but

she failed to identify them. Other witnesses are doctor who conducted post mortem procedure and proved the death and Police officers who's their evidence could not prove the issue of who killed the deceased.

The last evidence to be considered is Extra Judicial Statement (Exhibit P2), I have read the said exhibit, after in a thorough passing through the said exhibit, I found it lacks at least three ingredients to be qualified as Extra Judicial for the accused person to be taken that he gave his statement voluntarily. The short fall of it is that, The Justice of the Peace did not ask if the accused whether he truly wished to make a statement on his own free will and that if he do, the one, it might be used as evidence against him. The question of Justice of Peace to the accused was that;

Je kuna mtu yeyote kwa njia ya vitisho kwa ahadi au kwa mashambilo ya namna yoyote kwako, amefanya uje hapa nakueleza ushahidi wako mbele yangu? Jibu:....Hapana.

The answer Hapana from the question put to the accused with the aim to inquire him if he wishes to record his statement free from any promise or threat cannot be taken as voluntarily confession for the court to be relied upon as free will statement to the offence of murder as the accused stood charged.

Another issue I have noted in this statement is that the statement has no admission statement that accused murdered the deceased. Accused recorded that one Maganga Maziku found one Makeremo to arrange to kill Sande (the deceased), the said Makeremo found him (the accused) and told that there is a deal of killing. He said at once he denied, he was again approached by the said Makeremo with the same issue of killing, he accepted. On the day they went to kill, they were three him Maganga and Makeremo and it was at 20:00hrs. He revealed that when they approached where the deceased was, he got worried, one Makeremo followed him outside where he was outside the house, meanwhile the said Makeremo was smoking cigarette he took out his panga and started to cut the deceased, the deceased ran away but he fell down. Makeremo after he cut the deceased he ran away.

After been read the said extra judicial statement it came into my mind that, the plan of killing was in the hands of one Maganga Maziku who hired Makeremo to kill the deceased, the said Makeremo accepted the offer but he asked the accused to do the same, but accused refused but later he accepted, but again later he refused as he was worried to commit such offence and remain outside looking Makeremo committing the offence. It is

from that evidence from the statement of the accused that though he went to the scene but since at the beginning he was approached by Makelemo to kill the deceased he refused but later he accepted, meanwhile while they went at the scene he got worried and remain outside the house witnessing one Makeremo cutting the deceased. The statement clear show that accused had no intention to kill and when the act committed, he was worried and did not participate in the killing. This can not be taken as a confession of killing.

The practice is that where an accused person confesses before the police, he also be taken to the justice of the peace for extra judicial statement where the degree of free will under assumptions of voluntarily may be obtained, in instant case, the extra judicial statement has no admission for the accused to commit an offence rather it shows how the offence was committed by the said Makeremo. For that reasons I proceed to put these words that, nor the caution statement or extra Judicial corroborated to the prosecution evidence. The case of **Tuwamoi v. Uganda**, (1967) EA 84 The court had this to say that:

"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be

fully satisfied that in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a court will act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary for law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.'

The same view was established in the case of **Hemed Abdallah v. Republic**, [1995] TLR 172 as that;

Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances is satisfied that the confession must but be true.

In up short I found that the prosecution had no evidence to prove that Stima Masanja @ Juma killed the deceased as I have pointed out that accused person's cautioned statement retracted by the accused with no corroborative evidence to supplementary the said statement.

Again I have mentioned earlier that the rest of the prosecution evidence supports the charges against the first accused person were arresting Police Officer who were not eye witnesses and the statement alleged to be eye witness (exhibit P5) did not prove if accused was the very one committed the offence.

I have reached this point that the Prosecution failed to prove the Information of Murder contrary to section 196 & 197 of the Penal Code Cap 16 RE 2022. With thus accused person Stima Masanja @ Juma is hereby set free unless held with lawful cause.

It is so ordered.

DATED at **KAHAMA** this 24th day of May, 2023.


R.B. Massam
JUDGE
24/05/2023

COURT: Right of appeal explained.