

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT TARIME

CRIMINAL SESSIONS CASE NO. 35 OF 2022

THE REPUBLIC

VERSUS

**NYAMCHAMA S/O MGENDI @ MOKIRI**

JUDGMENT

*10<sup>th</sup> & 13<sup>th</sup> February, 2023*

**M. L. KOMBA, J.:**

**Sprina Paulo Otita** met her demise in the night of 7<sup>th</sup> April, 2021 at Gantamome village within Serengeti District in Mara Region after allegedly being battered by her grandson, **Nyamchama Mgendi @ Mokiri** (who is married to her granddaughter) the accused in this case. The report of post-mortem examination performed by a medical officer **Albart Kasanga** revealed the cause of deceased's death was due to excessive bleeding resulted from multiple cut wounds caused by sharp objects.

The death of **Sprina Paulo Otita** is the reason why the accused arraigned before this court for the offence of murder contrary to section 196 and 197 of the Penal Code Cap 16 [R.E 2019 now 2022]. The accused **Nyamchama Mgendi @ Mokiri** alleged to murder the deceased. It was stated on particulars of offence to the information

preferred against the accused, that, **Nyamchama Mgendi @ Mokiri** on 7<sup>th</sup> April, 2021 at Gantamome village within Serengeti District in Mara Region, murdered one **Nyaroka Paulo Otita @ Sprina**.

After the information read over and explained to the accused person in the language he understood, he denied the offence preferred against him hence the plea of not guilty entered against him.

As the cardinal principal in criminal law, the burden of proof always lies on prosecution side. To convince this court that it is the accused person who murdered the deceased, the prosecution marshalled a total of four witnesses namely, **Felix Daniel Ginene** (PW1), **G. 4076 D/CPL Saidi** (PW2), **Rong'ola Marwa** (PW3) and **G.5805 CPL Christopher** (PW4). The prosecution also had four exhibits (post-mortem examination report, sketch map, extra judicial statement and caution statement).

During hearing of the case at hand the prosecution was represented by Mr. Peter Ilole who was assisted by Mr. Lusako Mwaiseke and Ms. Esther Kyara all state Attorneys, on the other hand, accused was represented by Mr. Leonard Magwayega, an Advocate.

The testimony of the first prosecution witnesses **Felix Daniel Ginene**, Resident Magistrate at Mugumu Primary Court -Serengeti, (PW1) was to

the effect that on 12/04/2021, 2021 around 08:00 hrs while at his office he received a police officer with the accused who intended to record extra judicial statement. This witness informed this court that after he release the police officer, he asked the accused if he is ready and willing to record his statement, the accused who had no injury and was physically fit consented to give his statement. Accused started to record his statement which was read to (him) the accused upon found it to be correct the accused put his thumb mark and the PW1 signed and sealed it.

PW1 tendered extra judicial statement he recorded from the accused which was admitted and marked as an exhibit P3. During cross examination he informed the court that the accused appeared to him on 12/04/2021 which was Monday he was from the police station. He further informed the court that the accused explain to him that he first cut the fore head of the deceased and when she falls down he cut her throat.

**G. 4076 D/C CPL Saidi** (PW2) informed the court that on 09.04.2021 around 8:00 hrs while at his office he was assigned with a file from OC-CID with Ref. No. Mug/IR/837/2021 about murder so that he can proceed with investigation. He discovered that the offence was murder

and the accused was Nyamchama Mgendi of Gantamome Village and that cautioned statement was already taken by different officer, Constable Christopher (now corporal).

He further testified that in that statement accused confess his involvement in the death of Sprina, that he was the one who killed the deceased. PW2 talked to accused person while in police custody and the accused told PW2 that he killed Sprina (Nyaroka). Satisfied with that information PW2 sent back the case file and had to attend other emergence at Mbilikili village about the cattle theft and he return at Mugumu Police station around 19:00 hrs on the same date which was Friday.

PW2 further informed the court that on 12.04.2021 around 08:00hrs, it was Monday, together with detective Constable Benson they handed accused to justice of peace. He revealed that deceased was known by two different names which are Nyaroka and Sprina and relatives used them interchangeably. In his investigation he discovered that the accused is the one who murdered the deceased and after the event the accused surrendered himself to Majimoto Police Post and later on he was taken to Mugumu Police station.

When interrogated by the defence counsel, PW2 informed the court that they (PW2 and PW1) are the one who took the accused to justice of peace and informed him to be free to explain what he knows about this case. Apart from accused person, PW2 as an investigator he did not get an eye witness to this case. In re-examination, PW2 submitted that it was the accused person who asked to go to justice of peace and they just escorted him.

PW3, **Rong'ola Marwa** informed the court that Sprina Nyaroka Paulo Otita was his concubine and that on 07.04.2021 they left their home and went to buy some food stuff at Busawe Centre, in the evening of the same day around 16:00hrs they decided to go back home. He said while on their way home, deceased decided to go and look for her friend, Nyabebe, whom at her place they sale local liquor (gongo)PW3 didn't go there because he was not feeling well, he went home and sleep.

The witness informed the court that his "lover" did not show up till morning when he wakes up and decided to go to Nyabebe's homestead only to find the body of the deceased laying on the ground on the way to Nyabebe. He informed deceased children of the incident whom together they raised an alarm (yowe). It was the PW3 testimony that among the people whom responded an alarm was police officer from

Majimoto Police post, who decided to interrogate PW3. It was the testimony of PW3 that while he was interviewed by police at Busawe, that police officer received a phone call from his fellow policeman informing him that the accused who was involved in the crime he was investigating has surrendered to Mugumu Police Station. Satisfied with the information from the phone call, police officer left PW3 at the village and leave.

Witness elaborated further while in examination in chief that his "lover" was a drunker that's why when she was missing, he decided to go back to the pombe shop to see what happened. When cross examined, PW3 informed the court that he was informed that his wife did not find Nyabebe at her home and decide to join for a drink at pombe shop which is located at Nyabebe homestead. He confessed he did not see who killed his lover.

**G.5805 D/CPL Christopher** (PW4), his evidence was pertaining to cautioned statement he recorded the accused. He testified that on 08.04.2021 while at Majimoto police post he recorded statement of accused person after he warn him of the consequence of what he is going to record. The accused was physically fit and he freely consented to explain what happened. They were only two in that room which had

four chair and two table. When he finishes recording, he read to the accused who acknowledged what was written was true by his own hand right.

He further informed the court that the accused confess to murder one elder person, grandmother, he then finalized his evidence by tendering the caution statement (Exhibit P4) he recorded which was not objected.

Upon closing the prosecution case and this court to rule out that the *prima facie* case has been established against the accused, accordance with section 293(2) of the Criminal Procedure Code [Cap 20 R.E. 2019] the accused entered his defence leading by his advocate, Mr. Magwayega. The accused person was a sole witness in the defence side.

DW1 **Nyamchama Mgendi @ Mokiri** testified that he heard an alarm (yowe) from next village and when he was on the way going to where that alarm was coming, he met women who told him not to attend the alarm as the crowd will attack him associating him with the deceased's death. From that information he decided to surrender himself to Majimoto Police post. He denied to murder the deceased and he never used machete. During cross examination he informed the court he was not in conflict with the deceased and he was wondering why villagers wanted to kill him. That marked the end of defence case.

Having gone through the evidence adduced by both parties, I find the pertinent issue to deal with is whether the prosecutions proved their case beyond reasonable doubt and in doing so, I will stand firm to see whether all elements of murder were proved against the accused person. In the case of **Philimon Jumanne Agala @ J4 vs. The Republic** Criminal Appeal No. 187 of 2015, the Court of Appeal held that in murder trial, the prosecution must prove elements of murder.

There is plethora of authority that provides vital ingredients of the offence of murder. In criminal jurisprudence, in order to be triumphant, the prosecution has to prove the followings elements that establish the offence of murder;

- 1. There is the death of a person.*
- 2. The said death was caused by unlawful act or omission.*
- 3. It is the accused who caused the death of deceased.*
- 4. The accused acted with malice aforethought.*

Regarding the 1<sup>st</sup> and 2<sup>nd</sup> elements, it is undisputed throughout prosecution and defence evidence that **Sprina Nyaroka Paulo Otita** (the deceased) died and that her death was unnatural one. Despite the fact that the accused did not dispute the deceased death during the preliminary hearing, the evidence of PW2, PW3 and exhibit P1 (post-mortem examination report) proved that there is death and deceased death was due to excessive bleeding by multiple cuts wound. **The**



**crucial issue is whether the deceased was murdered by the accused person who was before this court.**

It is obvious that the evidence to consider in order to determine whether the accused is responsible for the deceased's death rests on Exhibit P3(extra judicial statement), Exhibit P4 (caution statement) and evidence testimonies adduced by PW1 and PW4. From all four witnesses there is no an eye witness and this suggests that, to the large extent, prosecution relied to Exhibit P3 and P4. It is in record that PW1 and PW4 are the one who took statement of the accused person, in which the accused confess to murder the deceased **Sprina Nyaroka Paulo Otita**.

The testimony of PW1, a Primary Court Magistrate and Justice of Peace, show that he recorded the statement of accused. I find no reason to doubt that the Magistrate appears before a court of law, and perjure himself that he had recorded the accused statement knowing to be not true. I hold that the accused was taken and he made his statement to PW1 in which he subsequently confessed to have been involved in the death of the deceased.

This court is convinced that the accused extra judicial statement to PW1 was made voluntarily as there is no allegations of torture, threats or any

inducement were raised by him during hearing and therefore exhibit P1 was correctly procured.

The next question that falls for consideration is whether or not the accused confessional statement to PW1 and PW4 required any corroboration before it could form the basis of a conviction. In the case of **Umalo Mussa vs. Republic**, Criminal Appeal No. 150 of 2005 CAT (unreported) it was held that, as a matter of law, such a confessional statement does not require any further corroboration if the court is satisfied that the confession is true. In this case, CAT was amplifying its previous decision in the case of **Richard Lubilo and Another vs. Republic**, Criminal Appeal No. 10 of 1995 (unreported) in which, having discussed the famous case of **Tuwamoi vs. Uganda** [1967] EA 84 at 91, they stated that:

*'What this passage says is that in order for any confession to be admitted in evidence, it must first and foremost be adjudged voluntary. If it is involuntary that is the end of the matter, and it cannot be admitted. If it is adjudged voluntary and admitted but it is retracted or repudiated by the accused, the court will then as a matter of practice look for corroboration. But if corroboration cannot be found, that is, if the confession is the only evidence against the accused, the court may found a conviction thereon, if it is fully satisfied that the confession is true.'*

Eight years later in the case of **Mashimba Dotto @ Lukubanija vs. Republic**, Criminal Appeal No.317 of 2013 (unreported), CAT observed that;

*'As correctly opined by both learned counsel, the Judge was certainly correct in saying that under normal circumstances a conviction could safely lie so long as the court warns itself on the danger of acting on the statement without corroboration. It is trite law that as a matter of practice, a conviction would not necessarily be illegal but it is a matter of practice in such cases for a trial court to warn itself and if the trial is with the aid of assessors to direct them on the danger of convicting without corroboration'*

It has been decided and directed that there is no requirement in law that the evidence of an extra-judicial statement must be corroborated by cautioned statement. In an ideal case, a cautioned statement can stand on its own without corroboration. See **Hassan Mohamedi Ngoya vs. Republic**, Criminal Appeal No. 134 OF 2012. However, I must warn and guide myself before I rely to exhibit P3 and P4.

Exhibit P3 was tendered by PW1, a Primary Court Magistrate and Justice of Peace, show that he recorded the statement of accused. I find no reason to doubt that Magistrate.

From the excerpt of **Mashimba Dotto @ Lukubanija** case (supra), conviction without corroboration is not illegal/fatal but this court has to

warn itself on conviction. Testimony, the statement in exhibit P3 is corroborated with one on exhibit P4. Among other information, accused explain how he cut the deceased;

*'Ndipo nilipomnyang'anya panga ile na kumkata kwenye paji la uso na kuanguka chini. Baada ya kuanguka chini, nilikwenda na kumchinja kwa panga shingoni kwake. Nilipomaliza kumchinja nilichukua pangana Kwenda nyumbani....'*

Unofficial translation is that accused grabbed the machete and cut deceased on the forehead then she fell down. After she has fall down, the accused went and slaughter her by using machete. When he finishes slaughtering the deceased, accused took machete and went home. Another piece of evidence which prosecution relied is Exhibit P4, a statement which accused recorded before PW4. In that exhibit there are similar words from the accused that;

*'....nikachukua jukumu la kumkata na panga kwenye paji la uso ndipo akaanguka chini na alipoanguka chini nilimfuata na kumchinja shingoni kwani nilikuwa na hasira...'*

However, being mindful of the danger of founding a conviction on uncorroborated evidence, I read Exh. P2 (postmortem report) which was prepared by the doctor who examined the body of the deceased and came to the conclusion that the death of the deceased was due to excessive bleeding resulted from multiple cuts wound on the neck and

front bone on the head, this information is sufficient to support the version of the accused who had told PW1, among other things, thus:

*'.....nilipomnyang'anya panga ile na kumkata kwenye paji la uso na kuanguka chini..... nilikwenda na kumchinja kwa panga shingoni kwake...'*

As can be gleaned from the above reproduced excerpt of the accused confessional statement to PW1, the parts of the body on which the deceased was cut according to the accused, were the same parts which were found to have severe cut wounds by Exhibit P2. This court is convinced that there is sufficient evidence to corroborate the accused extra-judicial statement to PW1 and connect the accused with the murder of the deceased. See **Muhangwa Simoni vs. The Republic**, Criminal Appeal No. 480 of 2019.

The third element as raised previously is proved that it is the accused who murdered the deceased.

In a murder charge, it is also important to prove malice aforethought, for murder entails the killing of a person with malice aforethought. This is the last element to test. Section 196 of the Penal Code, under which the accused person in the present case was charged provides as follows:

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

As I stated early, the cardinal principal in criminal law is that the burden of proof always lied on prosecution shoulders. See the decision of the Court of Appeal in **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 CAT at Mbeya where it was held as follow;

*"It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. In the case of **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika** [2002] T.L.R. 296 the Court held that: "A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt"*

The important issue here is whether the evidence in record has established murder. As a matter of law, the offence of murder involves unlawful killing of another person (human being) with malice aforethought. Malice aforethought is well established as provided for in section 200 of the Penal Code as follows;

*"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-*

*(a) an **intention to cause the death of** or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person; whether that person is the person actually killed or not; although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*

*(d) .....*

Now we have seen that malice aforethought can be established when one intentionally causes the death of another person. The court analysed how malice aforethought can be established while celebrating the case of **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994 (unreported) saying that: - "Usually, an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following:- (1) the type and size of the **weapon** if any



used in the attack; (2) the **amount of force** applied in the assault; (3) the part or **parts of the body** the blows were directed at or inflicted on; (4) The **number of blows**, although one blow may, depending upon the facts of the particular case be sufficient for this purpose; (5) The **kind of injuries** inflicted. (6) The attacker's utterances if any; made before, during or after the killing and **the conduct of the attacker** before and after the killing. (7) The conduct of the attacker before and after the killing.

From the evidence available, the accused used machete to attack the deceased, **machete is a dangerous weapon** by its nature, he used **much force** as evidenced that after one blow the deceased fall down, remember the deceased was an old woman, but it seems not enough the accused followed the deceased where she felt down and cut her throat. It shows he used more force in slaughtering the deceased. Moreover, party of the body where blow was directed was head and neck, as we have seen that the first blow was directed to the forehead and the he slaughtered her, that show accused intended to kill the deceased. In slaughtering, there is no chance a living organism can survive. Though the number of blows was only two, they were very strong and fatal as the deceased died on the spot. Kind of injury was cut



at the neck which is very sensitive area. In general, malice aforethought has been proved as established in the case of **Enock Kipela vs. Republic** (supra).

Accused person denied to have murdered the deceased. He informed the court that he heard an alarm from the villagers when he wanted to go and witness the problem, he was informed not to attend the alarm as he was associated by that killing, heard of that, he decided to go to Majimoto Police post to surrender himself. He confessed in court that he was afraid of an attack from the crowd. The question which a reasonable man can ask is what was he afraid of if he did no wrong. He denied to use machete nor to know the deceased although he confessed that he surrendered himself to police. He did not object admission of caution statement neither extra judicial statement.

From the above analysis, I am convinced that the prosecution has managed to prove the case beyond a reasonable doubt. Therefore, the accused **Nyamchama Mgende @ Mokiri** hereby convicted for the offence of murder contrary to sections 196 of the Penal Code, [Cap 16 R.E 2022].

Dated at **Tarime** on 13<sup>th</sup> February, 2023



  
**M. L. KOMBA**

**Judge**

**13<sup>th</sup> February, 2023**

**SENTENCE**

**Court:** Upon conviction of the accused for the offence of murder c/s 196 of Cap 16 I hereby sentence the accused **NYAMCHAMA MGENDI MOKIRI** under s. 197 to suffer death by hanging.

  
**M. L. KOMBA**

**Judge**

**13<sup>th</sup> February, 2023**

**Court:** Right of appeal is explained.

  
**M. L. KOMBA**

**Judge**

**13<sup>th</sup> February, 2023**