

IN THE HIGH COURT OF TANZANIA
AT SHINYANGA
CRIMINAL SESSION CASE NO. 51 OF 2021
REPUBLIC
VERSUS
MANYANGU KIBASI
JUDGMENT

21st & 30th March, 2023.

S.M. KULITA, J.

The accused person, one Manyangu Kibasi stands charged with the offence of Murder contrary to Sections 196 and 197 of the Penal Code [Cap 16 RE 2019]. It is alleged by the prosecution that, on 29th January, 2020 at Mwalushu village, within Itilima District, in Simiyu Region, the accused person murdered one Naomi Ngolo @ Banga.

Facts of the case as presented by the prosecution, which gave rise to this trial state that, on 29th January, 2020 at the night time the deceased was seated with her grandchildren namely Madida Steven and Naomi Steven in the kitchen. In surprise, they were invaded by someone who had masked his face. That invader started cutting the deceased with panga. As they were not the target, the grandchildren ran away

looking for help. When they came back, they found the invader escaped, but the deceased lying down bleeding. The matter was reported to police and the victim was taken to hospital. The victim died before she reached the hospital. Investigation was mounted, through secret informer the accused was arrested by police as the one who committed the offence. Further, post mortem investigation revealed that, the cause of death was haemorrhoid shock caused by the multiple cut wounds that the victim had sustained at the scene. It was further alleged that when the accused was interrogated, he confessed through both caution statement and the extra judicial statement. As such, the accused was arraigned to court for murdering Naomi Ngolo @ Banga.

When the information of murder was read over to the accused person during Plea taking and Preliminary hearing, he pleaded not guilty to it. Further, on 21st March, 2023 when the case came up for trial, the said information (charge) of murder was reminded to the accused, he pleaded not guilty thereto.

In discharging the duty of proving the charge against the accused person, the prosecution side summoned three witnesses and tendered four exhibits. The defense case comprises the testimony of the Accused person only with no exhibit. The evidence of the prosecution and defense side can be summarized as follows:

Daudi Sayi Banga testified as PW1. His testimony is to the effect that, on 29th January, 2020 during 20:00 hours he was informed of the incident by the deceased's neighbor. Following that information, he ran to the scene and found the deceased with cut wounds. PW1 told the court that, he managed to take the victim to hospital only that she died while on the way thereto. He added that, the deceased's grandchildren told him that, they were invaded but they did not identify the invader.

Daniel Keroiga Marwa who testified as PW2 stated that, he is a Magistrate at Sagata Primary Court. His duties among others, is to record extra judicial statements for accused persons who wish to confess. He went ahead telling the court that, on 5th November, 2020 one Manyangu Salagudi (Accused) was brought to his office by a Police Officer, D/C Mfaume. He added that, as the said Manyangu Salagudi wanted to confess, he gave him all his rights which includes inspecting his body to see whether he had bodily injuries. After he was satisfied that the victim had no injuries, he started to record his statement. PW2 said that, the accused confessed to have killed the victim and went to hide himself at Meatu. PW2 tendered the extra judicial statement and the same was admitted as Exhibit P1. When cross examined, the witness stated that, the accused was arrested on 25th October, 2020 and he was sent to him for confession on 5th November, 2020.

G 8198 D/Cpl Mfaume (PW3) testified that, he is a Police Officer attached in the Criminal Investigation Department (CID) at Itilima Police Station. He said that on 25th October, 2020 he was ordered to go and take the accused person, Manyangu Kibasi from Bariadi Police station to Itilima police station. He added that, the accused was suspected to have killed the victim, Naomi Ngolo Banga. PW3 who also identified himself as the investigator in this case further stated that, as the investigator, he collected the Post Mortem Report on the cause of the victim's death and the sketch map of the scene. He tendered them to court and the same were admitted as Exhibits P2 and P3 respectively.

PW3 went on stating that, after he had taken the accused to Itilima Police station, he started recording his caution statement at about 0800 hours. He said that he did so after he had given him his rights. PW3 tendered the caution statement to court. However, it was objected on the allegation that, it was taken under the influence of torture. After conducting trial within a trial, the said caution statement was admitted as exhibit P4 while the court reserves the reasons and its credibility in the judgment.

PW3 contended that, he took the accused to the Justice of Peace on 5th November, 2020. He said that the reason for delay was that he was giving him time to refresh his memory before he takes him thereto,

and that it was the date that the accused had consented to be taken to the Justice of Peace.

When he was cross examined by the Defense Counsel, PW3 stated that, the accused was arrested by the Police Officers of Bariadi, not for murdering Naomi Ngolo but for another case. It was assertion of PW3 that, the issue of Accused murdering Naomi Ngolo arose when the accused himself had confessed while interrogated by Godi, a Police Officer at Bariadi Police Station. Further, PW3 stated that, the accused was taken to Justice of Peace on 5th November, 2020 as he had denied it first but he later on agreed.

On these three witnesses as I said earlier, the prosecution case got closed. In terms of the provisions of section 293(2) of the Criminal Procedure Act, the accused person was found to have a case to answer. After being addressed in terms of section 293(3) of the Criminal Procedure Act, the accused person opted to testify alone on oath.

The Accused Person, Manyangu Kibasi testified as DW1. His testimony is to the effect that, he was arrested on 12th October, 2020 by the Police Officers of Bariadi for unlawful accommodating foreigners (Burundians) in his residential premise at Ng'anga village. He said that regarding denial of the accusation, he was beaten up by a Police Officer

namely Godi. DW1 further stated that, he went on staying at Bariadi Police Station till 25th October, 2020 when a Police Officer, Mfaume took him to Itilima police station. He added that Mfaume interrogated him for killing Naomi Ngolo, the accusation that he denied. He said that, he was thus beaten again till he decided to agree. He added that, he was then put to lock up till 5th November, 2020 when he was taken to the Justice of Peace for confession. He said that, before approaching the Justice of Peace, he was threatened by Mfaume to state as what was recorded in the caution statement otherwise, he would be beaten again. In conclusion DW1 stated that, he never committed the alleged crime. When cross examined DW1 stated that, the extra judicial statement was recorded while the Police Officer Mfaume was present in the same room.

That marked the end of both parties' evidence. In view of the above evidence, the following issues call for determination: -

1. Whether the victim died unnatural death (if yes),
2. Whether the accused person is responsible for the death of the victim (if yes),
3. Whether the accused person, with intention (malice aforethought), killed the victim.

Concerning the first issue, whether the victim met unnatural death, it is not disputable by either party that Naomi Ngolo Banga is dead. According to the post mortem report which has been admitted in court as Exhibit P3, the cause of the death of the victim is hemorrhoid shock.

The admitted post mortem report shows that, the deceased's body had multiple cut wounds on the head, neck and amputated left arm. Such multiple cut wounds prove that, the victim met with unnatural death. As there is no evidence disapproving this fact, I see no need of dwelling much on this issue. It is thus positively answered that, the deceased Naomi Ngolo Banga met unnatural death.

Concerning the second issue as to whether the accused person is responsible for the killing of the victim Naomi Ngolo Banga, the prosecution side relies on the extra judicial and caution statements. The issue is whether that available evidence suffices to conclude that, the accused person is responsible for the killing of Naomi Ngolo Banga. I understand that, accused person may be convicted on the confession statements but that is when the court believes that the confessions speak the truth. This is after knowing that the same were recorded out of accused person's free will.

As the accused person denied to have made the confessions freely, I have to be cautious in approaching the said confessional statements.

Starting with the extra judicial statement, testimony of PW3 shows that, the accused person was arrested on 25th October, 2020 and his extra judicial statement was recorded on 5th November, 2020. This is after a lapse of 11 days. I understand that, there is no time limit to record extra judicial statement but the law on section 32(2) of the Criminal Procedure Act requires the extra judicial statement to be recorded within a reasonable time after the accused has been arrested.

In the case of **Awadhi Gaitan @ Mboma vs. Republic, Criminal Appeal No. 288 of 2017, CAT at DSM** (unreported) in which the cases of **Mashimba Dotto @ Lukubanija vs. Republic, Criminal Appeal No. 317 of 2013** (unreported) and **Vicent Ilomo vs. Republic, Criminal Appeal No. 337 of 2017** (unreported) were cited, the Court of Appeal was of the views that, delay of sometime would be tolerated upon explanations of the prosecution side on it.

PW3 is the one who in his testimony gave explanations for delay to take the accused person to the Justice of Peace. He **first** said that, he was giving a chance for the accused person to refresh his memory;

secondly, he said that it is on 5th November, 2020 when the accused consented to go to the Justice of Peace for confession; and **lastly**, he said that, the accused had first denied to confess to the Justice of Peace but he later on agreed to do so.

The issue is whether these explanations are reasonable enough for this court to ground conviction on the said extra judicial statement.

The explanations for delay as advanced by PW3 tend to bring doubts on the prosecution case rather than saving the extra judicial statement. The following are the reasons; **first**, the explanations by PW3 show inconsistencies and contradictions, it is uncertain as to whether on 25th October, 2020 the accused person was given time to refresh his memory or he had denied to confess before the Justice of Peace. This alone goes to the root of the matter.

Likewise, if we are to take the explanation that the accused had first denied to confess before the Justice of Peace, then it raises doubts. The reason behind is that, it does not sound well for the accused whom we have been told that he freely volunteered to confess before the Police Officer, denied to go before the Justice of Peace for the same purpose on that same date, till 11 (eleven) days later. Prudence dictates that, for the accused person who has freely volunteered to confess,

would not choose to do it before one person and deny the other. With this prevailing situation, it is doubtful to ground conviction on the accused person basing on the said doubtful extra judicial statement.

From the foregone discussion, then prosecution remains with the caution statement only. As for it, as well, the accused person denied to have made it freely. He alleged that he was tortured to make him confessing and sign the same. The question is, can this court convict the accused person solely basing on the retracted/repudiated confession?

I am aware with the position of the law that, it is dangerous to convict the Accused person relying solely on the retracted/repudiated confession without corroboration. See, **Dickson Elia Nsamba Shapwata and Another v. Republic, Criminal Appeal No. 92 of 2007, CAT at Mbeya** in which it was held;

“With respect, we agree with Mr. Mkumbe that, it is always desirable to look for corroboration in support of a confession which has been retracted/repudiated before acting on it to the detriment of the appellant.”

However, I am also alive with the position of the law that, a court may convict on retracted/repudiated confession even without corroboration. See, **Tuwamoi v. Uganda (1967) EA 84** in which it was held;

"The present rule then as applied in East Africa, is regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement that has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied that in some circumstances of the case that the confession must be true" See also Hemed Abdallah v. Republic (1995) TLR 172"
(Emphasis supplied.)

With the above reasoning, it follows therefore that, for the court to act on the retracted/repudiated confession of the accused person, it must be fully satisfied, while basing on some circumstances of the case that, those confessions must be true. The question is, is there some circumstances in this case that can make this court to have been fully satisfied that the confession is nothing but the truth?

Here I must admit that, in this case, there are no circumstances to convince this court that the confession is true. This is because the doubts that have been discussed in the extra judicial statement above, extend to affect the caution statement as well. The above discussed doubts in the extra judicial statement depict that the caution statement

was not the result of accused person's free will. This goes with the same line of thinking that, had the accused person volunteered freely to record his caution statement on 25th October, 2020 then he would not have denied to go to the Justice of Peace on that same day. With this doubt, I hesitate to convict the accused person solely basing on the caution statement.

Further, we all know that, in criminal cases the prosecution side has a duty of proving its case beyond all reasonable doubts. During the preliminary hearing, the prosecution side stated that, the police got information through their secret informer that the accused person is the one responsible for the murder of Naomi Ngolo Banga. To our surprise, the same prosecution side through their witness PW3 told the court that, the accused person was arrested for another offence and he was connected with murder of Naomi Ngolo Banga after he was interrogated following his arrest on that other crime. This situation shows that, the prosecution was not consistent. It is uncertain as to how the accused person came to be connected to this case. Was he connected following the police informer's report or regarding his own statements after he was arrested and interrogated for another crime? This uncertainty poses a very serious doubt that goes to the root of the case. The same doubt

credits the accused person's defense that, he was just joined to this case which is not his.

On that account, I am of the settled mind that, this issue is answered in the negative that, the accused person herein, is not the one responsible for the murder of the victim Naomi Ngolo Banga.

I thus proceed to find the Accused person, Manyangu Kibasi **not guilty of murder, hence acquitted.** He should be released forthwith, unless held for some other lawful causes.



A handwritten signature in blue ink, appearing to be "S.M. Kulita".

S.M. KULITA
JUDGE
30/03/2023

