

**IN THE HIGH COURT OF TANZANIA**  
**AT SHINYANGA**  
**CRIMINAL SESSION CASE NO. 64 OF 2021**

**REPUBLIC**

**VERSUS**

**1. NONI KULWA @ NYOROBI**

**2. BAHINI CHARLES**

**JUDGMENT**

*28<sup>th</sup> March & 6<sup>th</sup> April, 2023.*

**S.M. KULITA, J.**

The accused persons herein, Noni Kulwa @ Nyorobi and Bahini Charles stand 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 21<sup>st</sup> April, 2021 at Idosela village, Mwamapalala ward within Itilima District, in Simiyu Region, the accused persons murdered one Kwimba d/o Lushona.

Facts presented of the case as presented by the prosecution which gave rise to this trial are the following; that on 20<sup>th</sup> April, 2021 at 00:01 hrs the accused persons herein invaded the deceased while she was asleep in her room. That the Accused Persons cut the deceased with



panga to death. The deceased's child who was nearby the scene heard a cry for help. When she reached thereat, she only found the deceased already dead and the accused person ran away. The Post Mortem Report revealed the cause of death being severe bleeding. Further, according to the facts, the accused persons were arrested on the night of 8<sup>th</sup> June, 2021. They were interrogated and both confessed to have killed the victim. As such, the accused persons were arraigned to court for murdering Kwimba Lushona.

When the charge (information) of murder was read to the accused persons during Plea taking and Preliminary hearing, they all pleaded not guilty thereto. Further, on 28<sup>th</sup> March, 2023 when the case came up for trial, the information of murder was reminded to the accused persons who maintained their plea of not guilty.

In discharging the duty of proving the charge against the accused persons, the prosecution side summoned five witnesses and tendered three exhibits. The evidence of the prosecution and defense side can be summarized as follows:

A Police Officer namely ASP Enock Manase Seme testified as PW1. His testimony is to the effect that, following information they acquired that the accused persons murdered the victim, they managed to arrest them at their residential premises during the night on the 8<sup>th</sup> day of



June, 2021. He narrated that, when they arrested the first accused person, he told them that, in committing the offence he had a panga while the second accused person had a torch. He went ahead telling the court that, the first accused person told them that after commission of the offence he ran with the said panga to his home, thereat he washed it for avoidance of blood discovery by strangers. He added that, the first accused person showed them the said panga which was used in the commission of the offence. PW1 went on asserting that, they also arrested and interrogated the second accused person who confessed too. He added that, the second accused person told them that, they were hired by one Robert Daudi to kill the deceased as she was a witch. When he was cross examined, PW1 stated that, some other people were also arrested on the murder of the deceased.

Dr. Mpelwa Masawe who testified as PW2 stated that, he conducted post mortem on the deceased's body on 21<sup>st</sup> April, 2021. He mentioned the cause of the deceased's death being loss of blood due to multiple cut wounds she had sustained. The witness tendered the post mortem report and the same was admitted as Exhibit P1.

The 3<sup>rd</sup> witness for prosecution was a Police Officer No. H 4406 D/C Abuu (PW3). His testimony is to the effect that, after furnishing the first accused person, Noni Kulwa Nyorobi with all his rights, he recorded



his caution statement. PW3 stated that the said accused person confessed to have murdered the victim in accompany with the second accused person. The caution statement of the first accused was tendered to court and admitted as exhibit P2. When cross examined PW3 stated that, the first accused person was not arrested at the alarm (*mwano*) as by then he was not yet known as the killer.

G 4380 D/CPL Hassan (PW4), a Police Officer at Itilima Police Station, testified to the effect that, he had recorded the caution statement of the second accused person, Bahini Charles. He said that he had so done after he had furnished him with all his rights. PW4 further stated that, the second accused confessed to have murdered the victim in accompany with the first accused person. The witness added that, it was the second accused person's confession that, he had a torch while the first Accused had panga in the commission of the crime, and that they were hired by one Robert Daudi to kill the victim as she was a witch.

The 5<sup>th</sup> and last witness for the Prosecution, F. 2600 D/SSGT Emilian (PW5) stated that, he was among the Police Officers who had gone to arrest the accused persons. He added that, the first accused person showed them panga which he had used in killing the deceased. He tendered the same to court and it was admitted as exhibit P3 while



the court reserved the reasons and credibility of the same in the judgment. When cross examined PW5 stated that, there was no any local government official during the search.

On these five 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 persons were found to have a case to answer in Murder as charged. After being addressed in terms of section 293(3) of the Criminal Procedure Act, the accused persons opted to testify themselves on oath. They had no witness to call nor exhibit to tender.

The 1<sup>st</sup> Accused person, Noni Kulwa Nyorobi who testified as DW1 stated that, on the incident day, 21<sup>st</sup> April, 2021 he heard the alarm (*mwano*) and attended. He told the court that while he was there in *mwano* the victim's mother mentioned the suspects of the crime being the victim's husband and some other people. Those persons were arrested by the police who had already arrived at the scene. DW1 went on narrating that, he also participated in the burial of the victim.

Concerning this case DW1 stated that, on 7<sup>th</sup> June, 2021 his cattle were grazed in the farm of somebody Busika and ate the crops. He said that, Busika called Police who arrested him for that matter. As he was custodied at the police station, he demanded the second accused person



for bail. DW1 further stated that after he had got out of custody, they went to talk to Busika on how to settle the matter amicably. It was during that settlement when Busika got angry and promised something bad to all of them. DW1 stated that, as settlement had failed they arranged to attend the police station on the following morning. However, on the night of that day he was arrested by Police and forced to show the residential premise of the second accused, he actually did so. Thus, they were all arrested and taken to the police station.

Concerning the confession DW1 stated that, as he did not pay bribe to the police and compensation to Busika, he was tortured and forced to sign the caution statement sheet which was already filled the contents by police. He thus denied the allegation of being paid by Robert Daudi to kill the victim.

The 2<sup>nd</sup> Accused, Bahini Charles testified as DW2. His testimony is to the effect that, on the incident he heard and attended *mwano* at the deceased's residential premise. He further narrated that he saw the people who were arrested in connection with the incident. DW2 stated that he participated in the burial as well. He told the court that, he was in the village from the incident day up to the date that he was arrested. Concerning the murder incident, he said that, he didn't killed the victim.



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

1. Whether the victim met unnatural death (if yes),
2. Whether the accused persons are responsible for that death of the victim (if yes),
3. Whether the accused persons, with intention (malice aforethought), killed the victim.

Concerning the first issue, whether the victim met unnatural death, it is not disputable that Kwimba Lushona is dead. According to the post mortem report which has been admitted in court as Exhibit P1, the cause of the death of the victim is severe loss of blood.

The admitted post mortem report shows that, the deceased's body had multiple cut wounds on the head and the arm, inflicted by a sharp object. Such multiple cut wounds by a sharp object prove that, the victim met unnatural death. As there is no evidence disapproving this fact, I find no need of dwelling much on this issue. This is positively answered that, the deceased Kwimba Lushona met unnatural death.

Concerning the second issue as to whether the accused persons are responsible for the killing of the victim Kwimba Lushona, I have the



following observations; for the first accused, Noni Kulwa Nyorobi the prosecution side relies on the caution statement, and the oral confession that led to the discovery of panga. For the second accused, Bahini Charles the prosecution case depends on the accused's oral confession. The issue is whether that available evidence suffices to conclude that, the accused persons are responsible for the killing of the deceased.

To start with the second accused person, Bahini Charles, I am alive with the principle of law concerning oral confession as stated in the case of **Boniface Mathew Malyango & Another v. Republic, Criminal Appeal No. 358 of 2018** where the Court of Appeal referred to its holding in the case of **Tumaini Daud Ikera V. R, Criminal Appeal No. 158 Of 2009** where it held; -

*"we reiterated that oral confessions of guilty are admissible and can be acted upon, but we also emphasized that great caution is required before courts rely on oral confession to convict. Admissibility of oral confession does not automatically mean this genre of evidence carries sufficient weight to convict. Even where the court is satisfied that an accused person made an oral confession, the court must take*



*an extra distance to determine whether the oral confession is voluntary"*

In connection with the above quoted position of the law, I pose and ask myself, whether the second accused person made an oral confession before the police officers, and if he made it, whether it was voluntarily done by the Accused.

Prosecution witnesses stated that, all accused persons confessed to have killed the victim upon being paid by one Robert Daudi, for the reason that the victim was a witch. This court finds that, if the confession was real made, the prosecution would have said something on the whereabouts of the said Robert Daudi who is alleged to have hired the accused persons to kill the victim. To our surprise, there was no prosecution witness who said a word on the whereabouts of the said person nor his missing. And, if he was missing, which efforts had been done to trace him and what was the result? This scenario raises a serious doubt on whether the 2<sup>nd</sup> accused person made the said confession. With this doubt, I hesitate to convict the 2<sup>nd</sup> accused person basing solely on the alleged oral confession.

That said doubt extends to the first accused person, Noni Kulwa Nyorobi. The circumstance is the same as it is uncertain whether the



first accused person made oral confession that led to the discovery of the panga alleged to have been used in the commission of the offence.

The prosecution side tendered panga tending to prove that, the first accused person led the Police Officers who arrested him, to its discovery. With this evidence the prosecution side wants this court to believe that, despite all circumstances that the first accused person may raise, including torture, he made oral confession before them.

I understand that, the law wants materials that have been discovered regarding confession be the ones that are connected to the crime. In Murder cases for example; discovery of the deceased's body or parts of it, discovery of the grave, or anything else like blood which has connection with the deceased or the incident as a whole, can be used to connect the suspect with a crime. That being the principle, should this court believe the accused person's confession relying on the tendered panga which has no blood from when it was confiscated? Panga is just a home utensil, anyone can have it. It is possible to find it in every house. On that account, the peculiarity on the tendered panga would be there only if it could be found with blood. As there was no blood on it when it was taken, its connectivity with the murder incident is very minimal, if



not nothing at all. On that account, I firmly hold that, this piece of evidence too fails.

Further to that PW5 who is among the Police Officers alleged to have conducted a search stated that, there was no any local Government Official who was called to witness the search at the 1<sup>st</sup> Accused's residential premise and there were no reason for that. This also creates a doubt on the recovery of the said panga thereat.

The remaining piece of evidence against the first accused person is the caution statement only. The same was objected on the allegation that the first accused person was tortured for him to sign it. The issue is whether I should convict the first accused person relying solely on the said caution statement which is retracted/repudiated.

Position of the law is 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.**

*"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  
(Accused)”*

However, I am 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, to act on the retracted/repudiated confession of the accused person, the court must be fully satisfied, while basing on the circumstances of the case that, confession must be true. The question is, is there any circumstance in this case which makes this court to be 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 to believe that the confession statement alleged to have been made by for the 1<sup>st</sup> Accused is true. This is because the doubts that have been discussed above affect this caution statement too. If the caution statement were true, the prosecution would have said something on the whereabouts of the purported hirer (Robert Daudi) and why he was not joined to the case. Further, if the confession was true, the prosecution side would have tendered something material which is connected with the murder in question. As for this matter, they have failed to do so. With this in mind, I hesitate to convict the first accused person basing solely on this caution statement which is doubtful.

On that account, I am of the settled mind that, this issue is answered in the negative that, the accused persons herein, are not the ones responsible for the murder of the victim, Kwimba Lushona.

I thus proceed to find the accused persons Noni Kulwa @ Nyorobi and Bahini Charles **not guilty** of murder, hence **acquitted**. They should be released forthwith, unless held for any other lawful cause.



  
**S.M. KULITA**  
**JUDGE**  
**06/04/2023**



