

IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
ORIGINAL JURISDICTION
CRIMINAL SESSION CASE NO.112 OF 2022.
THE REPUBLIC
VERSUS
AMOS S/O BITIWELO@ SILOZYA

JUDGMENT

Date of Last Order: 30/03/2023
Date of Judgement: 16/05/2023

NDUNGURU, J.

An accused person Amos s/o Bitiwelo @ Silozya on 26th February 2023 was served a notice of trial on the Information for Murder contrary to section 196 of the Penal Code Cap 16, the information was read over and explained to the accused Person who was required to plea thereto, on his plea, he pleaded not true to the information. It was alleged in the particulars of offence that, the accused person Amos Bitiwelo @ Silozya on 12th day of

April,2017 at Isanga Village within Momba District in Songwe Region murdered one **Loidi s/o Silwela**.

The brief facts are that the accused person and the deceased were neighbours living in the same village. That on the event date at night hours, the deceased with his wife one Elina Sinkala were returning back home from their business kiosk where they were selling food. While on the way as Elina Sinkala was walking ahead followed by the deceased heard a gun explosion. As she turned back, saw the deceased fallen down bleeding. She raised an alarm for assistance. The neighbours gathered at the scene. The matter was reported to the Police where investigation commenced immediately.

The deceased body was examined. The examination report revealed that the cause of death was due to severe bleeding caused by the shot wounds. From investigation, the accused was arrested for murdering the deceased. Thus this trial. During plea taking the accused denied the charge laid against him. On preliminary hearing, the accused disputed all facts except his names and particulars that is his age, occupation, residence and religion.

On 27/03/2023 the trial commenced. The Republic was represented by Mr. Joseph Mwakasege, learned State Attorneys whereas Accused person

enjoyed the service of Mr. Ezekiel Mwampaka learned counsel. To prove the offence against the accused person, prosecution paraded a total of four Witnesses and tendered four Documentary Exhibits which are Sketch Map (Exh. P1), Post Mortem Report(Exh.P2), Extra judicial Statement(Exh. P3) and Cautioned Statement (Exh. P4). The defence had one witness, the accused himself tendered no exhibit.

Elina d/o Sinkala, testified as PW1. Her evidence was that the deceased was her husband. That she is running kiosk business, selling food. Her kiosk is located at Isanga village. She informed the court that, on the fateful date (12/4/2017) she with her husband were at their business place. That they closed their business at about 20.00 hours and left home. She said on their way back home she was ahead followed by the deceased. That while walking she heard explosive shocking sound. As she turned back saw the deceased lying down. She said by then she did not know what made the deceased fall down. She raised an alarm for help. The people gathered at the scene. By then the deceased was already dead. That the deceased was seen bleeding. The witness went on saying, she did not see the person who exploded the thing which made the deceased fell down. PW1 went on telling the court that the deceased had once in dispute over land matter with the

accused. But the said dispute was by then already resolved by the Village Executive Officer.

In cross examination PW1 told the court that the dispute over land was resolved. Having been resolved, the accused never overlapped to the deceased land any more. Every one kept on farming on his land. That she had never heard the accused complaining over land. She did not see the accused at the kiosk on the material date. Neither she saw him immediately before the event.

PW2 was Assistant Inspector Mika. He is a Police officer. His evidence is to the effect that he is a Police officer. In 2017 he was working at Tunduma Police Station in Momba District. He said on 12/4/2017 he was among the police officers who visited the scene at Isanga village. He further told the court that at the scene they met many people gathered while the dead body was lying. That the deceased was bleeding at the back. That the scene investigation revealed that the deceased was shot by a gun make shot gun or "Gobole". the witness told the court that at the scene he was assigned to draw the sketch map of the scene which could assist to show the environment or the circumstances in which the offence was committed. It is the witness who tendered the sketch map as exhibit (Exh. P1). When cross

examined the witness told the court that in the sketch map the point marked "D" is not shown it is an oversight. At the scene the sketch is drawn roughly but when arrived at the office is redrawn.

PW3 was Adriano Laimu Syumbi. He is medical officer working at Tunduma Health Center. His testimony was to the effect that on 13/4/2017 was assigned to conduct post mortem examination. The dead body subject of examination was in the mortuary. That at the mortuary the dead body was identified by the police officer who accompanied him. PW3 told the court that in his investigation, revealed that the body was intact but the back part of the body was full of multiple perforation wounds. In further investigating the wounds saw round iron bits(golori) and the wounds were still bleeding. The witness told the court that from investigation he conducted, he established that the cause of death was due to excessive bleeding due to the multiple wounds on the back. PW3 tendered the Post Mortem Report as exhibit (Exh. P2). In cross examination, PW3 told the court that in the mortuary he was accompanied with police officers.

F. 8448 Detective Coplo Abel testified as PW4. his evidence was that he is a police officer investigation section. He said on 21/4/2017 he was at Tunduma police station there went one person who wanted to talk with

him privately. The person told him that it was the accused person one Amos who involved in murdering the deceased. PW4 told the court that he told the court that he reported the matter to OC CID then went to arrest the accused. He went on telling the court that on 25/4/2017 he was assigned to take the accused person to the justice to make confession. Having made confession, he took the accused back to the police station. In cross examination, PW4 testified that they were two police Officers who sent the accused to Justice of Peace.

PW5 was one Potini Paul Massawe. This is a justice of peace who recorded extra judicial statement made by the accused person (Exh P3). his evidence is that on 25/4 2017 at about 02.00 pm while at Tunduma Primary court the police officer on Abel sent to him the accused person by the name of Amos Silozya for recording extra judicial statement. The witness said having taken the police officer away from the court compound he remained with the accused person. PW5 went on testifying that he asked the accused person if he is conversant with Kiswahili, who responded to be. He said, he further asked the accused on the date he was arrested the accused responded to had been arrested on 21/4/2017, whether he had ant heath problem, he said not. That the accused told him that he is willing to record

his statement. PW5 told the court that the accused person confessed to had killed the deceased one Loid. He said that the accused told him that he had land dispute with the deceased. That due to the existing land dispute he went to Zambia to hire the people who killed the deceased

PW5 went on telling the court that having completed recording the statement read it to the accused who later signed. That he (PW5) also signed and stamped it. He then handed the statement and the accused person to the police officer one Abel who brought him.

When cross examined, PW5 he said he did not ask the accused the cause of pain he was experiencing on his hands. That he did not ask the accused any question regarding the pain. He did not know how serious the pain was. PW5 said he asked the accused if he was suffering pain on other parts of the body, the accused denied. But he did not record anywhere. He said, the accused was brought by one police officer in the vehicle. Further, that the accused told him that the disputed land is located at Isanga village. That the dispute arose and was resolved. That the accused did not mention the date he went to Zambia. That the accused did not mention the date the deceased was killed. That he did not know what the accused was referring

on 19/4/2017. In reexamination, the witness told the court that the accused person told him how long he has been in police custody.

G.222 Coplo Samson testified as PW6. His testimony is to the effect that he is a police officer. He is stationed at Tunduma Police station. He told the court that on 22/4/2017 he was assigned by OC- CID to record cautioned statement of the accused. The witness said having given the accused all his rights the then recorded his statement. PW6 said the accused confessed/ admitted to have killed the deceased due to the land dispute. He further said the accused said he hired the people to execute the killing. That having completed to record the statement he returned the accused to the lock up and gave the recorded statement to OC CID. It is PW6 who tendered the said statement as exhibit (**Exh.P4**)

In cross examination, PW6 told the court that the accused was arrested on 18/4/2017. That he trusted the accused to be telling the truth. The accused told him that the relatives were far, he then was willing to make his statement in their absence. If he would real need the relative, he could have waited for them. That the accused told him that he went to Zambia to one Edwin who sent him to Jimi Siame.

After PW6 called off his evidence the prosecution closed their case. The court under section 293 of Criminal Procedure Act Cap 20 R.E. 2022 after having passed through prosecution evidence had the view that, the prima facie case was established to enable an accused to defend the information laid against him.

Amos Bitiwelo Silozya defended as DW1. He vehemently denied the charge. He testified that he is living at Isanga village. The deceased was his neighbor. He also shared the border of their farms. That the deceased died in 2017. He was buried at the home village whereby he participated fully in the burial activities. That the deceased died of being shot. That he was shocked when he got such information.

DW1 went on testifying that he was arrested on 18/4/2017 at night at his home as he was suspected to have killed the deceased. That he was taken to Tunduma Police station. He said while he was on the way to Tunduma Police station, the police told him that he is suspected to have killed the deceased due to the land dispute. That on 21/4/2017 he was seriously beaten by the police officers forcing him to admit to have killed the deceased. DW1 named Abel, Mika and Samson being the police officers who were beating him consistently. That from the beatings he sustained, DW1

said he signed the papers without being read to him. DW1 said he was beaten by club on the legs knees and hands. That he never requested the police to record the statement. That he was sent to justice of peace whom upon seeing him said "kweli umepigwa mwanaume wewe saini tu hapa mungu atakusaidia utatoka mbele ya safari. DW1 said he told the justice of peace that the police officers were forcing him to admit to have killed the deceased, but justice of peace told him to sign he will be served as he goes ahead.

DW1. Went on saying the alleged land dispute arose in 2004. The said border dispute was resolved by VEO one Adia Mtambo. Thereafter, they lived peacefully. That the said dispute was resolved in his favour. He wouldn't have grudge with the deceased because the dispute was resolved in his favour.

When cross examined, DW1 told the court that the deceased was his neighbor. That the deceased was older to him. He has lived with the deceased in the village peacefully for quite long. That at the police station he was beaten consecutively using club/lungu. That he won the land dispute. In the land dispute the deceased was the complainant. In reexamination, DW1 told the court that it was the police who was required to issue PF3, but

they denied to issue it for him. That even extra judicial statement (Exhibit P3) proves that he had pain in the hands.

After the defence side had closed its case that marked the closure of cases from either sides, meanwhile learned counsels had at liberty to file the final submission or not, in response they all opted not file the final submission leaving the court to proceed with judgement without final submissions.

The above being the prosecution and defence evidence, the issue for determination is whether the prosecution has proved the charge laid against the accused beyond reasonable doubt.

The accused before this court is charged with the murder offence. The murder offence is a creature of the statute. Section 196 of the Penal Code defines murder as;

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

From the wording of the above cited provision for the murder offence in this case to be established or proved the following issues must be proved beyond reasonable doubt:

- (i) Whether the person one Loidi s/o Silwela 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 Amos s/o Bitiwelo Silozya killed Loidi s/o Silwela, if yes,
- (iv) Whether his action was actuated with malice aforethought.

Regarding the first and second issues above, there is no rival argument from the two sides. Both sides are at one hand that the alleged Loidi Silwela is actually dead. Further it is evidenced by PW1, the wife of the deceased who was with the deceased at the scene. It is the witness who heard an explosion sound and when turned back found the deceased fallen down while bleeding and witnessed him passing. It is the evidence of PW2 that having received information on the murder tragedy happened at Isanga village, he with fellow police officers visited the scene. That at the scene they met many people and the deceased body was lying on the ground. While bleeding on the back. That the body had shot wounds. The evidence of PW1 and PW2 is corroborated by the evidence of PW3, the medical officer who conducted post mortem examination. His evidence was that the cause of

death was due to **severe bleeding due to multiple penetrating wounds on the back.** (Exhibit "P2")

The two remaining issues are very paramount. Starting on whether or not the accused person caused the death of the deceased. In my scrutiny of the prosecution witnesses, no witness has testified to have witnessed the accused person killing the deceased one Loidi s/o Silwela. PW1 who was at the scene with deceased did not see the person who shot the deceased. The evidence before me is therefore entirely circumstantial. The question is whether circumstantial evidence is admissible and the court can ground conviction based solely on circumstantial evidence. In **Augustino Lodaru V. Republic** [2114] TLR 45 (CAT) *the court held.*

"it is settled law that a court a conviction based solely on circumstantial evidence. This is so where the said evidence irresistibly led to the inference that it was the appellant and nobody else who committed the offence. Such evidence must also, be incapable of more than interpretation and the chain linking such evidence must be unbroken"

Basing on the above case law it is settled now that circumstantial evidence can ground conviction, but the standard of proof has not been

diminished. It has remained the same that is beyond reasonable doubt. In insisting the standard of proof to remain that is provided by the law, the Supreme Court of India **in Balwinder Singh V. State of Punjab**, 1996 ALR 607 had this to say:

"In a case based on circumstantial evidence the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be to take place of proof".

In the case at hand, prosecution case is centered on two sets of the evidence. The first set is of PW1. on one hand and PW4, PW5, PW6 on another hand. The testimony of PW1 is trying to establish the likelihood or possibility of the accused being the murderer of the deceased. Whereas the second set is the testimony of PW4, PW5 and PW6. This set of evidence is establishing the fact that the accused person confessed to have killed the deceased.

The testimony of PW1 is that the deceased had a land dispute with the accused person. That the dispute was on the farm border/ demarcation. According to the testimony of PW1, the dispute was referred to Village

Executive Officer (VEO) and it was finally resolved. To her word PW1 told the court that **may** be the accused had resentment or antipathy(kinyongo). That was a mere assumption. I am of that view because when cross examined, PW1 told the court that ever since the dispute was settled the accused never overlapped to the deceased farm anymore. She said everybody kept on farming his land. It was her further evidence that, she never heard the accused complaining on the then resolved land dispute. To my view if there could be such complains that would be an indication that the accused was dissatisfied with the resolution reached thus he had an antipathy. In the absence of that PW1's assumption lacks pillars to stand on.

On the same footing the evidence of DW1 is that the said land dispute arose in 2004. That the said dispute was settled by the Village Executive Officer. That the same was settled in his favour thus he could not have any grudge with the deceased. Being the position, my view is that the evidence of PW1 is of no assistance in establishing that it is the accused person who murdered the deceased.

The second set of the prosecution evidence as stated earlier is the evidence of PW4, PW5 and PW6. These are witnesses who are trying to establish that the accused person had in various occasions confessed or

admitted to have murdered the deceased. The content of the evidence of PW4 is that on 21/4/2017 a good samaritan told him that it is the accused person who murdered Loid. The evidence available is that it is on that information PW4 accompanied with other police officers rushed to arrest the accused. Unfortunately, the evidence is silent on how the informer came to know that it was the accused who killed the deceased.

Further, the evidence of PW4 is that on 25/4/2017 while at the police station he got information from his fellow police officer (whom he did not mention) that the accused wanted to be sent to justice of peace to record his confession statement. That himself with his fellow police officers sent the accused to justice of peace. This statement is difficult to be trusted. That is because looking at the accused himself, it is not worth to believe that having recorded cautioned statement demanded to be sent to justice of peace. But again why only PW4 who is an arresting officer and the recipient of information from the informer. to the contrary, DW1 denied to tell PW4 that he wanted to be sent to justice of peace, he was just taken by police.

PW5 is the justice of peace who recorded extra judicial statement (**Exh. P3**) whereas PW6 is the police officer who recorded cautioned statement of the accused person (**Exh.P4**). The substance of the two

statements purports that the accused person confessed and admitted to have committed the charged offence. Both statements were admitted by the court during trial. The question at hand is whether by admitting them should the court take them in wholesome. The wisdom to that effect can be traced in the case of **Steven Jason & Two Others Vs. R**, Criminal Appeal No 79 of 1999(CAT) Unreported where the court stated;

"However, it is common ground that the admissibility of evidence during the trial is one thing and weight to be attached to is a different matter".

Admission of the accused person confession or cautioned statement is only the first hurdle. The second hurdle that the trial court has to overcome is to evaluate or assess the weight of such confessions. The test being; after considering all the circumstances including whether there is any corroboration and whether the statement contains nothing but the truth. The law is trite that the court can convict the person basing on confession statement where it is convinced that the statement contains nothing but the truth. See **TUWAMOI V. UGANDA** (1967) EA 91, **Hatibu Tengo v. R**, Criminal Appeal No. 62 of 1998 (Unreported)

As to whether or not what is contained in a statement is true, several ways have been developed by decisions of the Court of Appeal of Tanzania. **First**, if the confession leads to the discovery of some other incriminating evidence. **Second**, if it contains a detailed elaboration relevant and thorough account of the crime in question, that no other person would have known such details but the maker. **Third**, it must be coherent and consistent with the testimony of other prosecution witnesses especially with regard central story. And **lastly**, the facts narrated in the confession must be plausible. See **Peter Mfalamagoha v R**, Criminal Appeal No.11 of 1979, **William Mwakatobe v R**, Criminal Appeal No. 65 of 1995 and **Shaban Daud v R**, Criminal Appeal No. 28 of 2001(All unreported).

Now when closely examined the contents of Exhibit P3 and P4 the two reveal two different motive for killing. In P3 it is reveals that apart from the existence of land dispute what pushed the accused to kill the deceased is the occurrence of death of his son which made him to suspect the deceased to have killed him because he was threatened "utakuja kuona cha mtema kuni" he thus went to Zambia to his friend for advice. Whereas P4 reveals that the motive behind for killing was land dispute which existed between the two. The fact that the accused lost his son and suspected the deceases to be

responsible is not contained therein. But two statements are said to have been made by the same accused person.

Further, the two statements are silent on the fact that the alleged land dispute was finally resolved and the life of the two went on in a normal way as testified by PW1, wife of the deceased and DW1 in his defence. Taking into account that Exhibit P3, P4 and the testimony of PW1 is the prosecution evidence it had to be coherent and consistent to each other. See **Shaban Daudi's case** (supra). Incoherence and inconsistency pointed above creates a lot of doubts as regards credibility or truthfulness of the said statements. In the absence of independent evidence to corroborate, the evidential value is very shaky and precarious.

From the evidence available on record, the accused was arrested following the information the witness, PW4, received from the informer that it is the accused who is responsible with the killing of the deceased. There was no further investigative evidence on how the informer got to know. But the evidence available(PW1) is that the accused had land dispute with the deceased. Further that it might be that the killing was a result of the long existed dispute. The fact that the presence of land dispute was not something secret or confidential as the same was reported to the village

authority means it was something known to the people or open to public. So following the deceased murder, it is rather easy for the people to opine that the accuse is the one who murdered the deceased. Thus even the informer might have relied on that assumption.

Furthermore, item 6 of P3 provides that the accused stated to have pain on the upper hands "ana maumivu mikononi juu ya viganja. PW5 did not bother to inquire on such pain as to the cause and when the pain started and for how long it persisted to satisfy himself as to the voluntariness of the statement maker when made it. To my view PW5 being a justice of peace was obliged to go a mileage further to inquire on that taking into account that coming direct from police custody.

Taking all those into account, I am of the considered and firm view that the prosecution has failed to discharge its legal noble duty of proving the case beyond reasonable doubt. I hold that the case against the accused person has not been proved to the standard required. The third issue being responded in negative the fourth issue is redundant

I hereby dismiss the case and acquit the accused person. He be released from the prison forthwith unless lawfully held for any other lawful cause.



It is so ordered.


D.B NDUNGURU

JUDGE

16/05/2023