

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)

SITTING AT MPANDA

CRIMINAL SESSIONS CASE NO. 16 OF 2022

REPUBLIC

VERSUS

LUSHINGE ^{s/o} MASASILA ACCUSED

JUDGMENT

30th May, 2023 & 4th July, 2023

MRISHA, J.

This is a criminal session case in which the accused **Lushinge ^{s/o} Masasila** stands charged with the offence of Murder contrary to section 196 and 197 of the Penal Code, CAP 16 R.E. 2019. It was alleged that on 22.01.2021 at Simanjiro Village, Mpanda District within Katavi Region, the accused murdered one **Spora ^{d/o} Massanja**.

The above allegations were denied by the accused person and as a result, the prosecution brought four witnesses and tendered a sketch map and caution statement which were admitted as exhibits P1 and P2 respectively, with a view of discharging their legal duty which is proving the allegations beyond any reasonable doubt.

PW1, D/C Constable Ainea testified that on 22.01.2021 at 1500 hours he went at the scene of crime which is at Simanjiro Hamlet, in Katambike Village, at Ugala Ward, within Mpanda District, in Katavi Region regarding the incidence of death of one **Spora^d/o Massanja**.

He was accompanied by his superior one **A/Insp. Ndangala** and upon reaching there, his superior instructed him to draw a sketch map of the scene of crime. At the scene crime they found the deceased body laying down outside the house; the body had cut wounds. Before drawing a sketch map, he asked a resident of that area one **Peter^s/o Luzige** who led him to identify the body and marks.

PW1 prayed to tender the said sketch map as an exhibit, but Mr. Laurence, learned Advocate for the accused person, objected such prayer saying that the map was not one of the exhibits which were read out to the accused during committal proceedings which is contrary to section 246(2) of the Criminal Procedure Act [CAP 20 R.E. 2019] (herein after the CPA). After hearing the rival submissions from counsel for the parties, the court overruled the objection and the sketch map was admitted as exhibit P1.

Upon being cross examined, PW1 said he is the one who drew a sketch map of the scene of crime on 22.01. 2021. While at the scene of crime

he did not find the accused person, but there was a congregation of more than one hundred persons. He also said that at the scene of crime he found the deceased body with some wounds on her body which indicated that they were caused by a sharp object, although he did not see the weapon.

PW2, A/Insp. Godfrey Luzabila Ndangala testified that on 22.01.2021 while at Mpanda OCCID Office doing his job, he received an information from Ugalla that at Simanjiro Hamlet, in Ugalla Village there was a person who was being cut with a sharp object and died. After receiving such information, he prepared his fellow police and a transport. He also informed the RCO Katavi and OCD Mpanda about the incident and his plan to go there. To the scene of crime, he was accompanied by **D/C Masuka, D/C Ainea, Constable Augustino and Sgt Salum** and Doctor **Boniface ^s/o Misaga** of Kanoge Health Centre.

Upon their arrival at the crime scene which is Ugalla village, Simanjiro hamlet, they found the deceased one **Spora Masanja** lying downwards being cut with a machete on her head, neck, face and hand, and she was seriously bleeding. Also, while at the scene of crime they saw a bench with charcoal written words, *"Mwanamasanja uchawi wako mwisho leo na wewe ufe"*

That thereafter PW2 assigned PW1 to draw a sketch map and PW1 did as instructed and he was assisted by **Peter ^{s/}. Luziga**, a hamlet leader. Also, at the crime scene the body of the deceased was examined by Doctor **Boniface ^{s/}. Misaga** and after such exercise, PW2 handed over the body of the deceased to the relatives for burial process.

While at the scene of crime they managed to arrest a suspect one **Maduka ^{s/}. Chenya** for investigation process; they took him to Mpanda Police Station for interrogation. On 25.01.2021 at 0400 hours PW2 was phoned by **PC Faraja** of Kanoge Police Post who told him that the suspect of murder incident at Simanjiro had been arrested.

After getting such information PW2 accompanied **PC Masuka, PC Feric** and **PC Feruz** to Ugalla Village. They reached there at 0600 hours and found the accused **Lushinge ^{s/}. Masasila**. He asked him orally why he committed a murder offence and the said suspect responded by confessing to have committed the offence alleging that the deceased had bewitched his children. PW2 then instructed **D/C Cpl Masuka** to record the caution statement of the accused person.

He further testified that at Kanoge there is no Police station, but there is a ward Police one **PC Faraja** who perform his duties in the office of Ugalla Ward. He said the Out Posts are there to collect information and

report to the Police station; also, their duty is to sensitize the public with police community education@Polisi Jamii.

When cross examined, PW2 said that he got the information on 22.01.2021 at 0800 hours when he was at his working station. He did not pick the bench which had harsh words from the crime scene; they just decided not to pick it. He did not say it was the accused who wrote the words.

That **Maduka s/o. Chenya** was arrested at the scene of crime and after being interrogated, he does not know why he was not jointly charged with the accused person; it is only the NPS who may explain a way why he was not so charged, but why he knows is that that person was connected with the allegations of commission of the offence.

Also, PW2 said he was informed by the whistle-blower that **Maduka Njenya** was behind the incident of murder. That the accused was suspected to have committed the offence of murder. He does not remember the phone number used by **PC Faraja** to call him, but it was around 0400 hours when he received his call. That the accused was interrogated at Ugalla Police Post.

On re-examination, PW2 said he could not hand over the body to the relatives before a post-mortem examination. That he did not explain

how the words in the bench relate to the accused. That it is the court which makes an order for the deceased body to be examined.

PW3, H. 9449 PC Faraja, testified that on 22.01.2021 at 0600 hours he was at his working station Ugalla Police Post doing his normal duties. While there he received a call from one **Peter ^s/o Luzige** a hamlet chairman who told him that there was incident of murder of a woman **Spora ^d/o Massanja** within Simanjiro hamlet.

After receiving such information, he reported the matter to **PW2** and proceeded to the scene crime where he found the said woman already dead, then at 0600 hours **PW2** arrived at the scene of crime with his team including the doctor. Thereafter, the investigation process was mounted whereby the doctor conducted a post mortem examination of deceased body, and the police interrogated the witnesses. Then information was obtained from a whistle-blower and a suspect called **Maduka ^s/o Chenya** was arrested.

That the said suspect was taken to Mpanda Police Station for interrogation. On 25.01.2021 PW3 got information from a whistle blower about another suspect; he assigned the vigilantes to find and arrest the suspect who was thereafter apprehended, then he reported the matter to **PW2** about the arrest of a suspect called **Lushinge ^s/o Masasila**.

Thereafter, PW3 went at the place where the suspect was, then he arrested and matched him to the lookup while waiting for his superior one **Inspector Ndangala** (PW2) and his team to come. Upon arrival of those policemen at 0600 hours, PW3 took out the suspect from the lookup and handed him to PW3. He identified the accused person in court as one **Lushinge ^s/o Masasila**.

During cross examination, PW3 stated that he was informed that the deceased is called **Spora ^d/o Massanja**; he was so informed by a phone, but he does not have the number of the informer one **Peter ^s/o Luzige**. He said **Maduka ^s/o Chenya** was also arrested in connection with the incident of murder but he is not in court. That **Maduka ^s/o Chenya** was arrested for investigation purpose. That the accused was arrested for interrogation in relation to the death of **Spora ^d/o Massanja**.

PW3 also stated that at the scene of crime there were vigilantes, but he does not recall the number of the vigilantes. He said when the accused was interrogated the vigilantes were outside for security purposes. There is a lock up at Ugala Police Post and that the suspect was retained for three hours.

That at the scene of crime he did not see any item or exhibit, the only exhibit found was a bench which had some writings which read, "*Mwanamasanja sasa uchawi wako leo mwisho, na wewe ufe*". On the material date he interrogated the neighbours in presence of the accused person who told him he was the second person to arrive at the scene of crime. However, PW3 said he did not reduce the interrogation into writing.

On re-examination, PW3 said 22.01.2021 is the date **Maduka** ^{s/}. **Mchenya** was arrested and that **Lushinge** ^{s/}. **Masasila** was arrested on 25.01.2021 at 0300 hours. He did not see the one who wrote the words on the bench, but he found it with those words. When examined by the court, PW3 said that at Ugala there is a Police Post.

PW4, G. 8136 D/C Cpl Masuka also a policeman; testified that on 25.05.2021 at 0400 hours he arrived at Mpanda Police Station and was instructed by PW2 to accompany him to Ugala Police Post where there was a suspect of murder arrested and kept therein. They arrived at Ugala at 0600 hours, and upon arrival, he was instructed to interrogate and record the caution statement of the arrested suspect. He took the suspect from the lockup and matched him to the interrogation room.

Before doing so, PW4 introduced himself to the suspect who also introduced himself to him as **Lushinge s/o Masasila**. He told him he is not forced to say anything, but if he says anything the same will be recorded and used in court as evidence against him. He also informed the suspect that he has a right to call a relative, friend or an advocate to be present when his statement is being recorded. That the suspect opted to make his statement alone in Swahili language.

PW4 said he began to record the statement at 0800 hours and finished at 1030 hours, then he gave the statement to the suspect for reading and after doing, so the suspect signed the statement. Thereafter, he returned the suspect to the lockup and informed his superior boss for other steps to be followed.

He said he knows the suspect and could identify him. He looked around and identified the suspect as one **Lushinge s/o Masasila** who is the accused person. He said through his statement, the accused told him that he killed the deceased because she was bewitching the children of his second wife and that he sourced such information from the witchdoctor.

That the accused told him that he killed the deceased on 22.01.2021 at 0800 hours and that he used a machete which after using to cut the

deceased, he washed it with some water. That the accused told him he was arrested by the vigilantes on 25.01.2021.

He said he could identify the caution statement by his force number, date of recording that is 25.01.2021, and his hand writing. He identified the statement and prayed to this court that the same be admitted as an exhibit. His prayer was objected by Mr. Laurence on the grounds that some of the pages were not signed by the accused person contrary to the provisions of section 57(3)(a)(iii) of the CPA that caution statement was not properly certified and that the same was recorded out of the prescribed four hours period. However, after hearing the submissions from the counsel for the parties, the court overruled the objection and the statement was admitted as exhibit P2.

During cross examination, PW4 said he began to interview the accused from 8000 to 1030 hours, that he recorded the statement while at Ugala Ward office. The interrogation room had one police officer who is himself, and before interrogating the accused person, he did not examine the accused to see if he had any injuries.

He went on to respond that there was not any vigilante at the time he was interrogating the accused person, except outside where he there were many people, though he could not recall if among them were

vigilantes. He added that he did not know why those people were waiting outside. That **Inspector Ndangala** handled over the accused to him, but he did not give him the accused person's arrest warrant after completion of interrogation. That in the interrogation room there were two chairs and a table. That after finished recording the statement, he gave the accused a caution statement to read and he read it.

He asked the accused if he knows how to read and write and the accused confirmed to him that he knows, that the accused the document signed using his right thumb print and by writing his first name. He arrived at Ugala Village in deviate dates that is 22.01.2021 and 25.01. 2021 and on 22.01.2021 he went at the scene of crime and remained in the police vehicle with a driver. That PW2 only instructed him to interrogate the accused person. He did not give the accused any advice. That he played his role as a policeman.

He also said that his duty was only to interview the accused. That after he finished recording the caution statement, he returned the accused in the lockup. He did not talk to the citizens who were present. When re-examined, PW4 said before being handled over the accused to interrogate, he did not know him.

On the other side, the accused person **Lushinge s/o Masasila** who testified as DW1, entered his defence on oath by stating that on 25.01.2021 he was arrested by the police at his home and conveyed to Ugala Police Post where he was given a paper and forced to sign it. That the police officer who gave him a paper told him that he was suspected of killing one **Spora d/o Massanja**.

DW1 went on to state that he knew **Spora d/o Massanja** as his mother-in-law and he was living in peace with her and used to help each other in different problems. He also stated that he did not commit the offence of murdering **Spora d/o Massanja**. He finally prayed to this court to set him free.

During cross examination, DW1 said he resides at Ugala with his two families. That Sara is his wife and they have three children **Hamis, Mashona** and **Tungo** who are all alive. He did not get a child who later passed away; hence he had not attended any funeral ceremony at his home. DW1 also said he remembers the prosecution witness **PW4** who testified in court.

He did not know **Maduka s/o Chenya** and he did not mention any name in his statement. That he was arrested on 25.01.2021. On 22.01.2021 he was at home. He was charged with the offence of

murder. He was forced to sign the document, but he did not know how to read. When re-examined by his advocate, **DW1** said he never had a tragedy at his house. That police officer one **Masuka** arrested and charged him with the offence of murder. He was forced to sign the statement.

After a defence case was closed, both counsels were granted leave to make their final submissions by way of written submissions pertaining to this case. In his final submission Mr. Gregory Muhangwa, learned State Attorney, began by describing the charged offence and the facts leading to the prosecution of the accused person.

As for the place of the commission of crime, Mr. Muhangwa submitted that the question for determination is whether the accused person is guilty as charged, and went on to submit that although the court rejected to admit the witness statement of a doctor who conducted an autopsy of the deceased body, the absence of such document cannot vitiate the prosecution case because medical evidence is not necessary where there is direct evidence.

To bolster his submission, the learned counsel referred this court to the case of **Hilda Abel vs Republic** [1993] T.L.R. 246, **Filbert Hubert vs Republic**, Cr. Appeal No. 28 of 1999(unreported) and **Mathias**

Bundala vs Republic, Criminal Appeal No. 62 of 2004(also unreported). He said, for example, in **Hilda Abel vs R.** (Supra) the Court of Appeal held that:-

"...the courts are not bound to accept medical expert's evidence if there are good reasons for not doing so"

Mr. Muhangwa also cited the case of **Leonard Mpoma vs Republic** [1978] T.L.R 58 to show that sometimes the cause of death may even be established without the production of the body of the alleged dead person. He further contended that in the case at hand there is a witness who saw the deceased body and drew a sketch map of the crime scene. He described such witness as PW1.

The learned counsel submitted further that the accused evidence failed to weaken the prosecution case due to several reasons being; **one**, that, the accused did not state anything substantive to what was stated against him by the four prosecution witnesses who are PW1, PW2, PW3 and PW4, **two**; that, the accused stated that he had not lost any child and that he did not know **Maduka s/o Chenya** who introduced him to the witchdoctor; three; that, the accused disappeared on 22nd Day of January, 2020 and did not appear until on 25th day of January, 2020 when he was arrested elsewhere.

Basing on the above reasons, it was the learned counsel's contention that the accused told lies and his subsequent conduct glues him with an incident of murder of the deceased, thus he prayed to this court to find him guilty of the offence he stands charged. To cement his proposition, Mr. Muhangwa cited the case of **Bomboo AMMA & Petro Juma @Lanta vs. Republic**, Cr. Appeal No. 320 of 2016, CAT at Arusha and **Nkanga Daudi Nkanga vs The Republic**, Cr. Appeal No. 316 of 2013 CAT at Mwanza where it was held that: -

"...lies of an accused person may corroborate the prosecution case as we think it has".

To put more salt on a wound, the learned counsel submitted that the accused person admitted the offence in his caution statement (exhibit P2) when interrogated by PW4 which makes him the best witness in the present case, as it was stated in the case of **DPP vs Nuru M. Gulampasul** [1988] TLR 82 that: -

"As the court has consistently pointed out in the past that the very best witness is an accused who confesses his guilty"

In assessing the weight of documentary evidence as indicated in Exhibit P2 above, Mr. Muhangwa invoked the provisions of section 27(3) of the Evidence Act, CAP 6 R.E. 2022(the Evidence Act) which provides that: -

"A confession shall be held to be involuntary if the court believes it was induced by any threat, promise or other prejudice held out by the police officer to who it was made or by any member of the Police Force or by any person in authority".

In applying the above provisions of the law to the instant case, Mr. Muhangwa submitted that there is no any piece of evidence that exhibit P2 was obtained by threat, promise or other prejudice held by the police officer who is PW4; the only notable objection put forward by the accused's counsel based on the technical aspects such as absence of certification of the caution statement which are curable under section 169(1) that is why the caution statement was admitted as exhibit P2.

He concluded that since the caution statement of the accused person was not obtained by vitiating factor then it is their prayer that the court act on the accused confession to ground a conviction upon him for committing the offence of murder, as charged.

On the contrary, Mr. Laurence John, learned Advocate, submitted that the prosecution side has failed to prove its case against the accused person on the standard required by the law. To back up his contention, the learned counsel cited the case of **Olafu Wikechi vs Republic**

[1995] T.L.R, **Anthony Kinanila and Another vs Republic**, Cr. Appeal No. 83 of 2021, CAT at Kigoma(unreported).

Having done so, the learned counsel submitted that the prosecution side has failed to prove all the ingredients constituting the offence of murder in order to establish that the accused person committed the offence. Submitting on how the prosecution failed to discharge its legal duty, Mr. Laurence contended that first, there is no proof that the deceased person is really dead and second, that there is no evidence to prove the cause of that death.

He went on to argue that because death of the alleged deceased person is at issue in the present case, it was the duty of the prosecution side to provide medical evidence in order to prove occurrence of death and that the same was unnatural, as per the case of **Gabriel Simon Mnyele vs Republic**, Cr. Appeal No. 437 of 2007 CAT at Dar es Salaam (unreported) where it was stated, intel alia, that: -

"...It was in the interest of justice for the prosecution to have tendered all available medical evidence as to the cause of death."

Concluding on that point, Mr. Laurence submitted that since the prosecution has failed to bring any medical evidence to prove the cause of death of the alleged deceased person one **Spora d/o Masanja**, then

it is their contention that the above shortfall suffices to show that death has not been proved by the prosecution side.

In attacking the caution statement tendered by the prosecution and admitted as exhibit P2, the learned counsel submitted that the same was retracted and/or repudiated by the accused person but was not corroborated which is contrary to the requirement of the law as per the case of **Nuru Venevas and 2 Others vs Republic**, Criminal Appeal No. 431 of 2021 CAT at Kigoma(unreported).

He also challenged the said documentary prosecution evidence by arguing that since the accused confessed before a policeman who is PW4, then the same is inadmissible as it was held in the case of **Nanyalika vs Republic** (1971) HCD 314.

Still on the same evidence, the learned counsel contended that the evidence of PW1, PW2, PW3 and PW4 has no legal value because it is hearsay evidence as per the case of **Ndaisenga Vicent vs Republic**, Cr. Appeal No. 523 of 2021 CAT at Kigoma(unreported) in which the Court *stated that*: -

"It is trite law that the court cannot rely on hearsay evidence to found a conviction because it has no evidential value."

Applying the above principle to the case at hand, the learned counsel argued that because the said prosecution witnesses were not present at the time the alleged murder offence was committed, it seems that they were told by other persons about the incident and came to testify in court, hence he asked this court not to rely on that hearsay evidence.

Mr. Laurence submitted further that the prosecution failed to call the material evidence could assist it in proving the offence of murder against the accused person. He mentioned those material witnesses, who were also listed during a preliminary hearing, as **Maduka s/o Chenya** who could be the accomplice, the second was **Peter s/o Luziga** who is alleged to have led the police to the scene of crime and assisted PW1 in drawing a sketch map (Exhibit P1).

Also, according to the learned counsel, other material witnesses not paraded by the prosecution side were **Doctor Boniphace s/o Misaga** who is alleged to have conducted the autopsy of the alleged deceased body, and **Monica d/o Gervas** who was alleged to have seen the accused person invading the house of the deceased armed with a weapon.

Basing on the above omission, Mr. Laurence argued that failure by the prosecution to bring those material witness to testify before this court

entitles this court to draw an adverse inference against the prosecution evidence as per the case of **Nuru Venevas vs Republic**(supra).

The learned counsel proceeded by challenging the prosecution's omission to tender the bench bearing the words, "***Mwanamasanja Uchawi wako mwisho, ufe na wewe***", suspected to have been written by the accused person. He also, argued that the prosecution ought to bring the said bench before the court in order to verify that the handwriting on the said bench resembles to that of the accused person, short of which, he argued, could mean that the offence against the accused person remained highly unproved. He cited the case of **Ignatus s/o William @Mjeshi vs Republic**, DC Criminal Appeal No. 67 of 2021 HCT at Sumbawanga (unreported) with a view of cementing his proposition.

In conclusion, Mr. Laurence submitted that he is mindful of the position of law that it is not necessary for the court to accept the defence of the accused person in order to find him not guilty; all that an accused need to do is to raise a reasonable doubt as to his guilty, as per the case of **Fanuel Khula vs Republic** (1967) HCD No. 365. He also referred this court to the case of **Anthony Kinanila** (supra) where it was held that: -

"...in any criminal trial, the accused must not be convicted because he has put forward a weak defence but rather the evidence led by the prosecution incriminates him to the extent that there is no other hypothesis than the fact that the accused person committed the offence with which he stands charged."

Applying the above position with the present case, the learned counsel submitted that the accused has successfully raised some reasonable doubts as to his guiltiness due to the fact that his testimony that he used to live in peace with the deceased, but the prosecution did not cross examine him on that meaning that they accepted what the accused said about his good relation with the deceased. A case of **Anna Jamaniste Mboya vs The Republic**, Cr. Appeal No. 295 of 2018 CAT at Dar es Salaam(unreported) was cited by the learned counsel to back up his contention.

Moreover, Mr. Laurence submitted that since the accused testified to the extent that he lived well with the alleged deceased, he had no any reason to murder her, thus it was unfortunate for the prosecution witnesses to testify that the accused had attended some funeral ceremonies at his home, something which pushed him to commit the offence.

However, Mr. Laurence argued that the prosecution failed to prove that fact beyond reasonable doubt, hence their allegations cannot stand. Finally, the learned counsel submitted that on the strength of the above submission, it is their observation that the accused person is not guilty of the offence of murder and it is their humble prayer that he be set free.

Dispassionately, I have gone through the evidence adduced by both parties, the rival submissions as well as the authorities referred to this court by the counsel for both parties. It is glaring that both parties are in one as to the fact that the accused herein was arrested, interrogated and charged with the offence of Murder contrary to section 196 of the Penal Code following the serious allegations that he is the one who murdered the deceased person.

Before dwelling on the substance and determination of this case, I wish to point out that it will not be fair for me, if I will not appreciate a great job the counsel for both parties have done through their final submissions. Their works have revealed to me, and perhaps any reader of this judgment, that they applied much energy, skills and resources in preparing their legal documents. Suffice it for me to say that I appreciate their commendable job which has enabled the court to

understand the case at hand and be in a good position to come up with a just decision.

Back home, it should be noted that like in any other criminal cases, a charge of murder contrary to section 196 of the Penal Code cannot be said to be committed, unless the prosecution sufficiently proves all the ingredients beyond any reasonable doubts. That is the legal duty which remains with the prosecution and it cannot be shifted to the accused person, save for some few exceptions which do not apply in this case.

The legal duty is provided under section 110(1)(2) of the Evidence Act, CAP 6 R.E. 2022 which categorically provides that whoever wants the court to give judgment in his favour on the existence of any fact must prove that such fact really exists and that the duty on him is beyond any reasonable doubt. Also, in a number of years, courts of law across the country and outside have been emphasizing about the prosecution's duty of proving its case beyond reasonable doubt. See **Jonas Nkize vs Republic** [1992] TLR 213(TZHC), **Anthony Kinanila**(supra), **The DPP vs Philipo Joseph Ntonda**, Cr. Appeal No. 217 of 2020, CAT at Zanzibar (Unreported), **Woolmington v DPP** [1935] 25 Cr. App. R. 72 and **Mancini v DPP** [1941] 3 All E.R. 272.

In the case of **Jonas Nkize vs Republic**(supra) Katiti, J. (as he then was) had the following to say on the burden of proof principle: -

*"The day shall never come, not in my life time, when such highly priced principles, of criminal prosecution, will be as simplistically thrown into the such dirty dust bin of convenience. That, the general rule in criminal prosecution, **the onus of proving the charge against the accused, beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking.**"*

[Emphasis added]

Also, in **Mancini v DPP (supra)** Viscount Simon, LC (as he then was) stressed that: -

*"I would formulate the following propositions...that **the prosecution must prove the charge it makes, beyond reasonable doubt**, and consequently, that if, on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it. **The rule is general application, in all charges, under the criminal law. The only exceptions arise, as explained in Woolmington's case, in the defence of***

insanity, and in offences where onus of proof is specially dealt with by statute.” [Emphasis added]

In the case at hand, the main issue is whether the prosecution side has proved the offence of murder beyond any reasonable doubts. Like I have said before, I had enough time to go through the evidence of both sides together with the rival submissions by the learned counsel and all authorities cited therein.

What I observed is that despite joining hands on the fact that the accused was arrested and charged of an offence of murder, the counsel for the parties have parted ways on the serious allegations that accused is the one who murdered the deceased person one **Spora d/o Massanja**.

In a bid to convince the court that the offence against the accused person has been proved beyond reasonable doubt, Mr. Muhangwa has argued that although the prosecution was unable to procure a doctor who conducted an autopsy of the deceased body and tender a postmortem examination report as an exhibit, the circumstances of this case do not necessitate proof of death through medical expert's evidence, as the first ingredient of murder because there is direct evidence.

While I am inclined to agree with Mr. Muhangwa's proposition that there is evidence to prove that the deceased actually died and her death was unnatural, I will choose a different route in showing how I am convinced that the prosecution has passed the test of proving the above first ingredient of murder.

It is undisputed that the doctor who conducted the autopsy of the deceased body at Ugalla, a scene of crime, on **Dr. Misaga**, was not procured by the prosecution side and the postmortem examination report that he filled was not tendered in court as an exhibit.

However, the evidence of PW1, PW2 and PW3 save for PW4 who interrogated the accused person, show that they arrived at the scene of crime and saw the deceased body with serious wounds on her head and body. PW1 drew a sketch map of the scene of crime (exhibit P1) which among other things, describes where the deceased body was found. Also, neither the accused person nor his advocate was heard disputing that prosecution evidence.

Basing on the above reasoning, it is my considered view that the prosecution has managed to prove that one **Spora d/o Massanja** actually died, and her death was unnatural. Hence, I am not persuaded

by the defence counsel who invited me to believe that the ingredient of death was not proved.

Next for my determination is whether is the accused person one **Lushinge s/o Masasila** who caused the death of the deceased person with malice aforethought. I must admit that this question has tasked my mind as I was looking on the evidence adduced by both parties and the rival submissions by the learned counsel. However, I am confident that the cardinal principal of our criminal law, as elaborated above, will guide me to the right way.

The prosecution witnesses who testified before this court were four. PW1 is the one who drew a sketch map of the scene of crime. PW2 led a team of police officers and a doctor at the scene of crime after receiving an information from PW3 that on 22.01.2021 one **Spora d/o Massanja** was found dead outside her house after being cut with a machete on several parts of her body including her face, neck and hand.

According to the evidence of PW3 the information about the incident of murder at Simanjiro Village in Mpanda District was availed to him by a Hamlet Chairman of that area one **Peter s/o Luziga** who also appears to be a person who assisted PW1 in drawing a sketch map of the crime scene as per the evidence of PW1 and PW2 , but he was neither listed

by the prosecution at the committal proceedings, nor was he brought before this court to testify that he is the one who identified the deceased body and assisted PW1 in drawing a sketch map of the crime scene.

Again, according to the evidence of PW4 it appears that he is the one who was instructed by PW2 to interrogate and record a caution statement of the accused person whom he said confessed to have killed the deceased person after being tipped by a witchdoctor that the deceased was bewitching his second wife's children.

From those pieces of prosecution witnesses' evidence, it is obvious that none of them saw the accused causing death of the deceased person. Their evidence remains to be hearsay evidence which cannot be relied upon to ground a conviction against the accused person, unless corroborated by the direct evidence of a person and/or persons who witnessed the accused causing death of the deceased by cutting her with a machete as claimed by PW2, PW3 and PW4 for it to have evidential value. See **Ndaisena s/o Vicent vs The Republic**(supra), and **Vumi Liapenda Mushi v. The Republic**, Cr. Appeal No. 327 of 2016[2018] CAT (12 October,2018 Tanzlii).

At this juncture, a question that calls for my determination is whether the evidence of PW2, PW3 and PW4 who tendered exhibit P2, is sufficient to prove that the accused person is responsible for causing death of the deceased person with a malice aforethought.

It appears that on the material date which is 22.01.2021 one **Maduka s/o Chenya** was arrested and conveyed to Mpanda Police Station following the suspicion that he was responsible for the murder of the deceased person. However, he was later released from police custody after interrogation. That was the evidence adduced by PW2 and corroborated by PW3. PW1 was at the scene of crime but he did not say if he witnessed the arrest of that person; same applies to PW4 who apart from testifying that the accused confessed to him that he killed the deceased person, did not mention anywhere the name of **Maduka s/o Chenya** in his testimony.

It is my conviction that the evidence of such prosecution witness leaves a reasonable doubt whether the accused person is responsible for causing death of the deceased person. I say so because such evidence shows that **Maduka s/o Chenya** was the first person to be apprehended in connection with allegations of murder and according to Mr. Muhangwa's submission, he is the one who led the accused person

to the witchdoctor who told the accused that the deceased is the one who bewitched his second wife's children.

In the circumstances, any reasonable man would have expected the prosecution to bring that person either as a co accused person, or as an accomplice in order to corroborated the evidence of PW2 and PW3 against the accused person.

The same applies to other material witnesses who are **Monica d/o Gervas, Sara d/o Meshack, Kadulyu s/o Malimi**. According to the facts of the case which were read during a Preliminary hearing, **Monica d/o Gervas** is the wife of the accused who is alleged be bewitched by the deceased and was present when incident of murder happened at night.

Also, **Sara d/o Meshack** is a mother-in-law of the accused person who was sleeping near the deceased house when **Monica** screamed for help after being invaded by an unknown assailant, and **Kadulyu s/o Malimi** seems to be the witchdoctor whom it is alleged that he is the one who told the accused that the deceased is a person who was bewitching his second wife.

It appears that all those persons were not brought by the prosecution to testify in court despite the material information they seem to possess,

and unfortunately no reasons were given by the prosecution as to why they failed to parade them as key witnesses. In the case of **Gabriel Simon Mnyele v. Republic**(supra) the Court of appeal emphasized that: -

"...it also the law that the court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons"

As I have intimated above, the prosecution failed to bring material witnesses mentioned above without assigning any reasons while in actual fact, they were within reach. In the circumstances, this court draws an adverse inference on the prosecution evidence against the accused person.

As for the caution statement which was tendered by PW4 and admitted by this court as exhibit P2, it is a trite law that admission of a document as evidence in a trial is one thing, and the weight to be attached on it is another. See the case of **Stephen Jason and Another v. R**, Cr. Appeal No. 79 of 1999(CAT) (Unreported) and **Nyerere Nyague v. Republic**, Cr. Appeal No. 67 of 2010 (CAT)(Unreported). In the latter case the Court of Appeal emphasized that: -

*"Even if a confession is found to be voluntary and admitted the trial court is saddled with the duty of evaluating the weight to be attached to such evidence **given the circumstances of each case.**" [Emphasis added]*

In the case at hand, there is no doubt that the accused caution statement was admitted in court as exhibit P2. However, it appears that the same was retracted by the accused during trial. This can be ascertained from the evidence of accused who repeatedly said he was forced by PW4 to sign the caution statement. In my view such confession ought to be corroborated in order to support it. See **Nurus/o Venevas v. Republic**(supra).

Also, I have observed that the circumstances under which such caution statement was recorded were not conducive for the accused person to make it voluntary. This can be gleaned from PW4 who upon being cross examined say when he was recording the accused statement there were many people waiting outside.

The evidence of PW3 shows that the accused was arrested by vigilantes on 25.01.2021. Taking into account the evidence of PW3, PW4 vis a vis the accused testimony who complained to have been forced to sign a paper, I am of the view that the said statement was not voluntary made.

It is also my view that in order to eliminate all possible suspicions that the statement was not voluntarily made, PW2 who was the team leader, ought to make some arrangements for the accused to be taken to the Justice of Peace for his extra judicial statement to be recorded. Had that been done, the confession of an accused person could well be corroborated by a Justice of Peace.

Since, there was no such corroboration and the accused person has strongly denied to have committed the offence to which he stands charged, then I accord no weight to the above documentary evidence as per section 27(3) of the Evidence Act.

Before I pen off, I wish to recall the principle stated in the case of **Christian s/o Kaale and Rweikiza s/o Benard vs. Republic [1992]** T.L.R. where the Court of Appeal stated that: -

"...the prosecution has a duty to prove the charge against the accused person beyond all reasonable doubts and an accused ought to be convicted on the strength of the prosecution case."

As I have endeavoured to demonstrate above, the prosecution evidence is shadowed with a lot of discrepancies. That entails that the prosecution has failed to prove its case on the standard required by the law. Thus, basing on the above reasons, I find the accused not guilty of an

It is so ordered.


A.A. Mrisha
JUDGE
03.07.2023

DATED at MPANDA this 3rd Day of July, 2023.


A.A. Mrisha
JUDGE
04.07.2023

Judgment delivered via video conference from the High Court of Tanzania, Sumbawanga District Registry in the presence Mr. Kizito John Kitandala, learned State Attorney for the prosecution Republic, Mr. Eliud Ngao, learned Advocate who were at the Resident Magistrates' Court at Katavi, Mpanda this 4th Day of July, 2023 and the accused person present.




A.A. Mrisha
JUDGE
04.07.2023