

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KASULU

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 48 OF 2022

REPUBLIC

VERSUS

ABELI S/O ANDREA.....ACCUSED


JUDGMENT

13/7/2023 & 18/7/2023

Mlacha,J.

The accused Abel Andrea is charged of murder contrary to section 196 and 197 of the Penal Code, cap 16 R.E 2022. It was alleged that he murdered Joseline Leonard at Nyakasanda village, Kibondo district, Kigoma region on 22/6/2022. He denied the charges. The prosecution lead by Edna Makala state attorney called 9 witnesses who tendered six exhibits to assist them in discharging their burden of proof. The accused was the sole defence witness.

I prefer to start with the evidence of PW4 in my presentation of evidence. He is the Nyakasanda village chairman. It was his evidence that while at home during the night of 22/6/2022, he received a call from the chairman of Kibogo hamlet who told him that Joseline Leonard had been killed. He



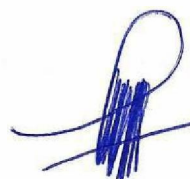
moved to the scene of crime and found her on the ground. She was dead. There was a lot of people who included the hamlet chairman. Looking close, he found her with blood coming from her nose, ear and rear side of the head. The body was on the ground at a street road. He made a call to the OCS of Mabamba police station who is PW5 ASP Hatari Sulusi Matabi. PW5 came later in the company of other policemen and PW1 Dr. Salehe Amani. The doctor checked the body. They decided to send it to Mabamba health center for observation.

It was the evidence of PW5 that he came with the doctor at the scene of crime in the company of other policemen. They arrived at around 9:00 – 10:00Pm. They found the body on the ground with blood coming out from the nose and ears as said above. She also had some blood on the shoulder. He directed PW2, G5474 D/CPL Musa to draw the map of the scene of crime. They had big torches which could assist the process. On his further inquiry, he was told that the deceased had a small body. He demanded to know its whereabouts. The husband of the deceased, Nyamweru Andrea said that it was at home. He went home to see the child. He met a daughter of the deceased called Antilia Nyamweru (PW6) who said that the child was asleep. He saw the child. He appeared okay. PW6 told him that he was at home and

heard her mother crying for help. She run to see her mother. She found her on the ground. The child was aside. She saw her uncle called Abel Andrea, the accused person, holding a stick and machete. He was running from the area. She tried to call her to come back for assistance but he could not come back. What shocked her was hearing her mother calling for help but seeing his uncle running away. She believed her uncle must have been the one who killed her mother. PW5 went back to the scene of crime and looked for Abel Andrea without success. It was suprising to miss him because there was a lot of people. PW2 drew the sketch map, exhibit P2.

It was the evidence of PW1 that he examined the body which was not breathing at all. He proved that she was dead. He adviced the police to take the body to the hospital because it was night.

It was the evidence PW6 that her mother moved with a sick child, Tecla, to buy medicine at the village center. Her father was in the farm cultivating maize. The farm is far away. She and her brothers and sisters remained at home. She then heard her raising an alarm looking for help. She got out running towards the area of the voice. He saw Abel running away. Abel is his junior uncle. He was running from the place where his mother had been towards the bush. He had a stick and machete. Her mother was on the



ground moving around. She was not speaking at this time. She was shaking her head. The child was aside calling her. She called Abel to assist so that her mother could not die but he proceeded to run away. It was around 7:00PM. There was light from the sun. Darkness was yet to fall down. There was nobody at the area. She picked the child and moved to the house of her senior uncle (Nazareti) to check if he was there but he could not see him. She met his child Isaya. She told him that her mother had been beaten. Isaya moved to see her. She rose an alarm seeking for assistance. The child was on her back at this time. People who came advised her to go back home to take care of her junior brothers and sisters. She left because it was nearby. The police came to see him at home. She he told them that she had been beaten by Abel. She could identify him in court. She insisted that she saw him running away from his mother holding a stick and machete. She could identify the stick, exhibit P5.

It was the evidence of PW1 that he examined the body of the deceased on 23/6/2022 and found blood on the mouth, ear and nose. She had a small wound on the rear side of the head. He pressed the head using his hand and noticed that it was soft. He discovered that the deceased sustained head injury damaging the brain. She missed oxygen in the brain and died. He had



the opinion that she was beaten by a blunt object on the head damaging the brain leading to death. He filled the postmortem examination report, Exhibit P1 and gave it to PW5.

It was the evidence of PW5 that on 26/6/2022 he got a report that Abel had confessed and was ready to show the stick and machete. His confessional statement (exhibit P6) was recorded on 22/6/2022 by PW9 G 7801 D/CPL John. PW5 decided to move with the accused to his home place where he could show the stick and machete. He moved to PW4 who could accompany them to the area. They met PW4 whom they told that the accused had confessed and was going to show them the stick and machete. Abel charged and said that he had thrown them in the bush. They move to the bush to trace them without success. He changed again and said that they were at home. PW4, PW5 and other policemen were led by the accused towards his home place. They met his wife. The accused said that the bamboo stick was inside. They entered inside. He showed them the bamboo stick and the machete. He said that he used the stick to beat her. He also showed the machete. They were seizure by the police. They filed a seizure certificate exhibit P4 which was signed by people in attendance. PW5 sent them to the police station and gave them to the exhibit keeper, CPL John. He directed



the accused to be sent to the justice of peace (PW3, Ratwifu Almas Omary). The justice of peace recorded his extra judicial statement which was received as exhibit P3. He recorded it on 29/6/2022.

The accused and the exhibits were later shifted to Kibondo police station where he was charged and sent to court. The exhibits were received by PW7 WP 10513 PC Grina (28) who handled them to PW8 WP 9703 CPL Alinda (30) the exhibit keeper. PW7 received them temporarily at the RCO office because PW8 was absent. The cautioned statement of the accused, exhibit P6 was tendered by PW9 after a trial within trial.

The court formed the opinion that there was evidence showing that the accused committed the offence. The accused was told of this fact and informed of his rights of defence. He elected to give a sworn evidence. He had no witness to call.

It was the defence of the accused that he was in the nearby village of Nyabitaka at the market on 22/6/2022. He arrived home late and went to sleep. He rose up at 00:00 midnight. He was told of the death of Joseline at this moment by his wife. He opted to proceed to sleep and go there in the morning. Joseline is a wife of his brother. He moved to his brother in the



morning and acted with others in the burial ceremonies. The police came later and arrested him. They accused him that he had killed Joseline something which is false. He challenged the evidence of Antilia saying that she could not establish the distance. She could not raise an alarm. He went on to say that they had a family dispute but it was solved 3 years ago. He said that the chairman of the village, Mr. Bedeche did not produce any exhibit showing that he had killed Joseline. He went on to say that the justice of peace recorded the statement using information supplied to him by the police. He went on to say that it was not wrong for him to have on machete or stick at home because he was a peasant. The stick brought is a hoe stick, he said. He proceeded to say that he was beaten before signing the cautioned statement. He asked the court to set him free.

Looking through, I could see no dispute that Joseline was found dead on the ground with blood coming out from the ears, nose, mouth and the rear head. The head was soft showing a breaking of the skull. The doctor said that she was beaten by a blunt object on the head which caused brain injury and death. The police and the village chairman supported the finding of the doctor. The accused did not question this element. So, death and the cause of death is not an issue.



The issue is who killed Joseline and if he had malice? We have the evidence of PW4 who was told the court that he came and found her on the ground. She was dead with blood coming out from the ear, nose and rear side of the head. He notified PW5 who came with a doctor and other policemen. PW5 support what was said by PW4. He was informed that that the deceased had a child. He moved home to see the condition of the child who was okay. He then got the story of PW6. That she heard a cry from her mother and moved to her risqué. She saw her on the ground fighting for her life. She was speechless when she came. That as she was approaching the area, She saw the accused moving away towards the bush holding a stick and a machete. She called her in vain. PW6 repeated these words in court saying it was at 7:00PM in a day sunlight.

The issue now is whether PW6 could identify her properly. The law on visual identification is now settled. In **Wankuru Mwita v. Republic**, (CAT), Criminal Appeal No. 03 of 2004 pages 5 it was said thus:

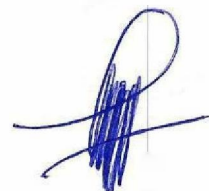
*"The law is also well settled that **visual identification evidence is one of the weakest kind** and in order to sustain a conviction it must be cogently established to the court's satisfaction that the conditions are favourable for an accurate*

*and water – tight identification of the accused and that it is free from all possibilities of mistaken identification (see **Waziri Amani V. R** [1980] TLR 250; **R.V. Eria Sebwato** [1960] EA 174; **Igola Iguna and Noni @ Dindai Mabina V.R**, Criminal Appeal No. 34 of 2001; and **Anthony Kigali V.R** Criminal Appeal No. 94 of 2005; (All CAT unreported))."*

The court went on to say the following at Page 6 and 7:

*"The seductive effect of identification is very persuasive. It has resulted in and may lead to the conviction of the innocent (see **R.V Turnbull and others** [1977] Q.B. 224, 228 – 229. **RV. Forbes**, [2001] 1 All E.R. 686). Even in recognition cases, capable of making and do make mistakes in recognition of close relatives and known friends or persons (see **Issa s/o Mgara @ Shuka V.R**, Criminal Appeal No. 69 of 2002 [CAT, unreported])). ... The frailties inherent in visual identification or recognition evidence imposes a requirement on courts to proceed with attention, caution and judiciousness."*

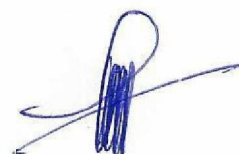
In page page 11 the court said thus:



*In **Marwa Wangati Mwita and Another V.R (2002)**. TLR we potentially stated that **the ability of a witness to name a suspect at an earliest opportunity is on all important assurance of his reliability**. In the same ways as an unexplained delay or complete failure to do so should put a provident court to inquiry...There is of course no fixed barometer to measure what amounts to an earliest opportunity or a rigid time – line that can be safely prescribed by law. Each case must turn on its own set of facts and circumstances."*(Emphasis added)

See also Kanyororo Marwa @ Kanyumko v. Republic, Criminal Appeal No. 100 of 2011 page 7 (LUANDA, J as he then was) and **Moris Jacob @ Ombee And Charles Joseph @ Robi Nyirabu v. Republic**, Criminal Appeal No. 220 Of 2012 page 6 (CAT).

PW6 spoke of the time which was 7:00PM. In our locality the sun is still up at this time so the crime was committed in broad day light. The area was open without any obstacle in between. She knew him before because she was her uncle. Given the distance which was a short range, the existence of sunlight, the absence of an obstacles in between, and the fact that she knew



her before, I don't find any possibility of mistaken identity. Further, the fact that PW6 could name him soon after the commission of the crime give her more credit. See **Peter Abel Kirumi v. Republic**, (CAT) Criminal Appeal No. 25 of 2016 and **Chacha Jeremiah Murimi and 3 others v. Republic**, (CAT) Criminal Appeal No. 551 of 2015. The accused was therefore properly identified.

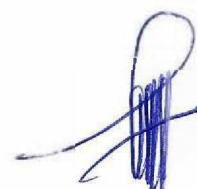
Next is the confession and extra judicial statements. The accused confessed before PW9 and PW3. He alleged to have been beaten before making the confession to PW9. This fact was examined in the trial within trial and he could not prove that element. He had no any PF3 or medical chit from the prison hospital. He alleged to have wounds but could not show wounds or scars to the magistrate at the district court. He could not show any scars to this court. He alleged that PW9 got the contents of the statement from some other people at the village but the court could not see that possibility. It instead believed PW9 and held that the statement was made voluntarily. I don't have a different opinion.

Speaking of the extra judicial statement, the court was asked to reject it because PW3 recorded it from a paper supplied to him by the police. Part of the extra judicial statement reads as under in Kisawhili:

"Ilikuwa siku ya Jumatano (5) ya Tarehe 22/Juni/2022 marehemu Joslin Leonard alikuwa sokoni, nilikuwa namuangalia. Baada ya hapo aliondoka kwenda nyumbani kwake. Mimi nilimfuata njiani nikamkata nikamuua. Nilimpiga rungu kichwani na shavuni akaaguka. Baada ya hapo mimi nilienda nyumbani na asubuhi ya siku iliyofuata nikaenda kwenye msiba wake, na ndio hapo nilikamatwa na askari polisi".


This literally means that he saw the deceased and followed her. He beat her with a club on the head and killed her. It is a clear confession. I believed PW3. He appeared to be well versed with the law and honest. I don't believe that he took these words from a police paper supplied to him by the police as alleged.

It is thus my finding that both the confession to the police and the justice of peace were voluntarily made and contain what was said by the accused. In law the evidence of a witness who confess is the best evidence. See **Jacob Asegelile Kakune v. DPP** (CAT), Criminal Appeal No. 178 of 2017 and **Paulo Maduka and 4 others v. Republic**, (CAT) Criminal Appeal No. 110 of 2007.



The words of the accused on the other hand were doubtful. It is hard to believe that the accused who live nearby, could be told that the wife of his brother had been killed and proceed to sleep till the other day. That is not practicable unless it is a lie. He alleged to have been tortured before making the confession but that aspect could not be established. He also attacked the magistrate saying that he forged the extra judicial statement but that element has been rejected. He challenged the identifying witness but the challenge has been found to be baseless on the reasons given above.

Based on the evidence of PW6, the eye witness, the confessions to the police and the justice of peace and the fact that the accused led the police to the place where he had put the stick used to commit the crime, I am satisfied that the prosecution have proved its case beyond reasonable doubts. I find you the said Abel Andrea guilty of murder as charged and convict accordingly.

A handwritten signature in blue ink, consisting of a stylized 'L' and 'M' with a horizontal line crossing through them.

L.M. Mlacha

Judge

18/7/2023

SENTECNE

There is only one sentence for murder which is death by hanging. Personally, I don't want this sentence but my hand are tied by the law and the judicial oath. I sentence you the said ABEL ANDREA to suffer death by hanging.

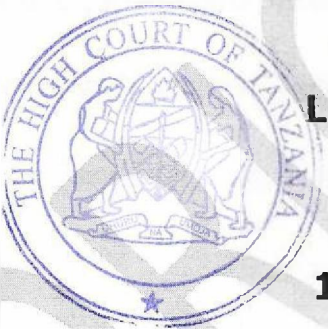



L.M. Mlacha

Judge

18/7/2023

Court: Judgement delivered. Right of Appeal Explained.




L.M. Mlacha

Judge

18/7/2023