IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF ARUSHA

AT BABATI

CRIMINAL SESSION NO. 98 OF 2022

REPUBLIC

VERSUS

TLUWAY SHAURI

JUDGMENT

Date: 2/5/2023 & 25/8/2023

BARTHY, J.

Tluway Shauri, the accused person herein, faces a charge of murder contrary to Section 196 of the Penal Code [Cap 16. R.E 2019] as punishable under Section 197 of the same Code.

The prosecution alleged that on 9th day of March, 2021 at Seloto Village within Babati District in Manyara Region, the accused murdered one John Reginald @Junior a three months baby.

When the charge was read over to him, the accused pleaded not guilty and the matter ensued to full trial.

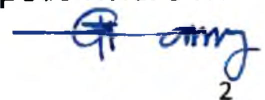
Throughout trial, the accused was proficiently represented by Mr. Joseph Masanja, learned advocate. The prosecution enjoyed services of Ms. Rhoida Kisinga, learned senior state attorney and Ms. Grace Christopher, learned state attorney.

During the hearing of the trial, in discharging the burden of proof the prosecution side marshalled six witnesses as required under section 3(2)(a) of the Evidence Act [Cap 6 R.E. 2022]. The following is the summary of their testimony.

Yasini Hussein the local militia testified to the effect that, on 9/3/2021 during noon hours, he heard rumors over the death of 3 years old child who was drawn in the big jar of water. PW1 went to the scene and saw the dead child on top of the water jar.

On 10/3/2021 during midnight hours he got a call from a man he did not know informing him as the local militia that, the man suspected to have killed the child has been found.

PW1 headed to Seloto village where the crime had occurred and found the crowd had gathered at the house of Tluway (now the accused person or DW1). He arrested the suspect and took him to Belma police post where he



was restrained until the following day when he was taken to Babati police station.

PW1 had known the accused person for about 3 years when he was working at the farm of Christopher Lyamuya.

While at the police station, on 10/3/2021 at about 09:00 the DW1 was made to record his cautioned statement before police officer G. 4205 Assistant Inspector Mwita Elias as PW2.

PW2 went on to state that, he wrote the cautioned statement of the DW1 and he had informed him with his rights prior recording it. Then DW1 signed to acknowledge he was cautioned. Since DW1 was said to be illiterate, PW2 started recording his statement under section 58 of the Criminal Procedure Act [Cap 20 R.E. 2019] (to be referred to as the CPA).

After PW2 recorded his statement, he read it out to him and DW1 signed verify it on each page. Then PW2 certified the same. The cautioned statement was tendered by PW2 and admitted by court as Exh. P1.

It was stated by PW2 that DW1 had confessed to put the child of Luiza in a big jar of water. PW2 identified DW1 to be the one who he had recorded his cautioned statement.

There was also Veronica Dominic an 11years as PW3. On her testimony she stated that, she knew Luiza (PW5) as their neighbour as well as the accused person. On further evidence she stated that, on 9/3/2021 at 0200hrs she went to play to the house of Zeriobia who lived with PW5, however she did not find anyone at home.

PW3 stated that she only found the baby sleeping alone, then she decided to go the rivers to look for her. PW1 found Zeriobia and PW5 washing clothes.

PW3 joined the duo but within no time she departed back home. On the way she met with Tluway (DW1) near the house of PW5 and saw him going to the house of PW5.

Sometime later, the body of baby John (the deceased) was found floating on top of that jar. However, on cross examination PW3 admitted to have not seen DW1 putting the deceased in the water jar.

Bertha Joseph who testified as PW4. On her testimony she stated that on 9/3/2021 at 1500hrs she headed home with the aim of using the bathroom/ rest room. After attending to the call of nature, she went to take

a water outside the house. As she opened the jar that was near the door to the house, she saw something she was not sure of to be the doll or the baby.

PW4 ran off screaming and frightened, then she started calling people. Three women and one man who was said to be DW1 went to the scene and verified it was the baby inside the jar. Later on, the police arrived at the scene.

There was also Luiza Elibariki as PW5. On her testimony she stated that she lived with her husband Regnald and her child Dativa aged 1 years and 3 months. Also, she lived with other relatives of her husband. PW5 went on stating that she also had a baby called John, but he has died when he was 3 months old on 9/3/2021.

PW5 recalled the event on 7/3/2021 when her young sibling sister went with her friend to see her baby. As she was seeing them off, PW5 leaned on a fence of the house of the DW1. However, DW1 remarked about that and when PW5 responded it was nothing, but the DW1 started to insult her and chase her off.

PW5 ran off to her house and stayed inside, but DW1 continued telling PW5 that he will do something that she will not forget.

Then on 9/3/2021 at 1400 hours PW5 bathed her baby (the deceased), breastfed and eventually put him to sleep. Then she left with Zenobia to the river to wash clothes and leaving the deceased sleeping alone inside the house, but she did not lock the door.

As they were still washing PW3 joined them, but after sometime she left. The duo after they finished washing clothes, they departed home. On the way they met with two women talking about the baby found in the jar. PW5 run to the scene where she saw the baby with matching clothes to his son floating in the water jar at the house of Michael Safari.

In a disbelief PW5 ran to her house, but she could not find baby John at home. She went back to the house of Michael Safari and recognized her baby with the clothes she had dressed him.

The police had arrived at the scene, PW5 told them in past couple of days she had quarreled with the DW1 who was her neighbour. She told them she suspected him because he promised her to do something she will regret.

On cross examination PW5 admitted to have not told anyone she had quarreled with DW1.

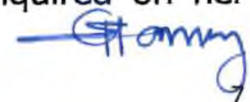
The last prosecution witness Astery Alexander an Assistant Medical Doctor at Dareda Mission Hospital testified as PW6. He recounted that on 12/3/2021 at 2:00 he was required with his superior Joseph Lorry, the Medical Officer In-charge to do post mortem of the baby at the mortuary.

PW6 together with police officers and relatives of the deceased they headed to the hospital mortuary and requested the attendant for the body of John Regnald. Through relative Reginald Joseph and Magdalena Ako, they were able to identify the deceased

PW6 identified the deceased baby to be 3 months old, whose body was swollen on the stomach and chest. He found the baby swollen with water on his lungs, which caused his lungs to fail and therefore caused respiratory failure and pulmonary edema.

After the examination of the deceased body, he handed it over to the family for burial. The post mortem report was tendered by PW6 and admitted by court as Exh. P2. That marked the end of the prosecution case.

The accused person Tluway Shauri testifying as DW1 on his sworn evidence he stated that; on 7/3/2021 while he was at home, he saw PW5 siting on his fence which was damaging his roof. DW1 inquired on her



conduct, but PW5 responded that he was "Maria dume" meaning the men who acts/ behaves like a woman.

DW1 inquired to PW5 if she wanted to see him as man or not, but PW5 ran away and DW1 continued with other things after she left. Then on 9/3/2021 at 6:00 he got a call from his boss Mijahara @ Lumumba requiring him to go to work on the following day.

On the following day he went to work from 0700 hours up to 1900 hours when he left home. However, on 10/3/2021 at 0200 hours he stated he was arrested and taken to village office where he stayed until the police arrived.

On the following morning he was taken to Babati police station, where he was interrogated, but he denied to have committed the offence. Nonetheless, he was tortured by two police officers demanding his confession.

Responding to cross examination, DW1 admitted to be the neighbour with PW5.

Another defence witness who testified as DW2 was Stanslaus Mataya Amara @Shauri Mataya, his testimony was such that, DW1 was his nephew.

He added that on 9/3/2021 at 9:00 he was at home then he saw DW1 and his friend going to work to the house of Lumumba Ara, who was his neighbour. He stated further that DW1 passed through his house, and during the evening he saw them going back to his house.

DW2 emphasized that there was only one way that passes to his house heading to the house of Lumumba. He insisted that on the fateful day he was sitting outside his house at 6:00 AM, when DW1 passed through to great him as he always did.

The last defence witness Lumumba John Ara @ Minja @ M/Kiti Jumuiya ya Wazazi Babati vijijini. He stated DW1 used to work in his house collecting manure for his farm.

He stated further that on 9/3/2021 around 7:00 Am DW1 arrived to his house to collect cow's manure. DW3 stated that DW1 stayed for the whole day and left at about 1805 hours with his wife.

Further responding to cross examination, DW3 stated that there are couple of roads reaching to his house. He denied to know DW2 as his neighbour or uncle of DW1. He added that, on the fateful day he was feeling sick and he stayed home most of the time. However, he admitted there was

couple of time he was inside the house. Therefore, there were things he would not see them while inside.

That marked the end of the defence side. The parties opted not to make final submission and left it to this court to determine the verdict of the accused person.

Now the issue before this Court is whether the prosecution has discharged its burden of proof beyond reasonable doubts in respect of the charge of murder against the accused person.

For the prosecution to successfully prove its case, it must prove through weight of evidence that the accused person committed the offence charged. As provided under Section 3 (2) (a) and 110 (1) of the Evidence Act, Cap 6, R.E 2019.

In discharging the onus, the prosecution must successfully prove three elements of the offence of murder in accordance to Section 196 of the Penal Code, namely;

i) That there is death of a person

ii) That death was caused by an unlawful act or omission

iii) That in causing death the accused acted with malice aforethought.

These ingredients will be tested each with the available evidence to establish as to whether the prosecution has discharged its burden of proof beyond reasonable doubts.

To begin with the first element which requires to determining whether there was the death of the person. From the testimony of PW6 the medical officer who performed the post mortem examination of the deceased body, verified the death of the deceased to have been caused by respiratory failure and pulmonary edema. The same is supported with Exh. P2 the post mortem report.

The evidence which was corroborated with that of PW2 the police officer who investigated this case, PW3 the neighbour who found the body of the deceased floating in the jar of water and PW5 the mother of the deceased who also saw the body of his deceased son in the jar of water.

The fact which was also not disputed by DW1 who was the neighbour with the family of the deceased. It is therefore clear that the death of John Reginald @Junior has been proved without any doubt.

Another element that needs to be proved is that the death was caused by an unlawful act or omission. Regarding to this element, the prosecution side had witnesses proving that the death of the deceased was not from natural cause, as he was drawn in a jar water. PW6 the doctor who conducted the post mortem examination on deceased body testified to have found the deceased body was filled with water in his stomach and ruled that the death was due to respiratory failure and pulmonary edema.

His evidence is corroborated with the evidence of PW4 who found the deceased body floating in a jar of water. Later on, PW5 the mother of the deceased after she found the crowd had gathered, she learned her baby was drawn in the jar of water.

The provision of section 203(b) of the Penal Code provides that, the person is deemed to have caused the death of another person, although his act is not the immediate cause of death. This can be done by inflicting bodily injury on another which would not have caused death if the injured person was submitted to proper surgical or medical treatment.

The act of putting alive baby to the jar of water unattended and leave him to suffer respiratory failure pulmonary edema which caused his death

was unlawful act. The evidence available therefore proves that the cause of death of the deceased was caused by unlawful act.

In the last ingredient therefore, this court is required to determine who who caused the death of the deceased and if there was the malice aforethought.

In the present case, despite the fact that the death of the deceased is not disputed by both sides, there is also the proof that, the death to be caused by unlawful act. However, there is no evidence from either side with the direct proof that it was DW1 who was seen killing the deceased.

Since there was the proof of death which is the actus reus of murder, there is also the need to prove the element of malice or *mens rea* and whether DW1 will be associated with the killing of the deceased.

Malice aforethought shall be deemed to be established by evidence proving an intention to cause the death of or to do grievous harm to any person that caused the death.

In order to perceive malice aforethought in the offence of murder, the provision of section 200 of Penal Code provides;

200. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate Penal Code [CAP. 16 R.E. 2022] the flight or escape from custody of any person who has committed or attempted to commit an offence.

The act of putting a three months child in the big jar of water and close its lid is the clear fact that the doer intended to cause death of the deceased. It is obvious the act was a pre-meditated killing.

To prove this element, the prosecution relied on the evidence that establishes there was the prior conflict that occurred between PW5 and DW1. As both sides are in agreement that they had a minor quarrel which had occurred two days before the murder of the deceased.

It is on record that, after the said quarrel PW5 never reported it to anyone. However, after the murder of her son, PW5 notified the police about the little squabble she had with DW1 and named him as the suspect.

The evidence further reveal that the murder had occurred on 9/3/2021, but DW1 was arrested on 10/3/2021. The ability of PW5 to name the suspect at the earliest possible time is the assurance of her reliability. The principle was underscored in the case of **Khalid Mohamed Kiwanga and another v. Republic**, Criminal Appeal No. 223 of 2019 Court of Appeal of Tanzania.

Also, according to the prosecution evidence, PW3 who is the neighbour of PW5, on the fateful day soon before the deceased body was found in the

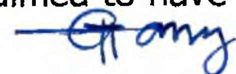
jar of water, she testified that she met with DW1 coming from the house of PW5.

However, PW3 did not see DW1 carrying anything, nevertheless soon later on, the deceased was found dead with PW4 dead in the jar of water. Then PW3 raised an alarm, she claimed two women appeared accompanying with DW1 to the scene of crime.

The evidence of the PW4 was not challenged by the defence side through cross examination or in defence testimony implying that DW1 real appeared at the scene as soon as the alarm was raised.

Failure to cross examine a witness on the facts adduced is considered as admissions of those facts. This principle has been stated by court in a number of times including the case of **Simiyu Masunga Lubisha Juma v. Republic**, Criminal Appeal No. 572 of 2019, Court of Appeal of Tanzania at Tabora (unreported). See also the case of **Masoud Charles Mwahalende & another v. Silas Mbembela**, PC Criminal Appeal No. 2 of 2022, Court of Appeal of Tanzania (unreported).

DW1 denied to be at the scene of crime on the day and time it the murder was committed and raised the defence of alibi. He claimed to have



been working at the house of DW3 from morning to evening and both never left the house. He also had DW2 his uncle to back up his defence that, he had met with DW1 early in the morning when he was going to work to the house of DW3 when he passed to his house. also, during the evening they met when DW1 was departing to his house.

It is notably that, the defence of alibi was raised without giving the notice to the court as required with the provision of section 194(4) of the CPA [CAP 20 R.E. 2002], still the provisions of sub section (6) of the same provision provides;

> *(6) If the accused raises a defence of alibi without having first furnished the particulars of the alibi to the court or to the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence.*

Despite the provision of law cited above giving the court with the discretion to accord weight to the defence of alibi that was not founded with prior notice, the court has emphasized in a number of times the need to take cognizance of the defence alibi or it will amount to a mistrial and a

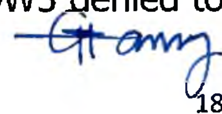
consequential miscarriage of justice. This was decided in the case of **Charles Samson v. Republic** [1990] TLR 39.

This court will however scrutinize the defence of alibi raised to ascertain its credence. The importance of scrutiny was stated in the case of **Marwa Wangiti Mwita and another v. Republic** [2002] TLR 39, when it was held that;

> *"The absence of notice required by section 194 of the CPA, 1985, does not mandate or authorize the outright rejection of an alibi, though. It may affect the weight to be place on it"*

With respect to the present case, the defence evidence of alibi is somewhat contradicting on each other, as DW1 stated on the fateful day he was working at the house of his boss DW3 for the all day. However, DW3 admitted during cross examination that on the said day he was sick and therefore he was inside his house and he did not keep an eye to DW1 for the whole day.

Also, there was evidence that DW1 was seen with DW2 going and leaving from the house of DW3 as there is the only way going to the house of DW3 and one must pass to the house of DW2. However, DW3 denied to



have known DW2 or being his neighbour. He also refuted the evidence that there was only one to his house and stated, various ways can be used to go to his house.

It is with no doubt that the defence evidence of alibi is contradictory, also DW1 failed to call the person he was mentioned to be with from the time he went to work until when he went back. DW2 and DW3 had mentioned DW1 to have been with his wife or friend. However, DW1 himself did not testify to that effect or call this useful person as his witness to confirm his absence from the scene on the fateful day.

The primal burden of the prosecution side is never shifted to the defence side, but with respect to the defence of alibi, it was prudent to call the witness to re-affirm the defence raised. As it was emphasized in the case of **Kubezya John v. Republic**, Criminal Appeal No. 488 of 2015 CAT (Unreported), the Court of appeal went a step further and held that;

> *... But in situations where, like here, the accused person is depending on the defense of alibi, it is his duty to demonstrate his alibi albeit on balance of probabilities.*

In this case, apart from the defence of alibi being raised without a compliance to the law, particulars of the alibi or notice was required to be furnished when DW1 was informed with this court that the case was established against him requiring to make his defence. Rather, the defence of alibi was raised during the defence hearing.

In according weight to the defence of alibi raised, the court finds on the balance of probability it was contradictory and unsupported to prove that, DW1 was at the house of DW3 at the time and day the murder of deceased was committed.

Considering that the court cannot convict an accused person based on his weak evidence, relatively in criminal cases the burden of proof lies to the prosecution side to prove the case beyond reasonable doubts. The emphasis of this duty was considered in the case of **Nathaniel Alphonce Mapunda and Benjamin Mapunda v. Republic** [2006] TLR 395, where the court among other things held that;

> *"As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of MOHAMED SAID V. R. this Court reiterated the principle by*

stating that in a murder charge the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt.

Gathered from the evidence of this case, it is clear that there is no direct evidence that is linking DW1 with the killing of the deceased save for his confession made in the presence of PW2. The confession which was challenged by himself stating that he was only made to sign the cautioned statement under cohesion.

There is the principle that an accused person who confesses to a crime is the best witness. This was emphatically stated in the case of **Ibrahimu Ibrahimu Dawa v. Republic**, Criminal Appeal No. 260 of 2016, Court of Appeal of Tanzania.

According to Exh. P1 the caution statement, DW1 stated that;

Ilipofika jana tarehe 9/3/2021 majira ya saa 9:00 nilikua nyumbani naongea na Christina Aye, akawa amepita yule dada ambaye ni Luiza na kunitukana tena mimi ni kuma na akaniambia kuwa atanionyesha. Nami nikamwambia kuwa nitamuonyesha. Ilipofika majira ya saa 16:00hrs mimi nilipita

pale anapoishi Luiza ambap ni kwa Safari ambaye ni mkwe wake Luiza. Nilipopita nilikaa ngámbo nikawa naangalia nyumbani kwa Safari, nikamuona Luiza akimnyonyesha mtoto wake pale nje na alikua mwenyewe. Baada ya kumaliza kumuogesha mtoto nilimuona akimpeleka ndani. Alipompeleka mtoto ndani nilimuona aliwa amebeba ndoo anaelekea mtoni. Nami nilipoona ameenda mtoni nilipata mwanya wa Kwenda nyumbani kwao na nikiwa nimepanga nikamchukue mtoto wake ili nimuuwe. Nilipoingia moja kwa moja nilienda chumbani na kumkuta mtoto yupo kitandani akiwa uchi amefunikwa na khanga na mtoto yule alikua ni mdogo wa kiume mimi sifahamu umri wake. Nami baada ya kumkuta mtoto mimi nilimchukua akiwa uchi nilimbeba na Kwenda kumtumbukiza kwenye diaba lililokuwa na maji nje kwenye nyumba ya Michael Safari.

In essence DW1 in his confession (Exh. P1) he admits to have committed the offence by killing the deceased as the revenge to the quarrel with his mother (PW5). The confession gives a detailed sequential narration on what transpired on the fateful day and how the murder was committed.

It is the settled law that when the court is dealing with repudiated or retracted confession it must accept it with caution unless it is satisfied that in all circumstances the confession was true.

There is also a need to corroborate it with independent evidence. Unless the court is fully satisfied that the confession was nothing but the truth. This principle was propounded in the case of **Tuwamoy v. Uganda** (1964) E.A 84. See also the case of **Mabala Masasi Mongwe v. Republic**, Criminal Appeal No. 161 of 2010 (both unreported).

Apart from a detailed confession of DW1, there was also the testimony of PW3 the neighbour child who saw DW1 entering the house of PW5, soon after it was learnt that the deceased was found dead near their house. The evidence that was not challenged anyhow by the defence side.

In those circumstances I find that the confession of DW1 was well corroborated with the evidence of PW3 and PW5. As it was clear that due to the quarrel with PW5 as narrated by both, then DW1 waited for PW5 to leave the house, then he went to take the baby and put him in a water jar and close the lid. Due to that conduct, the child died from respiratory failure and

PW5, soon after it was learnt that the deceased was found dead near their house. The evidence that was not challenged anyhow by the defence side.

In those circumstances I find that the confession of DW1 was well corroborated with the evidence of PW3 and PW5. As it was clear that due to the quarrel with PW5 as narrated by both, then DW1 waited for PW5 to leave the house, then he went to take the baby and put him in a water jar and close the lid. Due to that conduct, the child died from respiratory failure and pulmonary edema where the post mortem reveal the deceased stomach was full of water.

It is therefore clear that the confession of DW1 proves his motive to the offence of murder. From the total analysis of the evidence above, I find that the prosecution side was able to prove all ingredients of murder beyond all reasonable doubts. I therefore find the accused person Tlulay Shauri guilty of the offence of murder, I consequently convict him for the offence of Murder under section 196 of the Penal Code Cap 16 R.E 2022.

G.N. BARTHY

JUDGE

25/8/2022

SENTENCE

Once a person is convicted with the offence of murder under section 196 of the Penal Code Cap 16 R: E 2022, the law provides for only one sentence which is death by hanging. By virtue of section 197 of the Penal Code, I hereby sentence the accused person Tluway s/o Shauri to death; and in terms of section 26(1) of the Penal Code and section 322 (2) of the Criminal Procedure Act, Cap 20 R: E 2022, I hereby direct that the accused shall suffer death by hanging.

It is so ordered.

G.N. BARTHY

JUDGE

25/8/2022

Right of appeal is fully explained.

G.N. BARTHY

JUDGE

25/8/2022