

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
THE HIGH COURT
(MUSOMA SUB REGISTRY)
AT MUSOMA
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE No. 24 OF 2023
THE REPUBLIC v. 1. MGWASI JUMANNE @ WAPORI
2. MULABU MURUNGU @ MUYA
JUDGMENT

11.10.2023 & 17.10.2023

Mtulya, J.:

The present accused persons, **Mr. Mgwasi Jumanne @ Wapori** and **Mr. Mulabu Murungu @ Muya** were arrested at Kigeraituma and Bwasi areas of Musoma Rural District of Mara Region respectively, and were brought in this court to reply information of murder of **Ms. Nyabise Webiro** (the deceased) contrary to sections 196 and 197 of the **Penal Code [Cap. 16 R.E. 2022]** (the Penal Code). The offence is alleged to have taken its course on 25th September 2022 at Nyegina Village within Musoma District in Mara Region.

In order to substantiate its case, the Republic has brought in this court a total of five (5) witnesses whereas the defence has summoned two witnesses in protest of the allegation. According to **Mr. Bugingo Webiro** (PW2), the deceased was his sister and were neighbors in Nyegina Village and that on 25th September 2022

morning hours, he heard *yowe* species of noises raised at his sister's residence. As practice so requires, when there are *yowe* shouts in villages of the Lake Victoria Regions, the villagers are required to assemble and learn what has transpired. Similarly, PW2 went at the *yowe* direction and found his sister bleeding in several parts of the body, including hands and private parts and mentioned the accused persons as her attackers. Seeing his sister was in serious bleeding, PW2 decided to quickly ferry her to the nearest hospital at Nyasho area and later in the afternoon to Musoma Regional Referral Hospital (the hospital) for further treatment, but she was pronounced dead at night hours.

According to PW2, when the deceased was receiving treatment at Nyasho Hospital, he rushed to the nearest police station of Musoma Police Central Station for **Police Form Number Three** (PF.3) and **Report Book Number** (RB) where he cited the accused persons. PW2 testified further that he recorded witness statement on the same day of the event before expiry of the deceased and immediately started to search for the accused persons in Nyegina Village, unsuccessfully.

However, according to PW2, the accused persons were not spotted in Nyegina Village and did not appear for *yowe* shouts as the practice of *yowe* noises so require. Regarding the arrest of the accused persons, PW2 testified that he heard of the arrest of the

first accused on 10th October 2022 at Kigeraituma area and second accused on 1st November 2022 at Bwasi area along Majita Road in Musoma Rural District. According to PW2, after arrival at the crime scene, he found several villagers and a bit later, **Ms. Maria Nyangira** (PW1) had showed up for assistance to the deceased and the deceased had mentioned the accused persons as her attackers before PW1. PW1 was summoned to testify in this court and stated that on 25th September 2022 in morning hours, she was informed of the attack incident against the deceased and had rushed to the crime scene where he found the deceased bleeding from her private parts.

According to PW1, the accused had mentioned the accused persons as the attackers of her private parts by use of sharp weapon knife, and that she knew the accused persons as village mate since their birth, but were raised in different hamlets of Nyegina Center and Nyamagera. According to PW1, she was recorded witness statement on the same day in morning hours at the deceased's residence and mentioned the accused persons as she was informed by the deceased.

In order to justify extent of injuries and death of the deceased, a medical doctor who examined and prepared postmortem report of the deceased was marshalled as prosecution witness number three, **Dr. John Mmari** (PW3). In his brief

testimony, he stated that the accused was brought at the hospital on 25th September 2022 in noon and was operated to repair her body parts of head, stomach and private parts and during the process, she lost her life. According to PW3, the body showed multiple wounds in ileum, colon, urinary bladder and private parts were connected due to sharp object in chopping off the area. In his opinion, PW3 thinks that the death of the deceased was caused by multiple wounds in important organs of the body and failure of the organs to do their activities as required. In order to substantiate his testimony, PW3 tendered the postmortem report of the deceased as exhibit P.1, which shows the source of death as: *mult organs failure due to severe visceral injury in vaginal fistular & rectum anus.*

The police authorities in Musoma District had involved its two officers with distinct roles. Police Officer **F.1357 D/Sgt. Yusuph** (PW4) who investigated the case whereas officer **G.2705 D/Cpl. Isaya** (PW5) recorded cautioned statement of the second accused. According to PW4, he investigated the case and uncovered that the accused persons were connected with the attacks against the deceased and initiated manhunt which led to the arrest of the accused persons at different areas of Musoma Rural District. In his testimony, PW4 stated that the first accused was arrested on 10th October 2022 in morning hours at Kigeraituma area whereas the

second was arrested on 1st November 2022 in noon hours at Bwasi area and were all brought to Musoma Central Police Station for interrogation and cautioned statement recording. According to PW4 all accused were interrogated and the second had confessed commission of the offence before PW5.

PW5 was summoned and testified that he had interrogated and recorded cautioned statement of the second accused and in the statement the accused had confesses his involvement in the killing of the deceased. According to PW5, the accused was arrested on 1st November 2022 at 14:00 hours and recorded statement on the same day at 17:05 hours, after following all necessary legal steps in recording the cautioned statements of accused persons, including: introduction of himself to the accused, informing the accused all rights including calling for relatives or lawyers, cautioned him on using the statement against him in court. and finally the accused produced his statement without any force, inhuman treatment or promise. According to PW5, the statement was read before the second accused before he entered his signature in thumb print.

The statement had faced two points of objection for want of proper application of sections 50 (1) (a) and 57 (4) (a) to (f) of the **Criminal Procedure Act [Cap. 20 R.E. 2022]** (the Act). However,

the protests were overruled for lack of merit and the cautioned statement was admitted as exhibit P.2, which, in brief, shows that:

Nakumbuka tarehe 26/09/2022 majira ya saa 23:00 hours nilikuwa huko maeneo ya Nyegina katika Halmashauri ya Musoma Vijijini...muda huo nilikuwa na Mgwasi Jumanne @ Sobi @ Wapori ambaye ni rafiki yangu na tulikuwa tumeenda kwa Nyabise Webiro...siku hiyo nilikuwa nimeenda na Mgwasi Jumanne @ Sobi @ Wapori kwa bibi huyo baada ya kukutana na Odeka...kwenye kijiwe cha pombe za kienyeji kwa Masatu Ehunyo na huyo Odeka alituambia anaishi Shirati...alituambia kuwa anahitaji sehemu za siri za mwanamke na tukifanikiwa kumpelekea atatulipa shilingi laki mbili kila mtu na hapo hapo alitununulia pombe aina ya Gongo ya shilingi elfu tano na baadae kunywa, ndipo nikamwambia Mgwasi Jumanne @ Wapori twende kwa huyo bibi aitwae Nyabise Webiro. Tulifanya mpango tupate sehemu zake za siri ili tupate hiyo hela na tulipita nyumbani kwangu nikachukua kisu na tukaenda moja kwa moja hadi kwa huyo bibi, tukapiga hodi na tukamwambia kuwa tumempelekea pombe na yeye alifungua, tukaanza kunywa wote pamoja na yeye na baada ya ile pombe kwisha, nilinyanyuka na

kumdondosha chini na Wapori naye akamkandamiza chini, akambana kifuani na mikononi kisha kumfunga mdomo na mimi nikambana miguu yake. Nikachukua kisu nilichokua nimebeba, nikaanza kumkata kwenye uke wake na nikafanikiwa kukata kinembe chake ambacho ndicho tulikuwa tunakitaka kutokana na huyo Odeka...baada ya kufanikiwa kumkata, tulikiweka kwenye kimfuko na kumpelekea Odeka...na alisema anaenda kukitumia kwenye masuala yake ya uvuvi, na tulimuacha yule bibi akiwa anatokwa damu..tulipopata taarifa kuwa tunatafutwa, ndipo nikaondoka na kukimbilia maeneo ya Bwai...

The registered materials brought by the Republic in the case were pointing fingers to the accused persons, hence were called to reply the information brought by the Republic against the accused persons. The defence on its side, had summoned a total of two (2) witnesses, who were the accused persons themselves. The first accused (DW1) on his part had testified that he was arrested on 10th October 2022 along Kigeraituma lake side by the lake side ten-cell leader and later was brought to Kigeraituma Police Station and connected him with the murder of the deceased.

According to the first accused, on the same day the police had transferred him to Musoma Police Central Station for interrogation

and cautioned statement recording, but he refused involvement in the killing of the deceased. Regarding the complaint of killing the deceased on 25th September 2022, the first accused stated that he was in his usual duties and knows the second accused, but had never conspired with any person to kill the deceased. However, the first accused testified that he was born and raised at Nyegina Village and cooperated well with the deceased and second accused in good and bad moments of life, including burial ceremonies, but got the news of her demise on 25th September 2022 when he was at lake side of Kigeraituma with his fellow fishermen **Mr. Masaka** and **Mr. Sikudhani**.

On his side, the second accused (DW2) had testified that he was arrested on 1st November 2022 at 14:00 hours at Bwai area where he was working since May 2022 and that during the attacks and expiry of the deceased on 25th September 2022, he was at his working station in Bwai. After the arrest, according to the second accused, he was taken to Mugango Police Station and later to Musoma Police Central Station and was interrogated and recorded cautioned statement at 20:00 hours, but had refused participation in the attacks. However, he confessed killing of the deceased after several beatings and torture by PW5 on the next day 2nd November 2022 at 09:00 hours. According to the accused, he does not know

how to read and write, but the statement was not read to him and was forced to sign the same by use of a thumb print by PW5.

Regarding the complaint of taking deceased's private parts for fishing activities, the second accused had testified that he did not take any and that he knows the first accused, the deceased and PW2 as they live in the same village of Nyegina. However, the second accused had testified that: he cannot tell where PW5 got the detailed information on his life; he did not mention the first accused in the statement; he knows the first accused; the question of recording time of the cautioned statement was not posed before PW4 and PW5; he heard the death of the deceased, but could not participate in burial ceremonies as he was in his roles at Bwasi; and he contributed condolences via his mother, but cannot bring her to testify.

In the present case, there are two (2) types of evidences registered by the Republic, namely: first dying declaration of the deceased; and second, confessional statement of the second accused. The law regulating dying declaration is enacted in section 34 (a) of the **Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act) in the following words, in brief:

...when the statement is made by a person as to the cause of his death as to any of the circumstances of the transaction which resulted in his death, in cases in

which the cause of that person's death comes into question, whether the person who made them was or was not, at the time when they were made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

The enactment was celebrated by this court ten years after our independence in 1961 in the precedent of **Republic v. Marwa** (1971) HCD 473 and was supported by the Court of Appeal (the Court) in 1990 in the precedent of **Adrian Masongera v. Republic, Criminal Appeal No. 77 of 1990**. Of course, the practice was cherished by the East Africa Court of Appeal prior to the independence in 1961 in the case of **Pius Jasunga v. Republic (1954) 21 EACA 331**).

All the indicated precedents are in agreement that the rule in considering the evidence of dying declaration is that it is unsafe to base a conviction on dying declaration without there being a corroboration. This court has been following the move without any hesitation (see: **Republic v. Samwel Saulo @ Ikula**, Criminal Session Case No. 58 of 2016 and **Republic v. Elias Singisila & Another**, Criminal Session case No. 116 of 2016).

The text of 1971 displayed in the precedent of **Republic v. Marwa** (supra), shows in brief, that:

*A dying declaration is evidence which is admissible against an accused person, but **such evidence falls into that class of evidence which needs to be corroborated before such evidence can be acted on.** But where circumstances exist showing that the deceased could not have been mistaken in his identification of the accused, a conviction can result even though such was the only evidence against an accused person. However, it is only on rare occasion that such evidence would be acted on without corroboration.*

(Emphasis supplied).

In the present case, the deceased and accused persons are village mates and witnesses PW1 and PW3 have produced evidence to show that the deceased and accused persons took sometimes to cherish *Gongo* species of alcohol before launching attacks. The evidences produced by PW1 and PW2 were corroborated in one hand by the accused themselves that they know the deceased as their village mate, and on the other by P.2.

In the instant case, the deceased had mentioned the accused persons at earliest possible time when she met her brother PW2 and daughter PW1. Similarly, PW1 and PW2 mentioned the accused persons before the police officers at the earliest possible time. This is an assurance of their credibility and reliability as required by the

law in the precedent of the Court in **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39.

On the same note, both accused persons have testified that they were not at Nyegina Village on the night hours of 25th September 2022, but in different areas of their work in Kigeraituma and Bwasi. However, they declined to bring persons who saw them on the night hours of 25th September 2022. The first has declined to call his fellow fishermen **Mr. Masaka** and **Mr. Sikudhani**, whereas the second had declined to call his mother, who was well aware of absence of his son.

The law in the precedent of the Court in **Wambura Marwa Wambura v. The Republic**, Criminal Appeal No. 115, shows that failure to call material witnesses may make courts to draw adverse inferences against the accused persons. This court has been following the move (see: **Republic v. Mroni Samo Ryoba**, Criminal Session Case No. 12 of 2023; **Republic v. John Mbatira & Three Others**, Criminal Session Case No. 181 of 2022; and **Stanley James @ Mabesi v. Republic**, Criminal Appeal No. 115 of 2022).

In the present case the Republic has produced a detailed exhibit P.2 which implicates both accused persons. The exhibit shows how the murder was planned, the motive behind it and how it was executed. It displays even how the female genital organ of

the deceased was chopped off from its original position. I have also noted details of historical background and life of the second accused person.

The details could only be produced by a person who had a knowledge of the incident. Statements of this nature cannot be complained as they were extracted by beatings and torture. The law regulating confession only requires voluntariness of the confession (see: section 27 (1) & (3) of the Law of Evidence, **Tuwamoi v. Uganda** [1967] EA 84 and **Republic v. John Mbatira & Three Others** (supra). In my considered view, the present confession was freely and voluntarily made by the second accused before PW5.

I am aware of the complaint of time limitation as per requirement of the law in section 51 (1) (a) of the Act. However, PW5 had explained it in details that the second accused person was arrested on 1st November 2022 at 14:00 hours and recorded P.2 on the same day at 17:05 hours. Similarly, regarding the application of section 57 (4) (a) to (e) of the Act, it was complied as it was well explained by PW5. The precedents of the Court in **Chamuriho Kirenge @ Chamuriho Julias v. Republic**, Criminal Appeal No. 597 of 2017 and **Juma Omary v. Republic**, Criminal Appeal No. 568 of 2020 are inapplicable in the present case.

In the precedent of **Chamuriho Kirenge @ Chamuriho Julias v. Republic** (supra), as indicated at page 18 of the judgment, exhibit PE.2 did not indicate if it was read over to the appellant during the hearing of the case. Again, the precedent is silent on whether the document had been printed to have complied with section 57 (4) (e) of the Act. In the precedent of **Juma Omary v. Republic** (supra) the complaint is indicated at page 5 of the decision that the exhibit was certified under section 10 (3) of the Act instead of section 57 of the Act.

In the present case, I scrutinized exhibit P.2 recorded by PW5 and found that it complies with the law in section 57 (4) and indicated at the very bottom of page 3 by the use of the words: *Mimi G. 2705 D/Cpl. Isaya nathibitisha kuwa maelezo haya ya onyo ya Mulabu Murungu @ Muya nimeyaandika kwa usahihi na uaminifu chini ya kifungu namba 57 (4) cha Sheria ya Mwenendo wa Mashauri ya Jinai Sura 20 kama ilivyofanyiwa marekebisho mwaka 2022.* With such citation, I think it is vivid that the statement indicates compliance with the law and in any case, it is neither silent or cited section 10 (3) of the Act.

The remaining question is whether the accused persons have attacked the deceased with *malice aforethought*. The law on malice is enacted in section 200 of the Penal Code and had received the interpretation of the Court in the celebrated precedent of **Enock**

Kipela v. Republic, Criminal Appeal No. 150 of 1994. The Court in the precedent has placed seven (7) important factors to be considered in resolving malice aforethought and stated at page 6 of the decision:

...usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing.


In the present case, the materials produced by PW1, PW2, PW3 and P.2 indicate that the accused persons have attacked the deceased by use of knife directed at sensitive parts of head, neck, stomach, and chopped off private parts to cause severe pains to death. These materials, in totality, show that the accused persons had killed the deceased with malice aforethought.

Having said so, and considering the materials produced by the parties, I am of the considered view that the prosecutions side has produced water tight evidences against the accused persons. It has established its case beyond reasonable doubt that the accused persons, **Mr. Mgwasi Jumanne @ Wapori** and **Mr. Mulabu Murungu @ Muya**, have killed the deceased, **Ms. Nyabise Webiro**, with malice aforethought, hence I convict the accused persons for the offence of murder contrary to sections 196 and 197 of the Penal Code.

It is so ordered.

Right of appeal explained.




F.H. Mtulya

Judge

17.10.2023

This Judgment was pronounced in open court in the presence of the accused persons, **Mr. Mgwasi Jumanne @ Wapori** and **Mr. Mulabu Murungu @ Muya** and their learned Defence Attorney, **Mr. Daud Mahemba** and in the presence of **Ms. Happiness Machage**, learned State Attorney for the Republic.


F.H. Mtulya

Judge

17.10.2023

MITIGATIONS

Mahemba: My Lord, this is a murder conviction against the accused persons. My Lord, I understand section 197 of the Penal provides for a death sentence. However, My Lord, article 14 of the Constitution preserves the right to life and directs all State organs to protect the same. My Lord, this court is part of the State organs and may push other State organs to comply with the Constitution. My Lord, this court may start the process by avoiding section 197 of the Penal Code. My Lord, this will lead to awareness to the other State organs and agencies, including the **Law Reform Commission** to move in the subject. My Lord, after saying that, I let it to this court to start the move. That is all my Lord.

F.H. Mtulya

Judge

17.10.2023

1st Accused: I did not participate in the killing My Lord. I pray this court to find me innocent.

F.H. Mtulya

Judge

17.10.2023

2nd Accused: My Lord, I was not aware if this offence leads to such a penalty. I pray for a lenient penalty My Lord. That is my prayer.

F.H. Mtulya

Judge

17.10.2023

ANTECEDENTS

Machage: My Lord, the offence of murder is enacted in section 196 of the Penal Code and when accused persons are found guilty, there is only one penalty under section 197 of the Penal Code. My Lord, this court has to abide with the law. It has no options under the Constitution. My Lord, it is true that the Constitution provides for the right to life, but the accused persons have taken the life of the deceased. I pray the law enacted in section 197 of the Penal Code to take its course. That is all my Lord.

F.H. Mtulya

Judge

17.10.2023

SENTENCING ORDER

I have heard submissions of learned minds in this case, and considered enactment of section 197 of the Penal Code. The section was enacted following enactment of section 196 of the Penal Code. Section 197 of the Penal Code was enacted without alternatives. It only provides for death sentence. I have perused previous decisions of this court and **Tanzania Sentencing Guidelines, 2023**. All previous decisions of this court have resolved in favor of section 197 of the Penal Code. The Guidelines provides for mandatory sentences at its page 9 and at page 10 indicates that any person convicted of murder shall be sentenced to death.

Having said so, my hands are tied by the law in section 197 of the Penal Code, previous practice of this court and page 10 of the Guidelines, hence I sentence the accused persons, **Mr. Mgwasi Jumanne @ Wapori** and **Mr. Mulabu Murungu @ Muya** to death, and shall be suffered by hanging

It is so ordered.

Right of appeal explained.

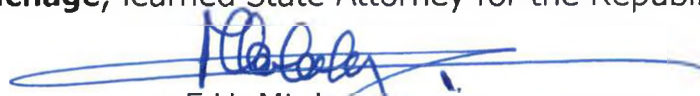



F.H. Mtulya

Judge

17.10.2023

This Sentencing Order was pronounced in open court in the presence of the accused persons, **Mr. Mgwasi Jumanne @ Wapori** and **Mr. Mulabu Murungu @ Muya** and their learned Defence Attorney, **Mr. Daud Mahemba** and in the presence of **Ms. Happiness Machage**, learned State Attorney for the Republic.


F.H. Mtulya

Judge

17.10.2023