

**IN THE HIGH COURT OF TANZANIA**  
**(MWANZA REGISTRY)**  
**AT MWANZA**  
**CRIMINAL SESSION NO. 221 OF 2015**  
**THE REPUBLIC**  
**VERSUS**

**MATONGO MATHAYO @MAGOTI-----1<sup>st</sup> Accused**

**JUMA MSAFIRI @STEPHANO-----2<sup>nd</sup> Accused**

**JUDGMENT**

*30<sup>th</sup> October & 16<sup>th</sup> November 2023*

**ITEMBA, J.**

This judgment is a result of an order made by the Court of Appeal in Criminal Appeal No. 271/2021 dated 20/7/2023. Whereas, the trial court judgment was nullified because it did not align with section 312 of the Criminal Procedure Act. It was further ordered that, for the interest of justice, a fresh judgment to be composed.

The accused persons, **Matongo Mathayo @Magoti** and **Juma Msafiri @Stephano** stand charged with the offense of murder contrary to section 196 of the Penal Code, Cap. 16 [RE: 2002]. The prosecution alleged that both accused persons, jointly and together on the 21<sup>st</sup> day of



March 2014 at about 20:00hrs in Luhuha village within Geita District in Mwanza Region, did murder one Hadija d/o Lwankunyango. Both Accused Persons denied the charge. During the trial, the prosecution side thus the Republic was represented by Mr. Daniel Masambu and James Palangyo the learned State Attorneys while Mr. Renatus Malecha and Isaka Kubini both learned counsels represented the 1<sup>st</sup> and 2<sup>nd</sup> accused persons respectively.

The trial was conducted with the aid of three assessors namely; Sospeter Makanza (59yrs), Angelina Stanislaus (57yrs), and Mabula Lucas (53yrs). In summing up, the Gentlemen and Lady Assessors, all of them opined to find the accused persons not guilty of murder as charged.

The court conducted a trial involving the calling of five (5) prosecution witnesses and two for the defence. The prosecution witnesses were **Tabu d/o Busangala (PW1), Venance Nganda (PW2), F. 3040 Detective Coplo Joseph (PW3), D. 6944 Detective Sergeant Emanuel (PW4) and WP 6760 PC Yosepha (PW5)**. The prosecution also tendered six (6) exhibits; **The Post Mortem Examination Report** for the diseased Hadija d/o Lwankunyango (**Exhibits P1**) the **sketch Map (Exhibit P2)**, the **Accused's caution statements (exhibit P3 and P4)** and the **accused extra-judicial Statements (exhibit P5 and P6)** respectively.



At the trial, **PW1 Tabu d/o Busangala** testified that, on 21.03.2014 at around 19.00 hrs, she was off from the market where she sells some groceries and the deceased joined her on the way back home where it is alleged to be 2 hours walk up to their respective homes. That, while walking, she heard people running towards them, she was stabbed by a knife and ordered to close her eyes. When she regained consciousness, she looked at her company, the deceased and found her dead. That, the deceased appeared to have been attacked and cut by a sharp object on her head and neck and her brain was visible. That, she went to report the matter to a street chairman, although she wasn't able to identify the **assailants**.

**PW2 Venance Nganda** testified that he is a medical doctor working at Geita District. That, on 22.03.2014 at around 9.00 am he was assigned to conduct a post-mortem examination of the body of the deceased body which was identified to him by Rehema Rubando and Samwili Malekela. His findings were that the cause of death was a result of severe head injury and he produced a postmortem report which was admitted as **exhibit P1**.

**PW3 F. 3040 Detective CPL Joseph**, a police officer stationed at the RCO office Geita, drew a sketch map of the scene of crime. He



tendered the sketch map and it was admitted as **exhibit P2**. It was **PW4 D. 6944 Detective Sergeant Emanuel** who recorded both accused persons cautioned statements on 07.06.2014. That, the 1<sup>st</sup> accused narrated the story of how they committed the offence with the co-accused. The cautioned statements of Matongo Mathayo the 1<sup>st</sup> accused person and Juma Msafiri the 2<sup>nd</sup> accused person were admitted and marked as **exhibit P3** and **P4** respectively.

Further, **PW5 WP 6760 PC Yosepha** testified that she worked with the police force, general duty at Karumwa Police Post and that on 22.03.2014 she escorted the accused persons to the justice of peace where they recorded their statements. She tendered the said extrajudicial statements and they were admitted and marked as **exhibits P5 and P6 respectively**. When cross-examined, PW5 further stated that the office of the Ward Executive Officer (WEO) opens from Monday to Friday but she escorted the accused on 08.06.2014 which was on Sunday.

The prosecution case was marked closed and this Court ruled in terms of section 293(2) of the Criminal Procedure Act, (CPA), [Cap. 20 R.E. 2019], that the prosecution managed to establish a prima facie case against the accused persons therefore, they were required to enter their defence. The accused persons were addressed in terms of section



293(2)(a) and (b), (3) and (4) of the CPA and they both chose to defend themselves on oath without calling witnesses.

**DW1 Matongo Mathayo**, Muslim affirms and testified that, he was arrested at his home in Katoro Kilimahewa Street in connection with the deceased murder. As he denied the charges, he claims that he was sent to a bush, beaten and later tortured at Geita police station where he was forced to thumbprint a document. That, he was tortured and injured and he was sent to the hospital and was never sent to a justice of peace. He prayed to be acquitted by this court because he was just framed by the police.

**DW2 Juma Msafiri Stephano** testified that he is a resident of Katoro whereas on 07.06.2014 at about 18.00 hrs he was arrested by four police officers. He claimed to have been detained at Geita police post and beaten and the next morning, he was sent to Buseresere police post where he was tortured. That, after he gave out his personal particulars, he was sent back to the police cell and transferred to Geita police station where he was forced to sign a statement and he was never taken to a justice of peace. He prayed to be acquitted because he was framed for a crime he never committed. The defence case was marked closed.



Having heard the prosecution and defence witnesses in this case, the accused persons are charged under Section 196 of the Penal Code, Cap.16 [RE: 2019] which provides that:-

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

This being a murder case, the prosecution is duty-bound to prove the case against the accused persons at two stages;

*First*, that it is the accused person who killed the deceased Hadija d/o Lwankunyango, and,

*Two*, that they did commit the killing with malice aforethought as stipulated for under Section 200 of the Penal Code, Cap. 16[RE: 2002] now [RE: 2022].

The *Actus Reus* is well proved for it is not disputed that the diseased Hadija d/o Lwankunyango died and the cause of her death was due to severe head injury (exhibit P1). Heartlessly, the cut wounds were brutally inflicted on the deceased using a heavy and sharp object, which connotes that, the assailants did it with malice aforethought and there is no dispute that the assailant contemplated and intended to kill.

Before me now, the most contentious issue which prompted the trial of this case is *whether the accused persons, Matongo Mathayo @Magoti*



and Juma Msafiri @Stephano killed the deceased Hadija d/o Lwankunyango. To prove their case against the accused persons, the prosecution paraded five witnesses who testified in connection to the death of the deceased Hadija d/o Lwankunyango as against the accused persons who gave their evidence under oath as DW1, and DW2 respectively and denied the charges against them.

First, as I hinted earlier, the evidence of PW1, PW2 and PW3 did establish the nature of the incident of the death of the deceased that was unnatural and based on the way it was committed, there is no doubt that the assailant contemplated to kill. Their evidence was never denied by the accused persons.

Second, the evidence of PW1 who was with the deceased at the scene, established that the offence took place around 19.30 hrs. As it appears, PW1 could not identify any of the assailants and there is no evidence of identification before the court.

The prosecution accusation is built on the evidence of PW4, one D. 6944 Detective Sergeant Emanuel, a police officer who recorded the accused person's cautioned statements and the evidence of PW5, WP 6760 PC Yosepha, who escorted the accused persons to the Justice of peace to record their extrajudicial statements. Both the accused persons



repudiated their cautioned statements (exhibits P3 and P4) and the extra-judicial statements (exhibits P5 and P6).

In analysis, I will start with the evidence of PW5, WP6760 PC Yosepha who testified that, she escorted the 1<sup>st</sup> and 2<sup>nd</sup> accused persons on 08.03.2014 and 09.03.2023 respectively, to record their confession statements before the justice of peace who was the WEO of Kalangalala ward. Considering that in their defence, both the accused persons denied to have been taken to justice of peace and so, they denied to have made the confessions I assessed first the evidence of PW5. If PW5 testified that she escorted the accused persons to have their statement written so she is not the one who recorded the said statement. PW5 also maintained that it was on Sunday 08.03.2014 when he escorted the 1<sup>st</sup> accused, while testifying further that the office of the WEO is a public office and opens from Monday to Friday and not on Sundays. I have noted the contradiction on the date of recording the statement whether it was during weekdays or weekends. Further, when it comes to the admissibility of exhibits, it is trite law that the basic prerequisites are relevancy, materiality and competence of the person to tender it. See also: **DPP Vs Christian Biskasevskaja** Cr. App 76/2016 Court of Appeal of Tanzania Arusha. It was also emphasized in **The DPP vs Mirzai Pirbakhshi @ Hadji & Four Others** Criminal Appeal No. 493 Of 2016:





*A possessor or custodian or actual owner or alike are legally capable of tendering the intended exhibit in question provided he has knowledge of the thing in question'.*

Considering the sensitivity of the confession statements, if the recording officer was the Ward Executive Officer, he was the competent person to tender those extra judicia statements and not PW5 who merely escorted to the accused to the WEO. There is no information as to why the WEO did not testify and how the statement reached PW5. In addition, it is obvious that, PW5 do not have full information and knowledge of the statements and he therefore cannot talk about the statements. PW5 cannot be cross-examined on the same. This will occasion serious injustice on the part of the suspects. Therefore, the statements were produced by incompetent person which is unprocedural and they are hereby expunged from records.

At this stage, the prosecution is left with the evidence of PW4 and cautioned statements of the accused persons which were both repudiated by the accused persons. As it stands, there is no evidence to corroborate these cautioned statements. I am in accord with the principle of law that, not every confession, be it retracted, repudiated or otherwise, needs to be corroborated. A conviction may be solely based on a confession but caution must be taken based on the circumstance of the series of the



events so stated. In the case of **Twaha Alli & 5 others vs Republic**, Criminal Appeal No. 78 of 2004, the Court of Appeal put it clearly thus:-

*"We wish to emphasize here that it is a mundane truth that the very best of witnesses is an accused who confesses his guilt. This confession, however, should not be taken casually..."*

The principle was enunciated as early as 1945 by the Eastern African Court of Appeal in the case of **Republic vs GAE s/o Maimba and Another** (1945) 12 EACA 82, held that: -

*"There is no rule of law or practice making corroboration of a retracted confession essential. Corroboration of a retracted confession is desirable but if the court is fully satisfied that the confession cannot but be true, there is no reason in law why it should not act on it."*

This position was reiterated by the East Africa Court of Appeal in the case of **Tuwamoi vs Uganda** [1967] E.A. 84 where it was held that: -

*"...Corroboration is not necessary in law and the court may act on the confession alone when it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true"*

See, also **Michael Luhiye vs Republic** [1994] TLR 181 and **Jumane Mfaume @ Said vs Republic**, Criminal Appeal No. 52 of 2006.

Going to the testimony of PW4, he testified that he wrote the cautioned statements of the accused persons who confessed to have killed the deceased. He stated that, both the accused persons admitted to



having planned and executed the plan of murder together. This being the evidence of PW4, both the accused persons denied having given their statements for it to be written down rather they were asked for particulars and forced to sign a statement. I have searched the prosecution evidence, and I do not see the testimony as to what triggered the accused's arrest? Why among all the people in Katoro did the police arrest the accused? The chain of evidence is missing a piece on how the accused persons linked with the offence in the first place. PW4 who recorded the cautioned statements of both accused persons does not say how did the suspects ended up in their custody in the first place? This important information is missing and it supports the claims that perhaps the accused persons were actually framed. Time in memorial, the Court of Appeal warned on the danger of basing a conviction on the retracted or repudiated caution statements. In the case of **Nyerere Nyague vs Republic, Criminal Appeal No.67 of 2010** upheld the decision in **Tuwamoi vs Uganda (1967) EA 91**, it sets a principle that even where voluntariness of a repudiated or retracted confession statement has been cleared, a prudent court should always evaluate the entire evidence and assess the weight to be attached to it. The court observed that:-

*"...even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to*



*be attached to such evidence given the circumstances of each case."*

Based on the circumstance of this case, were there are gaps in prosecution evidence, I find it dangerous to convict the accused solely based on their repudiated and retracted cautioned statements. I hand with the principle stated in the case of **Bombo Tomola vs Republic**, [1980] TLR 254 and **Hemed Abdallah vs Republic**, [1995] TLR 172, it was held that: -

*"Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular or unless the court after full consideration of the circumstances, is satisfied that the confession must be true; and that once the trial court warns itself of the danger of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true, it may convict on such evidence without any further ado."*

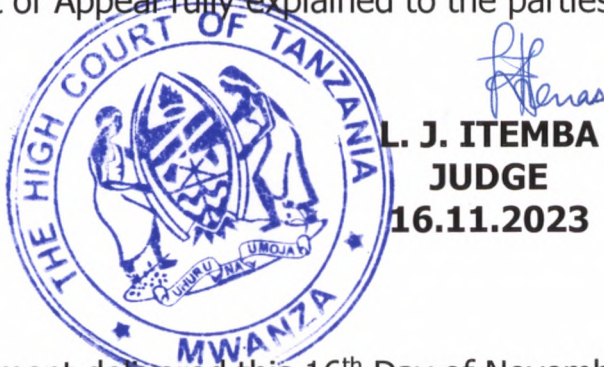
That being the analysis, I have reached the following conclusion. The accused persons ought to be convicted only on the strength of the prosecution and the standard of proof is beyond reasonable doubts. I am satisfied that the prosecution evidence falls short of proving the charges of murder against the accused persons. I am in accord with all the 3 assessors that the prosecution has failed to prove their case beyond reasonable doubt against Matongo Mathayo @Magoti and Juma Msafiri



@Stephano the accused persons. In the event, I find the accused persons Matongo Mathayo @Magoti and Juma Msafiri @Stephano not guilty as charged. I, therefore, order their immediate release from custody unless lawfully held.

**DATED** at **MWANZA** this 16<sup>th</sup> November 2023.

Right of Appeal fully explained to the parties.



Judgment delivered this 16<sup>th</sup> Day of November 2023, under my hand and seal of the court, in the presence of both accused persons, Mr. Godfrey Odupoy, Ms. Verena Mathias and Mr. Mussa Mlawa learned state attorneys for Republic, Mr. Eric Rutehanga learned counsels for the accused persons and Ms. Gladys Mnjari, RMA.

*L. J. Itemba*  
**L. J. ITEMBA**  
**JUDGE**