IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT SINGIDA
ORIGINAL JURISDICTION
CRIMINAL SESSION CASE NO. 97 OF 2022
THE REPUBLIC
VERSUS
JUMANNE ALEX MTATURU

JUDGMENT

Last Order: 10th October 2023
Judgment: 30th November 2023

MASABO, J.:-

JUMANNE ALEX MTATURU, the accused person herein, is charged with the offence of murder contrary to sections 196 and 197 of the Penal Code [Cap 16 R.E 2019] (now R.E. 2022). The particulars of the offence are that on 3rd April 2021 at Manga Village, Mtipa Ward, Mungumaji Division within the district and region of Singida, he murdered **Ramadhani Mohamed Kasimu**. When the charge was read over to him, he pleaded not guilty to the charge hence this trial.

To prove the case against the accused person, the prosecution paraded seven witnesses and tendered four exhibits which are: extra judicial statement of the accused person, a post mortem report of the deceased, a sketch map of the scene of the crime, a certificate of seizure and cautioned statement of the accused which were admitted as exhibit P1, P2, P3, P4 and P5, respectively. The witnesses were Aisha Omary, the accused's wife (PW1) who, for the reasons I shall disclose in the due course, she did not testify.

Ferdinand Michael Njau, a justice of the peace testified as PW2, Jumanne Salum Msaghaa was PW3, Omary Hamisi Chima was PW4, Ramadhani Hassan Nkungu as PW5, Grace Mlolo Mwansele, an assistant medical doctor testified was PW6 and D7603D/SSGT Rajab, a retired police officer who was an investigator of the case testified as PW7. After the closure of the case and a ruling on case to answer being pronounced and the accused person addressed as per the law, he opted to defend himself on oath. He testified as DW1 and tender no exhibit.

Before I go to the evidence adduced by both the prosecution and the defense side, I will briefly comment on PW1. As said above, she is the accused's wife and as per section 130(1) of the Evidence Act, Cap. 6 R.E 2022 she is a competent but not a compellable witness. When she appeared in court, she was addressed under section 131 of the same Act and when asked if she was willing to testify, she remained silent. Besides, she appeared fearful such that she could not even face the accused person. Even when asked to mention her own name, her voice was too low. Her choice to remain silent and her demeanor suggested that she was feaful hence unwilling to testify against her husband. In the foregoing, it was found prudent to have her excused. Consequently, the prosecution remained with six witnesses.

The evidence gathered from these six witnesses and the exhibits tendered can be summarized as follows. The deceased was the accused's maternal uncle. Both were living in the same compound but in different homes. The

deceased was an old man aged seventy (70) years and depended upon the accused person's family as caretakers. They were taking care of him, giving him food and other necessities of life. On 2/4/2021 at around 19 hours the accused went to give the deceased food and remained there until 20 hours when he left and went back to his home. Later on, he returned to the deceased's home unannounced, broke into the house and found the deceased warming himself around firewood. He pushed him and caused him to fall on the bed frame. He thereafter took a rope and tightened it around the deceased's neck until he died. In disguise, he carried the deceased's body and threw it into a pond. Thereafter, he went back to his home and slept until at about 5:00 hours on 3/4/2021 when he woke up and pretended that he was going to greet his uncle. After a short while, he went back to his home and told his wife that the deceased was missing. Together, they notified neighbors and in the company of neighbors, they started to search around until they found his dead body in the pond.

The incident was reported to police. PW7, a police officer, arrived at the scene being accompanied by PW6, a clinical doctor. They had the deceased's body removed from the pond and it was identified as the body of Ramadhan Mohamed Kasimu, the deceased person herein. It had a black manila rope tied with three knots around its neck. It had wounds on the right hand, at the wrist joint and at its ear. A postmortem examination was then performed by PW6 and its result revealed that the cause of death was lack of oxygen due to suffocation (Exhibit P2). PW7 drew a sketch map of the scene of the

crime (Exhibit P3). He also seized the manila rope and issued a certificate of seizure (exhibit P4).

PW7 held the accused under restraint after being informed by the deceased's relatives that he was the sole suspect because he told them that on the fateful night, he visited the deceased who bequeathed him his farm, a revelation which was suspicious. The accused was taken to Singida Police Station. In the course of interrogation while at the station, the accused confessed to have killed the deceased so that he could inherit his farm. After his cautioned statement was recorded, the accused was on the same day, taken to PW1, a justice of the peace before whom he made an extra judicial confession to the murder of the deceased.

In his defence, the accused testifying as DW1 denied the allegations. He confirmed the relationship between him and the deceased who was his uncle. He also confirmed that he was his caretaker and he routinely greeted him every morning. As per his routine, on 3rd April 2021 at around 6 am he went to greet the deceased but he found him missing. Later on, as they were searching for the deceased, they found his body in the pond. He also told the court that PW7 apprehended him after the completion of the post-mortem examination. He made him board a police motor vehicle which took him to Singida Police Station. After they arrived at the police station, PW7 handcuffed and tortured him while forcing him to confess. Unable to endure the pain any longer, he confessed. He was taken to a justice of peace where

he also confessed as he was told before by PW7 that if he did not confess, he would be tortured again.

I have thoroughly and dispassionately assessed the evidence adduced by both parties. Section 196 of the Penal Code, Cap 16 against which the accused herein is charged, states that a person shall be guilty of murder if, with malice aforethought he causes the death of another person by an unlawful act or omission. Two things have therefore to be proved, namely that the deceased's death was occasioned by an omission or unlawful act of the accused person and that, the unlawful act or omission was actuated by malice aforethought. The particulars of the offence and the evidence on record entertain no doubt that the deceased died an unnatural death. As per the report of post mortem examination, he died as a result of suffocation. Two main questions call for determination namely, whether the suffocation that caused the deceased's death was inflicted on him by the accused person and whether, the accused person did so with malice aforethought.

For these two questions to be answered positively and for a conviction to be entered thereof, it must be proved that the suffocation was caused by none other than the accused person and he did so with malice aforethought. The law casts this duty on the prosecution. It is a cardinal principle of law that, in criminal cases such as the one at hand, it is the prosecution that has a burden to prove its case to the required standard which is proof beyond reasonable doubt (see **Mohamed Haruna @ Mtupeni & Another vs Republic** (Criminal Appeal 259 of 2007) [2010] TZCA 141 TanzLII).

Looking at the prosecution's evidence above summarized, it is crystal clear that none of the prosecution witnesses saw the accused person killing the deceased and thus, there is no direct evidence against him. The evidence implicating him is a blend of circumstantial evidence and his own confession. The circumstantial evidence is built on the following three circumstances, namely: *one*, the accused was the last person to be seen with the deceased. *Second*, the suspicious coincidence between the deceased's death and the accused's assertion that the deceased has bequeathed him his land. And, *third*, the accused's conduct when he went to greet his uncle in the morning.

Regarding the first circumstance, it was substantially uncontested and the accused himself admitted that indeed, he was the one who went to give the deceased food and after he had eaten, he left the place and went to his home at around 20 hours. There was in addition, an oral testimony by PW5 who is the deceased's nephew and the accused person's cousin. This witness told the court that the accused disclosed to him that on 2/4/2021 he was at the deceased house. At around 21 hours he went back to his home and returned again to the deceased's house at 1:00 am. After a one hour conversation with the deceased, he left him and went to sleep at his home. At 5:00 am he went back to the deceased's home but he found him missing. PW5 was not cross examined on the truthfulness or otherwise of these visits. He was only cross examined on the reasons for such frequent visits whereby he responded that the accused told him that he frequented his uncle's place as he had a fever. The failure to cross examine PW5 on this material fact

suggests that his narration that the accused visited the deceased at the time above stated was true. Thus, it is taken to have been established that the accused person was the last person to be in contact with the deceased and that, their last meeting was 1 am which was only 4 hours before the deceased was found missing. I am aware of the accused's belated attempt to discount the midnight visit. In his defence, he stated that the last time he was at the deceased's home was at 20 hours. Having keenly considered this defence, I have found it to be an afterthought. Be it as it may, the fact that he was the last person to be seen with the deceased has remained intact.

The seemingly suspicious coincidence between the incident and the accused's assertion that the deceased bequeathed him his land on the fateful night which is the second element in the chain of circumstances will not detain me as its source was unknown and it lacked corroboration. PW7 never disclosed the names of the relatives of the deceased who told him that they suspected the accused as the culprit because he told them that he was with the deceased at night and that the deceased bequeathed him his farm. In addition, PW5 who is the sole relative of the deceased who came to testify, did not allude to this suspicion and when he was asked if he knew the person who murdered his uncle, he responded that he did not know. Accordingly, this part of the chain attracts no weight and it is disregarded altogether.

Coming to the third circumstance, the prosecution's evidence was that, after the accused went to greet his uncle at 5 am he did not find him and from there he hurriedly announced his disappearance. Save for the difference on

the time, this circumstance was uncontroverted and it was sufficiently corroborated by the accused himself. In his defence, he told the court that as per his routine, on 3/4/2021 at 6 am he went to greet his uncle but he did not find him. He then went back to his family and notified his wife and neighbours. During cross-examination, he disclosed that when he arrived at the deceased's home at 6 am he found the door open. He called the deceased from outside and when he did not hear his response, he did not enter the house but went back to his home and announced the deceased's disappearance. Asked why he did not enter the house although he used to enter the same, he just stated that during the morning visits, he often found his uncle outside. Thus, he was worried why on that material date he was not outside.

When the revelations about the accused's reluctance to enter the house, his hurried announcement of the deceased's disappearance and the close relationship between him and the deceased are considered cumulatively, they manifest a disturbing encounter. As already stated, going by the PW5's testimony, the accused's early morning visit to the deceased was only 4 hours after he left him at around 1 am, or, going by the accused's narration, it was only 9 hours after he had left him at 20 hours. It defeats logic why the accused who was a frequent visitor to the deceased's home grew cold feet and chose not to enter the house to find out what had befallen his uncle. It is similarly incomprehensible why he hurriedly announced the deceased's disappearance. In my considered view, his conduct strongly suggests that he knew the whereabouts of the deceased and his morning visit was nothing

but a disguise. Had he not known that the deceased was not there, he would have certainly gone inside to see whether he was there and what had possibly befallen him.

Not only that, in his defence, the accused told the court that after his three male neighbours who are Shadrack, Mimbi and Sumbe arrived, they split into two groups each with two persons and before they embarked on the wild search for the deceased, they discussed and agreed on the location which each of the two groups should go. The accused went with Shadrack and it was his group that went to the pond and discovered the deceased's body. Much as the accused told the court that Shadrack was the one who first discovered the deceased's body, the cumulative narrative above strongly suggests that, the accused's choice of the location for his group was not coincidental. The accused knew very well that the deceased's body was in the pond and he tactically chose that direction so as not to waste much time searching for the deceased and in disguise, he let Shadrack go to the pond to avoid any suspicion.

Turning to the confession which is the second incriminating evidence against the accused, as stated earlier, this court was presented with two confession statements the first one being the statement made before PW7 and the second is an extrajudicial confession made before PW1. The caution statement was admitted after I overruled an objection whereas the extra-judicial confession statement was admitted uncontested.

Starting with the extra-judicial statement (Exhibit P1), much as it was admitted uncontested, it is a requirement of the law that before allotting it any weight, the court should examine it to see whether its recording was compliant with the law. Impliedly, this requires me to see whether its recording was compliant with Chief Justice Guideline as summarized in the case of **Japhet Thadei Msigwa vs. Republic** Criminal Appeal No. 367 of 2008 [2011] TZCA 108 TanzLII, where the Court of Appeal stated that when a justice of the peace is recording a confession of a person who is under police restraint he should, among other things, ask such person whether any person by threat or promise or violence has persuaded him to give the statement and whether he really wishes to make the statement on his own free will. And, having asked him these questions, he should inform him that if he makes a statement, the same may be used as evidence against him (also see the cases of **Peter Charles Makupila @Askofu vs. Republic** Criminal Appeal No. 21 of 2019 [2021] TZCA 197 TanzLII).

The law requires further that, after recording the statement, the justice of the peace should read it over to the accused person and it must be stated/indicated that the document was read over to him (see **Chamuriho Kirenge @Chamuriho Julias vs. Republic**, Criminal Appeal No. 597 of 2017 [2022] TZCA 98 TanzLII). Looking at the extrajudicial statement (Exhibit P1), I have found it to be compliant with the requirements above. Hence it attracts weight considering also that its admission was uncontested and the accused told the court that he stated the truth.

The second confession is the one made in a cautioned statement recorded by PW7 and which was admitted as Exhibit P5 Unlike the extrajudicial statement which can be recorded at any time whenever the accused person is ready to have his confession recorded, the duration for recording of cautioned statement is statutorily regulated. Section 50(1) (a) of the Criminal Procedure Act [Cap. 20 R.E 2022], requires that the recording should be done within four (4) hours commencing at the time when the suspect was taken under restraint in respect of the offence. The duration may be extended under section 51 (1). These provisions call for strict compliance as held in the case of **Emmanuel Malahya vs. Republic**, Criminal Appeal No. 212 of 2004 (unreported) where it was stated that:

> Violation of section 50 is fatal and we are of the opinion that ss. 53 and 58 are on the same plane. These provisions safeguard the human rights of suspects and they should therefore not be taken lightly or as a mere technicality.

In the instant case, exhibit P5 shows that it was recorded on 03rd April 2021 from 16.00 hours to 17.02 hours. PW7 who recorded the accused's cautioned statement was the one who arrested the latter. However, in his testimony, he did not state the time he arrested the accused. The only evidence relating to the arrest of the accused person is that of the accused himself who stated that the policemen went to the pond where the deceased body was found at around 12 hours and after it was medically examined, he was made to board the police car and he was ferried to the police station. A doubt is consequently entertained on whether in recording the cautioned statement, section 50(1) of the Criminal Procedure Act was complied with. Assuming

that the accused was put under restraint from 12 noon or 12:30, it would follow that the time at which the recording was done (16 hours to 17 hours) stretched beyond the permissible period. There being no other evidence to the contrary or a suggestion that an extension of time was granted, it is presumed that the recording was offensive to section 50(1). The doubt is therefore resolved in the accused's favour.

The immediate question emerging from this finding is what should be the fate of the cautioned statement? In the case of **Ramadhani Mashaka vs. Republic**, Criminal Appeal No. 311 of 2015, CAT (unreported) the Court of Appeal had this to say:

> It is now settled that a cautioned statement recorded outside the prescribed time under section 50(1) (a) and (b) renders it to be incompetent and liable to be expunged.

Accordingly, the cautioned statement admitted as exhibit P5 is hereby disregarded and expunged.

Having disregarded the cautioned statement, I have remained with only two pieces of evidence, that is the circumstantial evidence and extrajudicial statement. Whether these two suffices to ground a conviction is the next question for determination. Starting with the circumstantial evidence, it is a settled law that in order to ground a conviction on circumstantial evidence, the exculpatory facts inferred from such evidence should be incompatible with the innocence of the accused or put otherwise, the circumstances

should be incapable of more than one interpretation. It should be pointing towards the guilt of the accused and when taken cumulatively, it should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and no one else (see **Simon Musoke vs. Republic** (1958) EA 718 and **Jimmy Runangaza vs Republic** (Criminal Appeal 159 of 2017) [2018] TZCA 188 TanzLII.

The threshold is however relatively lean when, such as the case at hand, the circumstances are such that the accused person was the last person to be seen with the deceased. Dealing with a similar issue in **Abel Mathias @ Gunza @ Bahati Mayani vs Republic** (Criminal Appeal No. 267 of 2020) [2023] TZCA 25 TanzLII the Court of Appeal held that:

> It is true that for a conviction on circumstantial evidence to stand, it should not be capable of an interpretation other than the accused's guilt. However, the specie of circumstantial evidence we are dealing with here, is that of the last person to be seen with the deceased, which as we stated in **Miraji Idd Waziri @ Simana & Another v. Republic** Criminal Appeal No. 14 of 2018 (unreported)
> "simply means that; where there is evidence that an accused was the last person to be seen with the deceased alive then there is a presumption that he is the killer unless he offers a plausible explanation to the contrary".
> See also **Mathayo Mwalimu & Another v. Republic,** Criminal Appeal No. 147 of 2008 cited by Ms. Paul and **Akili Chaniva v. Republic**, Criminal Appeal No. 156 of 2017 (both unreported), ...

> In our considered view, the plausible explanation envisaged in the above principle should be in the suspect's evidence so as to counter the evidence presented by the prosecution. [emphasis added]

Based on what I have already demonstrated, I am of the firm view that, the circumstances above when taken cumulatively, are sharply inconsistent with the accused's innocence as they form a chain so complete that there is no escape from the conclusion that the accused herein is responsible for the deceased's death. Also, as I have already demonstrated, the accused's explanation is wholly implausible. Besides, the fact that the deceased was suffocated and put in a pond, clearly manifests the accused's intention to murder his uncle.

As regards the confession made before PW1, the law regards the confession made before a magistrate or justice of the peace as a valuable piece of evidence capable of sustaining a conviction (See section 28 of the Law of Evidence, Cap 6 RE 2022). In fact, the accused person who confesses the commission of the offence before the justice of the peace or any person is regarded by law to be the best witness for his case. Articulating this principle in **Chande Zuber Ngayaga & Another vs Republic** (Criminal Appeal 258 of 2020) [2022] TZCA 122, TANZLII, the Court of Appeal stated that:

> It is settled that an accused person who confesses to a crime is the best witness. The said principle was pronounced in the cases of **Jacob Asegellle Kakune v. The Director of Public Prosecutions**, Criminal Appeal No, 178 of 2017 and Emmanuel Stephano v. Republic, Criminal Appeal No. 413 of 2018 (both

unreported). Specifically, in **Emmanuel 13 Stephano** (supra) the Court while reiterating the above principle stated that: -

> 'We may as well say it right here, that we have no problem with that principle because in a deserving situation, no witness can better tell the perpetrator o f a crime than the perpetrator himself who decides to confess. " [Emphasis added].

The accused herein having voluntarily confessed before PW1 that he killed the deceased so that he could inherit his farm, was the best witness for his case.

That said and done, and since the two essential elements for murder have been established, I have found the prosecution to have proved its case beyond reasonable doubt and I hereby convict him of murder contrary to sections 196 and 197 of the Penal Code, Cap 16. In consequences thereto, he shall suffer death by hanging. The right to appeal is explained.

DATED and **DELIVERED** at **SINGIDA** this the 30th day of November 2023.

J.L. MASABO

JUDGE