

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT MBULU

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 39 OF 2023

REPUBLIC

VERSUS

PASKALI S/O PETRO @ QAMARA..... ACCUSED PERSON

JUDGMENT

21st & 27th May 2024,

Kahyoza, J.:

Leonia John @ Leonia Sabiniani, eight years old girl, died a violent death. She was raped, strangulated during or after the commission of crime and died of brain hypoxia. The prosecution arraigned Paskali s/o Petro @ Qamara with the offence of murder of Leonia John.

The prosecution alleged that Paskali s/o Petro @ Qamara, did, contrary to sections 196 & 197 of **the Penal Code** [Cap. 16 R.E. 2022], on the 9th day of April, 2023 at Langhagesh village, within Mbulu District in Manyara Region, murder one Leonia D/O John @ Leonia D/O Sabiniani. The accused person denied the charge.

To prove the accused guilty, Ms. Mary Lucas, assisted by Mr. Amilion Moses, State Attorneys, who appeared for the Republic summoned four witnesses, to wit; Rev. Father James Leonard (**Pw1**), Joseph Joachim Panga (**Pw2**), Denis Paskali (**Pw3**) and F. 3667 D/Sgt Joseph (**Pw4**); The prosecution also tendered four documentary exhibits namely; a Sketch Map plan, Certificate of seizure, a report on post-mortem examination and caution statement of Paskali s/o Petro @ Qamara.

The defence learned advocate, Mr, Basil Boay, led the accused person to defend himself on oath. The accused person denied to commit the offence contending that the case was fabricated against him.

The prosecution's account was that, Mbulu Roman Catholic Diocese owns and operates "*Kituo cha Kuhudumia Wagonjwa na Wasiojiweza'*" that is "the *Centre of Orphans, Sick and the Needy*" (the Centre). Rev. Father James Leonard Yarrot (**Pw1**), was a supervisor and manager of the Centre. The Centre had two categories of beneficiaries of its services, the residents, and non-residents beneficiaries. According to Rev. Father James Leonard Yarrot (**Pw1**), Joseph Joachim Panga (**Pw2**), and Denis Paskali (**Pw3**), the Centre organized a get-together party on the 9th day of April,

2023 to mark Easter Sunday. All residents and non-resident beneficiaries attended. Leonia John, a non-resident beneficiary, attended the party.

At 06:00pm the party ended and non-resident recipients were released to join their families, and the resident recipients went to their hostels. Later, the residents went to the church for evening prayers and finished at around 09:00 pm. According to Joseph Joachim Panga (**Pw2**), Benedict was one of the persons who not only attended the party but also went to the church for evening prayers. Benedict told Joseph Joachim Panga (**Pw2**), that he had left his mobile phone at Joseph Joachim Panga (**Pw2**)'s kiosk for charging and that he went to pick it and found kiosk was closed from inside. He asked Joseph Joachim Panga (**Pw2**), the owner of the kiosk, to help him to get his cellphone.

Joseph Joachim Panga (**Pw2**), deposed that he was the owner of the kiosk owner and he was working at the Centre. Rev. Father James Leonard Yarrot (**Pw1**) supported the evidence of Joseph Joachim Panga (**Pw2**), that he was the owner of the kiosk. Joseph Joachim Panga (**Pw2**), and Rev. Father James Leonard Yarrot (**Pw1**) deposed that the former employed Paskali s/o Petro @ Qamara, the accused, to run his kiosk. Thus,

Benedict approached Joseph Joachim Panga (**Pw2**), an employer of the accused person, the kiosk keeper, for assistance.

Joseph Joachim Panga (**Pw2**) went with Benedict to his kiosk. He found it closed from inside. He knocked three times but it was in-vain. To gain entrance, he forced the door open. Using a torch from his mobile phone, he saw Paskali s/o Petro @ Qamara, laying and beside him was a child. Paskali s/o Petro @ Qamara, tried to cover the child in vain. Joseph Joachim Panga (**Pw2**) saw a half-naked girl, as she had only a T-shirt and probed Paskali s/o Petro @ Qamara as to what he was doing. Paskali s/o Petro @ Qamara, jumped and got hold of him trying to escape.

Joseph Joachim Panga (**Pw2**) raised an alarm for help. Mzee Benedict responded. They arrested Paskali s/o Petro @ Qamara. They took him close to the Centre's gate. Rev. Father James Leonard Yarrot (**Pw1**) responded to the call for help. He met Joseph Joachim Panga (**Pw2**), who recited to him what transpired.

Rev. Father James Leonard Yarrot (**Pw1**) entered the room and found a girl, he identified as Leonia John, laying on the floor, legs wide apart, bleeding from her genitals. And she had vomited. He saw her

underpants beside her. The girl was half naked as she wore only a t-shirt. He suspected she was not alive. He rushed outside to rescue Paskali s/o Petro @ Qamara from the angry mob that aimed at killing him. He took Paskali s/o Petro @ Qamara to a safe room and deployed security guards to look after him.

Rev. Father James Leonard Yarrot (**Pw1**) summoned Dr. Denis Paskali (**Pw3**), to check the victim and advise them accordingly. Dr. Denis Paskali (**Pw3**) was a clinical officer volunteering at the Centre before he was employed by Huruma Dispensary at Hydrom.

Dr. Denis Paskali (**Pw3**) examined the girl and found blood trickling from her genitalia and lacerations around it. Further examination revealed that her vagina ruptured. He saw bruises and nails marks on her neck. He made findings that, she was raped and strangulated. Dr. Denis Paskali (**Pw3**), confirmed Rev. Father James Leonard Yarrot (**Pw1**)'s doubts that the child was no more.

Dr. Denis Paskali (**Pw3**) advised Rev. Father James Leonard Yarrot (**Pw1**) to ensure people do not tamper with the deceased's body. Rev. Father James Leonard Yarrot (**Pw1**) instructed the deceased's body to be

shifted to another room. He reported the incident to police. Police went to the scene of the crime following day, morning.

F. 3667 D/SGT Joseph (Pw4) was one of the police officers who went to the scene of the crime following Rev. Father James Leonard Yarrot (**Pw1**)'s report of the incident. He found Paskali s/o Petro @ Qamara, the suspect locked in a room. He went to the scene of crime, he found skin oil (topline), skirt, skin tight underpants and one shoe. The deceased was laid on the other room. He seized the items. He added that D/CPL Imran interviewed the suspect who admitted to commit the offence and recorded his caution statement. Police took the body to Dongobesh health Centre. The doctor examined the deceased's body and prepared a post mortem examination report.

A sketch map, a certificate of seizure, a post mortem examination report and Caution statement of Paskali s/o Petro @ Qamara were tendered and admitted during the preliminary hearing as exhibits P1. P2. P3 and P4, respectively.

After it was established that, Paskali Petro, the accused person, had a case to answer, he defended himself on oath. He neither called a witness

nor tendered any exhibit. Paskali Petro (**Dw1**), a resident of Dumbeta village, testified that on 29th day of February, 2023 took his three children to the Centre for service. They were registered at the Centre, two of his children were epileptic, and the other had persistent chest pain. After his children were received at the Centre, he stayed around to provide care to his children

On the 9th day of April, 2023 at around 08:00 pm Paskali Petro (**Dw1**), was at the church for praying. From the church, he decided to go to kitchen to check if everything was okay as part of his duty. Before he reached there, he found Joseph Joachim Panga (**Pw2**), standing near the Centre's gate. Joseph Joachim Panga (**Pw2**), requested him to collect his cellphone that he had left charging at his room. Paskali Petro (**Dw1**) entered Joseph's room and started searching for the phone. Whilst there, Joseph entered in the room and invited his attention to a dead body and asked him what was that, while pointing at the dead body behind the door. Paskali Petro (**Dw1**) denied to have been involved in anything before he was sent by Joseph Joachim Panga (**Pw2**), to that room.

Paskali Petro (**Dw1**) deposed that he saw the body. The body was of a young girl, half-naked. They left the room and went to the Centre's gate,

where Joseph Joachim (**Pw2**) told several people that, there was a body in his room. People went and witnessed the same. There was no explanation as to what happened to the said girl.

Paskali Petro (**Dw1**) explained that, Joseph Joachim (**Pw2**)'s room had one entrance and two compartments, one used as a sitting room and the other one a bed room. A sitting room was used as a restaurant and the other was used as a bedroom. The body was in the first room, the sitting room "sebule".

Later on, at 10:00 hrs Paskali Petro (**Dw1**) was arrested and kept in a room that is used to keep delinquents at the Centre. The next morning, on 10. 4. 2023 at 10:00 am police took him to Joseph Joachim (**Pw2**)'s kiosk, tortured him forcing him to admit to commit the offence. Despite the torture and threats from the police, Paskali Petro (**Dw1**) maintained his innocence.

They persisted with the torture, and Paskali Petro (**Dw1**) had nothing left but to succumb to their demand, and he admitted to have killed the deceased in a cautioned statement. He deposed that the caution statement was involuntarily obtained. Paskali Petro (**Dw1**) added that Centre was

poorly managed and supervised. He beseeched this Court to release him for he was innocent.

Having heard the evidence of both sides, it is the duty of this court to find out if the prosecution has proved the accused person guilty beyond reasonable doubt.

To establish that Paskali Petro (**Dw1**) committed the offence of murder, the prosecution had a duty to prove; **one**, that Leonia John, the person alleged to have been killed is in fact dead; **two**, that the alleged death was unnatural one; **three**, that Paskali Petro (**Dw1**) is the one who killed Leonia John, (the deceased); and **four**, that Paskali Petro (**Dw1**) killed Leonia John with malice aforethought. Malice aforethought is established as per section 200 of the Penal Code, when the prosecution proves-

- 1) an intention to cause death or grievous harm to a person whether such person is the person actually killed or not;
- 2) that the accused person acted with knowledge that the act or omission causing death will probably cause the death or grievous harm; or
- 3) an intention to commit the offence punishable with a sentence of three years or more.

Is Leonia John dead? and if the answer is in affirmative, was her death unnatural?

There is no dispute that Leonia John is dead. The prosecution and Paskali Petro (**Dw1**) executed a memorandum of facts agreed not to be in dispute, among other things that, **Leonia D/O John @ Leonia D/O Sabiniani** is utterly dead. According to the post mortem examination report admitted during the preliminary hearing as **exhibit P.3, Leonia D/O John @ Leonia D/O Sabiniani** died a violent death. She died of brain hypoxia because of strangulation. She had bruises around the neck, signs of blunt forceful penetration around her genitalia and perineal tear of 1 x 3 cm with multiple bruises at the vaginal with blood stains.

Even if, the parties had not executed the memorandum of facts agreed not to be in dispute, the evidence of Rev. Father James Leonard Yarrot (**Pw1**), Joseph Joachim (**Pw2**) and Dr. Denis Paskali (**Pw3**), one hand, and Paskali Petro (**Dw1**)'s defence, on the other, established beyond reasonable doubt that, Leonia John is dead and her death was unnatural. The evidence revealed that Leonia John was found dead, half naked, blood tripping from her private parts and her neck having signs of being

strangled. She vomited before she died. All that proved that she died a violent death.

I therefore, find without any scintilla of doubt in mind that; **one**, Leonia John the person alleged to have been killed is in fact dead; and **two**, her death was unnatural one. She died untimely and a violent death. The next question is whether Paskali Petro (**Dw1**), the accused person is the one who killed Leonia John.

Did is Paskali Petro (Dw1), the accused person kill Leonia John?

To establish that Paskali Petro (**Dw1**), the accused person, killed Leonia John, the prosecution tendered circumstantial evidence. There was no eyewitness. The prosecution's duty is to prove beyond reasonable doubt that unnatural death ensued, which it did, and establish the link between the said death and the accused. The Court of Appeal in **Mohamed Said Matula v. R., [1995] TLR. 3** held that-

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts

away from the prosecution and no duty is cast on the appellant to establish his innocence.” (Emphasis added)

It is settled that, when the prosecution relies on circumstantial evidence, such evidence or facts must irresistibly lead to the conclusion that it is the accused and the accused only who committed the offence the accused is charged with. Thus, the evidence should eliminate the possibility of any person other than the accused person committing the offence. In **Mathias Bundala v. R**, [2007] T.L.R. 53 or tanzlii [2007] TZCA 175, the Court of Appeal of Tanzania held that-

“a case depending conclusively on circumstantial evidence the court must before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis than of guilty”

To establish the accused person guilty based on circumstantial evidence, the Court of Appeal in **Bahati Makeja V R.**, [2010] T.L.R. 49 or tanzlii [2011] TZCA 31, added that -

1. *"The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established,*

2. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person,*
3. *The circumstances taken cumulatively should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and no one else, and*
4. *The circumstantial evidence in order to sustain a conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and should be inconsistent with his innocence”*

The prosecution staged two substantial pieces of evidence to connect **Paskali @ Petro @ Qamara** with the offence of murder; **one**, that he admitted to commit the offence. The prosecution tendered Paskali @ Petro @ Qamara’s caution statement (confessional statement) as **exhibit P.4**. Once a caution statement is admitted during the preliminary hearing, the prosecution is relieved a duty to prove that the accused person admitted voluntarily. Further to that, the accused person cannot disown such evidence. Thus, a fact that the accused person voluntarily confessed to commit the offence before the police is deem proved. Section 192(4) of the Criminal Procedure Act, [Cap. 20. R.E 2022] (the **CPA**) states that-

*192(4) Any fact or **document admitted or agreed**, whether such fact or document is mentioned in the summary of evidence or not, **in a memorandum filed under this section shall be deemed to have been duly proved**; save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved. (Emphasis added)*

I therefore, find it proved that the accused person agreed to commit the offence. It is settled that a person who confesses to have committed a crime is the best witness to the offence in issue.

The accused person attempted to disown the confession during his defence. I regret that, his attempt to disown his caution statement came too late and thus, I take it as a mere afterthought. He who wants to challenge the admissibility of a confession or statement must do so before it is admitted. The Court of Appeal in **Shihobe Seni vrs. R.**, [1992] TLR 330, held that-

*"It is trite law that if an accused person intends to object to the admissibility of a statement or confession he must do so before it is admitted and not during cross-examination or during defence. **In this case, the appellants "missed the boat" by trying to disown the statements at the defence stage. That was***

already too late. Objections, if any, ought to have been taken before they were admitted in evidence.” (Emphasis added)

Two, Paskali @ Petro @ Qamara was found at the scene of crime laying beside a deceased, legs apart, half naked body, which had bruises on the neck and bleeding from her genitalia. When probed he tried to escape, but he was arrested at the scene of crime. The accused was so found by Joseph Joachim (**Pw2**). The accused did not refute the evidence regarding the state of the deceased but the allegation he was found laying beside a dead body.

Joseph Joachim (**Pw2**) deposed and Rev. Father James Leonard Yarrot (**Pw1**), supported him that, he employed the accused as a kiosk keeper (shopkeeper) or a restaurant attendant. He deposed that his kiosk sold household items and food stuff. Joseph Joachim (**Pw2**) employed the accused who was living away from his home as a way of helping him to get his basic needs for his children who were residents at the Centre and for himself.

The accused refuted the evidence that Joseph Joachim (**Pw2**) employed him. He said that he entered the kiosk on the material day because Joseph Joachim (**Pw2**) sent him to collect Joseph Joachim (**Pw2**)’

cellular phone. However, he later deposed that he entered to collect Mzee Benedict's cellular phone which Joseph Joachim (**Pw2**) was charging for him.

It is trite law that every witness must be trusted unless, there is good reason to question his credibility. In **Goodluck Kyando v. R.**, [2006] TLR 363 and **Edson Simon Mwombeki vs R.**, tanzlii, [2016] TZCA 266 the Court of Appeal stated that-

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

I did not find any reason to disbelieve the evidence of Joseph Joachim (**Pw2**) deposed and Rev. Father James Leonard Yarrot (**Pw1**). Their evidence was consistent and plausible. Being alive of the fact that the accused person had no duty to prove his innocence but to raise a reasonable doubt in the prosecution's evidence, his evidence fell short of that. The accused person was not consistent as to why he entered the kiosk. The accused person deposed that he entered the kiosk to take Joseph Joachim (**Pw2**)'s cellular phone and later he changed that he entered to take Mzee Benedict's cellular phone.

In addition, I do not find the accused person's evidence plausible that he was able to see a cellular phone in the second room, (bed room) or inner compartment of the kiosk, but he was unable to see deceased's body laying in the first compartment or sitting room. The accused deposed that to enter the bed room one had to pass through the sitting room.

I did not believe the accused person's evidence. I therefore, find it proved that Paskali @ Petro @ Qamara, the accused person was found laying beside a dead, legs apart and half naked body, which had bruises on the neck and bleeding from her genitalia. Such circumstances prove irresistibly that, the accused not only raped Leonia John but also killed her.

Did the accused kill Leonia John with malice aforethought?

Having found that Leonila is dead and that she died unnatural death caused by Paskali @ Petro @ Qamara, the accused, the next question is whether he did so with malice aforethought. Malice aforethought as discussed above is established by proving any of the circumstances under section 200 of **the Penal Code**. The circumstances relevant to the facts of this case are provided under section 200 (a) and (b) which are proof that the accused intended; **one**, to cause death or grievous harm to Leonia

John; or two, to commit the offence punishable with an imprisonment sentence greater than three years.

The prosecution proved beyond reasonable doubt that, Leonia John was strangled and died of hypoxia. He who strangulates another his intention is nothing but to kill that other. The prosecution evidence was that there were visible marks of nails or fingers on the deceased's neck. Thus, the accused applied excessive force to the young girl's neck. He must have intended to suffocate or kill her. The Court of Appeal in **Enock Kipela v. R.**, tanzlii, [1999] TZCA 7, said that-

"...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 or and

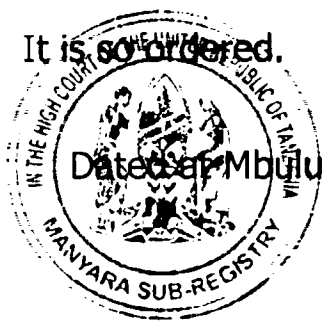
*(7) **the conduct of the attacker before and after the killing.**”(Emphasis added)*

In addition, the prosecution proved that in the course of quenching his sexual desire, the accused caused Leonia John's death. Thus, one may argue that death was accidental since it was not intended. Section 200(c) of the Penal code provides that, malice aforethought exists when the accused intended to commit an offence that is punishable with an imprisonment sentence greater than three years. In the present case, the accused person had an intention to commit the offence of rape. Leonia John was a girl below 18 years old. She could not consent to have sex with the accused person. Since the prosecution proved that the accused person penetrated the deceased, it proved rape.

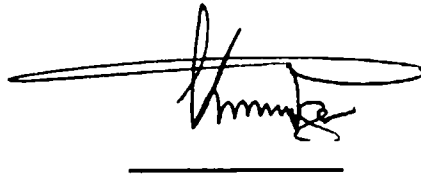
I find it proved that the accused person raped Leonia and in the course, he caused her death. Rape is punishable by a sentence of not less than thirty years. Consequently, since the accused person had intention to commit the offence of rape which is punishable with a thirty years' custodial sentence, in the course, killed Leonia John, it is construed that the accused person killed Leonia John with malice aforethought.

I find that **Paskali @ Petro @ Panga**, killed Leonia John with malice aforethought.

Eventually, I find the prosecution proved by circumstantial evidence and beyond reasonable doubt that, **Paskali @ Petro @ Panga**, the accused person, murdered Leonia John. Consequently, I convict **Paskali @ Petro @ Panga**, with the offence of murder contrary to sections 196 and 197 of **the Penal Code**, [Cap. 16 R.E 2022].



Dated at Mbulu, this 27th day of May, 2024.

A handwritten signature in black ink, appearing to read 'John R. Kahyoza', written over a horizontal line.

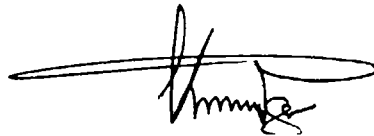
John R. Kahyoza,

Judge

SENTENCE

Paskali @ Petro @ Panga, the accused person has been convicted with the offence of murder, which has only one sentence, that is to suffer death by hanging as provided under sections 196 & 197 of the Penal Code read together with S. 322 of the Criminal Procedure Act, [Cap. 20 RE 2022], the CPA. Unfortunately, my hands are tied. I have no room to

consider neither the prosecution's grounds for imposing a stern sentence nor the defence's mitigations seeking for a lenient sentence. Consequently, I sentence **Paskali @ Petro @ Panga**, the accused person to suffer death by hanging under sections 196 and 197 of the Penal Code read together with section 322 of the Criminal Procedure Act.



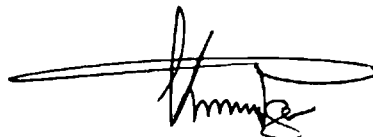
J. R. Kahyoza,

Judge

27/5/2024

Court: Judgment delivered in the presence of Ms. Mary Lucas SS/A assisted by Ms. Anifa Ally, the State Attorney for Republic, the accused persons and Mr Basil Boay advocate for the accused person.

Right to appeal after lodging notice within 30 days from today and upon being served with the record of appeal submit the grounds of appeal within 21 days explained.



J. R. Kahyoza, J.

27/5/2024