

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DODOMA SUB REGISTRY

AT SINGIDA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO.39 OF 2022

THE REPUBLIC

VERSUS

HAMIS STEVEN WILLIAM

JUDGMENT

Last order: 21/5/2024

Judgment: 23/5/2024

MASABO, J.:-

Hamis Steven William, the accused herein stands charged with murder contrary to sections 196 and 197 of the Penal Code Cap 16. The particulars of the offence set out under the charge sheet are that, on 17th May 2020, at Mgela village within Iramba District he willfully and unlawfully murdered one Hamisi Ramadhan Kizoza. When the charge was read over to him, he entered a plea of not guilty, and in consequence, the case had to come for a full trial. Hence, the present judgment.

When the trial commenced the prosecution represented by Mr. Hussein Mkeni, learned State Attorney paraded four witnesses and produced two

exhibits to prove their case. On his part, the accused having been found with a case to answer and addressed in terms of section 293(2), did not exercise such right for the reasons I shall divulge in the due course.

From the four prosecution witnesses and the two exhibits rendered, it is gathered that Hamisi Ramadhani Kizoza, the deceased herein, 17th May 2020 was just a normal day during the Holy month of Ramadhan. In the evening at around 19 hours, he joined his family for Iftar. As they were having Iftar the accused person who was a close relative to the deceased, arrived. They welcomed him for iftar but he refused. He told them that he had come to see the deceased as he had a matter to discuss with him. When the deceased finished his iftar, the accused person asked that he escort him. The deceased obliged. They left the deceased's home together while conversing. The deceased did not return to his home. As at 22 hours, he had not returned. His wife, Johari Shaban (PW3) was worried. She sent their son one Said to look for the deceased at the mosque but when he returned, he notified her that the deceased was not there.

They waited longer, assuming that the deceased escorted the accused person to his home which is considerably far from their home. As time passed, they assumed that the deceased who was also an Imam at the mosque, had passed by the mosque as he used to spend the night at the mosque during the last 10 days of Ramadhan. Surprisingly as of 14 hours, he had not returned. Worried further, PW3 sent their two sons, Jumanne and Jaffari to the mosque but they did not find him. They resolved to inquire

from the accused person who left with him. They phoned one Kisinza who resides with the accused person and asked him to inquire from the accused person about the whereabouts of the deceased who had earlier on accompanied him. The accused responded that he did not know as they parted ways at the farm of his father, Steven William. The said Kisinza told the deceased's son that the accused person was acting weirdly and it seemed as if he wanted to run away. At the instruction of the deceased's sons, the said Kisinza locked the accused person inside until when the later(deceased's son)arrived. They demanded that he take them to the farm where he allegedly parted ways with the deceased. On arrival at that farm, they found the deceased laying dead with large cut wounds on his head and face. The accused person was apprehended. The incident was subsequently reported to the police station whereby a team of officers led by PW2, Inspector Salum Nannume, went to the scene accompanied by Dr. Sebastian Sabuda Magwa (PW1) who conducted a postmortem examination of the deceased and established that the deceased's death was caused by severe head injury. The report thereto was admitted as Exhibit P1.

Meanwhile, the accused person was taken under police custody and while there he was interviewed and confessed commission of the offence. He was then taken to Hachard Byabajuka, PW4, a justice of the peace who was then a magistrate at the Primary Court of Iramba district at Kiomboi. While there, he made an extrajudicial statement confessing the commission of the offence in an extra-judicial statement which was admitted as Exhibit P2. In this statement, the accused made a long narration of what transpired on the said

day ranging from his visit to the deceased home, the way he executed him, and the efforts he took to destroy evidence.

In the totality of this evidence, I made a ruling that a prima facie case requiring the accused person to answer has been established. I subsequently addressed the accused of his rights under section 293(2) of the Criminal Procedure Act, Cap 20 R.E 2022 and I thereafter invited him to respond. His response was as follows: "*Hizi kesi zinaenda haraka haraka. Nina miaka kumi gerezani lakini kesi zinaenda haraka haraka*". Literally translated as "These trials are too fast. I have been in prison for ten years but these trials are conducted too fast".

Following this irrational answer, the defence counsel, Mr. David Rutayuga seized the opportunity to address the court on the mental disorder of the accused person, his inability to comprehend the nature of the ongoing proceedings and to give rational answers to the questions put on him, which he submitted that, demonstrates his inability to exercise his right under section 293(2) of the Criminal Procedure Act. The learned counsel drew my further attention to the previous proceedings of this court. He stated that this is not the first time the issue of the accused person's mental disorder has surfaced. That, when the accused was arraigned in this court for a plea and preliminary objection, the counsel who was representing him, indicated that the accused intended to rely on the defence of insanity and leave was granted for the accused person to be detained at Mirembe National Mental Health Institute for ascertainment of his mental status during the

commission of the offence. The result thereto indicated that he was sane but, when he was arraigned for the second time it was ordered once again that he be detained at Mirembe National Mental Institute for further examination but the results were the same. He prayed that these two reports notwithstanding, this court make a special finding on the accused person's mental health and if he is found guilty of the offence charged, he be detained as a criminal lunatic and dealt with accordingly. I will revert to this submission and prayer later.

The offence of murder against which the accused person herein is charged is a creature of sections 196 and 197 of the penal Code, Cap 16 and for it to be considered to have been proved, two things must be established, namely that a person was unlawfully and willfully killed. In other words, it has to be proved that the death occurred as a result of an unlawful act or omission of the accused person which has been perpetuated by ill intent, referred to commonly as malice aforethought. In this particular case, therefore, it has to be proved that the deceased Hamis Ramadhani Kizoza died of the unlawful act or omission of the accused person and that the accused person did so with malice aforethought.

Undeniably, the answer to the first question as to whether Hamis Ramadhani Kizoza is dead is straight and so is the answer to the question of whether or not his death was natural. The evidence of his wife PW3 and that of the doctor, PW1 and PW2 considered together with Exhibit P1, sufficiently prove

that Hamis Ramadhan Kizoza did not die a natural death. He died of a severe head injury.

The lingering question that this court has to determine is whether the accused herein unlawfully and willfully caused the death. From the evidence on record, it is clear that there was no eye witness to the incident. The only evidence implicating the accused is circumstantial evidence and his confession before PW4 as contained in the extra-judicial statement admitted as exhibit P2. Starting with the circumstantial evidence, the law is settled that for circumstantial evidence to attract weight, the exculpatory facts inferred from such evidence should be incompatible with the innocence of the accused. That, it should be pointing toward the guilt of the accused. In the present case, it is inferred that the accused was the last person to be seen with the deceased. He went to the deceased's home and asked the deceased to escort him. They left together in the presence of PW3. The deceased never returned and when the accused person was asked about the deceased's whereabouts, he responded that they parted ways at the farm of Steven William and led them there only to find the deceased lying dead.

The circumstances are, therefore, of the accused person being the last person to be seen with the deceased while alive. In such cases, the law would presume the accused person to be the killer unless he offers a plausible explanation to the contrary. In **Abel Mathias @ Gunza @ Bahati Mayani vs Republic** (Criminal Appeal No. 267 of 2020) [2023] TZCA 25 TanzLII, the Court of Appeal while dealing with a similar issue stated 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 species 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".

As no explanation was offered to the contrary, it is presumed that the accused person is the killer.

Turning to confession, section 28 of the Evidence Act Cap 6 R.E. 2022 provides that, a confession freely and voluntarily made by the accused person is admissible and invaluable. Essentially a confession is presumed to have been voluntarily made unless it is repudiated or retracted. In **Nyerere Nyague vs Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103, TanzLII, the Court of Appeal instructively stated that:

As we understand it, the relevant law regarding admission of accused's confession under this head is this: First, a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground, either that it was not voluntarily made or not made at all (See **SELEMANI HASSANI v R** Criminal Appeal No. 364 of 2008 (unreported)).

In the present case, we were presented with the accused person's confession contained in the extra-judicial statement recorded by PW4 who tendered it in court. Its admission was not objected hence it was admitted as Exhibit P2 and its substance was read over. In it, the accused person eloquently narrated all the essential ingredients of murder. In the present case Exhibit P2 discloses all the elements of the offence of murder. He gave a good narrative of not only how he executed the murder but how he planned it and the reasons thereto. With regard to the execution, his narration as regards planning coincides with PW3's testimony as to how the accused person went to their home and had the deceased escort him after iftar. He further stated that, as they were walking, he asked the accused to go in front of him while he drew a machete which he was carrying, and assaulted the deceased with it in the head. The latter part of this narration coincided with the postmortem report and oral testimonies of PW1, PW2 and PW4 who all stated that the deceased had cut wounds on his head.

The fact that the accused person carried a machete when he went to the deceased's home and managed to convince him to escort him, hence driving him away from his family members, demonstrates his premeditated ill intention. His pre-incident conducts are further demonstrations of not only his ill intent but also his intention to conceal the murder and escape justice as having executed the deceased, he washed the machete and threw it away and when he went to his home, he washed his blood-stained clothes and changed into different ones to avoid any trace.

In my firm view, much as there was no eyewitness to the incident, these two pieces of evidence considered conjointly sufficiently implicate the accused person for the offence of murder of Hamis Ramadhan Kizozo which he stands charged unless there is a defence to the contrary.

Unfortunately, there was no such defence because, as already stated after it was decided that the accused has a case to answer and after he was addressed of his rights under section 293(2) of the CPA and called upon to express how he would exercise his right of defence, he gave irrational answers. Hence, the prayer by the counsel that a special finding as to his mental status be made and if found guilty, he be detained as a criminal lunatic.

Indeed, the record show that there have been concerns about the accused person's mental status from the first day he was arraigned before this court on 15th September 2022 when his counsel, Mr. Christopher Malinga, prayed and leave was granted by this court (Masaju, J) that the accused person be detained at the mental institution and while there, an examination to ascertain the state of his mind at the commission of the offence he was charged with was performed. After the examination, Mirembe National Health Hospital where the accused person was detained, transmitted a report to this court on 1st November 2022, showing that the accused herein was sane when committing the offence he is charged with. After receipt of this report, the case was scheduled for plea and preliminary hearing before Mdemu. J (as he then was) on 5th May 2023. Both counsels agreed that the

accused person be referred for further examination of his mental status at the commission of the offence. The report transmitted to this court by Mirembe National Mental Hospital after the accused person was referred there for further examination, had the same results that the accused person was sane when committing the offence as the statements on record do not suggest that he was insane. Rather, they show that he knew very well what he was doing and that is the reason he tried to hide the evidence by washing the weapon he used and by washing his clothes.

On the other hand, and as demonstrated above and throughout the proceedings, the accused person appeared to have a mental disorder and was incapable of following or understanding the proceedings, or even giving rational answers to the questions put to him. He could neither sit nor stand still during the proceedings but required the constant attention of police officers to prevent him from running away or making unwarranted noises.

In the foregoing, much as the accused appears insane, I am unable to invoke the provision of section 219 (3) of the Criminal Procedure Act, as there is no evidence upon which to base the special findings that he was insane when committing the offence. Rather, I have found it incumbent to seek refuge under section 221(1) which caters for cases where, although there is no evidence as to insanity, the accused person is unable to understand the court proceedings. Section 221(1)(b) specifically states that:

221.-(1) Where the accused, though not insane, cannot be made to understand the proceedings-

(b) in cases which are the subject of committal proceedings by a subordinate court and of trial by the High Court, the subordinate court, shall commit the accused for trial by the High Court and either admit him to bail or send him to prison for safe keeping, **and the High Court shall, if the Director of Public Prosecutions has filed an information, proceed to hear all the evidence available both for the prosecution and the defence, and if satisfied that the accused is guilty of the offence charged shall sentence him to be detained during the President's pleasure** [the emphasis is of this court].

Accordingly, and based on my earlier finding that the evidence on record sufficiently implicates the accused person for murder, I convict him of murder contrary to sections 196 and 197 of the Penal Code, Cap 16 and I subsequently order that he be detained during the President's pleasure and be dealt upon in accordance with section 221(2) and (3) of the Criminal Procedure Act, Cap 20 R.E 2022.

DATED and DELIVERED at SINGIDA this the 23rd day of May 2024.



A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above the printed name.

J.L. MASABO

JUDGE