

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DODOMA SUB REGISTRY

AT SINGIDA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 159 OF 2022

THE REPUBLIC

VERSUS

1. JISUSI JIPOYA MAJIKU

2. NSUKUMA JIPOYA MAJIKU

3. JITASUGA JIPOYA MAJIKU

JUDGMENT

Date of last order: 21/5/2024

Date of Judgment: 4th June 2024

MASABO, J.:-

The accused persons herein, Jisusi Jipoya Majiku, Nsukuma Jipoya Majiku and Jitasuga Jipoya Majiku are siblings. They have been jointly arranged of two counts of murder of Wile Ngusa and Inalo Majiku. The particulars of the two counts are that with a common evil intention, they unlawfully killed Wile Ngusa and Inola Jipoya on 1st September 2021 at Msansao village, Mtekente ward, Ndago Division within Iramba District in Singida Region.

During the trial, the prosecution has a team of three high spirited prosecutors comprised of Mr. Nehemia Kilimuhana, Mr. Michael Martin Peter and Mr. Hussein Mkeni, learned State Attorneys. The defence had a similarly high-spirited team of three counsels: Mr. Peter Ndimbo, Ms. Salma Musa, and Mr. David Rutayuga, learned counsels for the first, second and third accused persons.

In proof of the allegation that the accused persons herein brutally murdered their sibling Inola Jipoya and his wife Wile Jipoya, the prosecution paraded four (4) witnesses and six (6) documentary exhibits. The accused persons defended themselves under oath. They had neither an additional witness, a documentary exhibit or real object.

The first prosecution witness was Yasin Athuman Nyawangele (PW1) then a medical doctor at Ndago Health Centre who went to the scene of the crime on 1/9/2021 and performed a postmortem examination on the deceased bodies. He recalled that there were two deceased bodies. The first body was of a female person identified as Wile Ngusa and the second was of a male person identified as Inalo Jipoya. In the course of the examination, he observed that both bodies had a large cut wound on the right side of the neck and were in pools of blood. In addition, the body of Wile Ngusa had another wound at the middle of his head and a third one on his nose. From this observation, he concluded that the death was caused by severe hemorrhage. The postmortem report of Inalo Jipoya was admitted as Exhibit P1 and that of Wile Ngusa was admitted as Exhibit P2.

The second witness was Yona Simon Zacharia (PW2), a justice of the peace who recorded the accused persons' extra-judicial confessions. He recalled that the second accused person went to his duty station at the Primary Court of Singida District at Singida (town) on 21/9/2021 being accompanied by D/CPL Raphael (PW3). He narrated the procedures he used before, during and after recording the 2nd accused's extrajudicial confession and in the end, he tendered it as Exhibit P3.

F5775 D/SGT Raphael (PW3) was a member of the first investigation team, a task force comprising 4 people, three of them being from the DCI Office. On 9/9/2021 he was assigned to join a task force of three policemen specifically sent by the DCI to investigate the murder herein. During the investigation, the task force led by Inspector Mwakyusa learned that soon after the incident, the second accused person, Nsukuma Jipoya, was arrested but released. After collecting his information, they arrested him on 10/9/2021. They took him to Misigiri police station. After they arrived, he took him for an interview. Further, he recalled that on 15/9/2021 the first and third accused persons reportedly surrendered themselves at Kiomboi Police Station. They collected them and sent them to Misigiri Police Station. There, he interviewed them starting with the first accused person and after he finished, he interviewed the third accused person.

His further narration was that he followed all the protocols for interviewing criminal suspects and complied with all the procedural requirements

including those stipulated under section 58(4)(6) of the Criminal Procedure Act, Cap 20 R.E 2022. He cautioned the suspect, informed him of his rights and ensured that he signed the record of the interview after it was read over to him. He recalled that in all their respective caution statements, each of the accused persons confessed to have formed a common intention to murder Wile Ngusa, their sister-in-law, as they believed that he was bewitching their family. They further confessed that the execution of such evil intention was done by Shija Lutonja and Maduhu John whom they procured and paid a sum of Tshs 1,800,000/= contributed by all of them. Incidentally, the murderers also exterminated their brother Inalo Jipoya who was not part of the original plan.

The last prosecution witness was E. 4998 D/SGT Mohammed, PW4, an investigator who took over the investigation from the task force on 20/9/2021. His testimony was wholly reliant upon the facts he read in the case file and his opinion of such facts. He told the court that when he took over the case file, there were four suspects, that is, the three accused persons herein and Mandalu Jisusi Jipoya who was later released as the evidence was not pointing at him. The rest of the testimony was the repetition of the evidence above narrated as to the confessions and his personal opinion of these confessions. Interestingly, much as this witness was the investigator, he was oblivious of many facts even the elementary ones.

The accused person had a common defence. They all distanced themselves from the murder and stated that they had a good relationship with their brother Inala Jipoya and his wife Wile Ngusa, thus they had no reason let alone the intention of exterminating them. The first and the third accused stated further that, they were at Loya village in Tabora where they were nursing the first accused's son one Mwinamila Jisusi (now deceased) who was undergoing treatment at the traditional healer. They only came back after the incident and having buried their brother and sister-in-law, they stayed for two days and returned to Loya village as the condition of their patient had deteriorated. While there, they were notified that the second accused was arrested alongside the members of their families. Out of concern, they went to Kimboi police station on 12/9/2021 to inquire about the arrest of their people. Surprisingly, they were taken to Misigiri police Station and detained as suspects of murder. As regards their confession statements, while admitting to have made such confessions, they alleged that they were severely tortured and forced to confess. To avoid further torture, they concocted a common story that they procured Maduhu John and Shija Lutonja to exterminate Wile Ngusa at a consideration of Tshs 1,800,000/=. It was their prayer that the confessions be discounted as they were not freely taken. This marked the end of the evidence from both parties.

The ultimate issue for determination is whether the prosecution has proved its case. As I embark on the determination task, it is apposite, I think, to start with the general principle of law and practice on the burden of proof as

it obtains in criminal cases such as the one at hand. According to section 3 (2) (a) of the Evidence Act, Cap. 6 R.E. 2022, in criminal cases, fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact exists. That is to say, the guilt of the accused person must be established beyond reasonable doubt. This principle is summarized in **Matibya Ng'habi vs Republic** (Criminal Appeal No. 651 of 2021) [2024] TZCA 34 TanzLII where the Court of Appeal instructively stated thus:-

“ it is instructive to state that, this being a criminal case, the burden lies on the prosecution to establish the guilt of appellant beyond reasonable doubt. In **Woodmington v. DPP** [1935] AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined but case laws have defined it. For instance, in the case of **Magendo Paul & Another v. Republic** [1993] T.L.R. 219 the Court held that:-

For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed. ”

Intrinsically, therefore, the prosecution evidence must be so strong as to leave no doubt on the criminal liability of the accused person. In other words, it must irresistibly point to the accused person and not any other person (see the case of **Samson Matiga vs R**, Criminal Appeal No. 205 of 2007, Court of Appeal (unreported). Back to the case at hand, the counts of murder

against which the accused persons stand charged are creatures of section 196 of the Penal Code, Cap 16 which provides that:-

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

Accordingly, for the prosecution to establish its case against the accused persons, it has to prove beyond reasonable doubt that the accused persons, unlawfully and with malice aforethought occasioned the death of the deceased. In other words, it has to be established without reasonable doubt that Wile Ngusa and Inalo Jipoya died unnatural deaths and that the accused persons herein, with common malice aforethought, unlawfully occasioned such deaths by their omission or unlawful acts.

When scanning through the evidence, I have observed that the evidence of PW1 and post-mortem reports admitted as exhibit P1 and P2 have ably established the cause of death. The account by PW1 who saw the deceased bodies and performed the postmortem examination was not controverted and so were his reports as contained in Exhibit P1 and P. As per these reports, Wile Ngusa died of severe bleeding caused by cut of the right side of the neck, to the head and nose and Inlao Ngusa died of severe bleeding caused by a cut of the right side of the neck with a sharp object. Vividly from these facts, their death was unnatural. Even the accused persons were at common that their brother and sister-in-law, died unnatural deaths as they were mercilessly butchered by unknown people during the night. In the

foregoing, it is taken to have been proved beyond reasonable doubt that Inalo Jipoya and his wife Wile Ngusa died an unnatural death.

As for the third element, the allegations are that the accused herein are the main culprits. The evidence implicating them is mainly their confession statements contained in their respective caution statements (exhibit P4, P5 and P6) as recorded by PW3 and the extrajudicial statement of the second accused as recorded by PW2 (exhibit P3) which I have all thoroughly read. Basically, and save for the second accused's extra-judicial statements to which I revert further, in these confessions, the accused persons confess to have formed a common intention to kill their sister-in-law, Wile Ngusa, whom they suspected of bewitching their families and to have procured Shija Lutonja and Maduhu John to exterminate her at a consideration of Tshs 1,800,000/=.

Starting with the cautioned statement of Nsukuma Jipoya Majiku (Exhibit P4) which appears to be more detailed than the rest, his confession as appearing on pages 2 to 3 of the statement was that:

"Mimi nimekamatwa na tukio la mauaji ya ndugu yangu INARO JIPOYA na mkewe WILE D/O NGUSA waliouawa kwa kukatwa mapanga sehemu mbalimbali za miili yao. Nakiri kuhusika katika kupanga njama za mauaji haya nikishirikiana na ndugu zangu wengine Jususi s/o Jipoya na Jutasuga s/o Jipoya. Mipango hii ya kufanya mauaji ilianza kutokana na matendo ya ushirikina aliyokuwa akiyafanya huyu WILE NGUSA katika familia yetu kwani tulizika wazazi wetu kutokana na vifo vilivyotokana na ushirikina na pia hata mifugo yetu kupungua sana huku yeye akiwa na idadi kubwa mifugo. Tulimwonya ndugu yetu INARO Jipoya kuachana na huyo mke wake lakini alikataa. Mipango ya kumuua ilianza

kwa sisi ndugu watatu niliowataja kupanga na katika kupanga mipango hiyo tulikubaliana kukodisha watu watakapo tusaikia kuua na tuliwapata watu wawili ambao ni SHIJA S/O LUTONJA na MADUHU JOHN wote wakazi wa Msai. Malipo ya mauji haya tulikubaliana yawe Tshs 1,800,000/= katika fedha hiyo mimi nilitoa laki 600,000 na iliyobaki ilitolewa na wenzangu. Baada ya kupanga njama hizi kaka zangu wawili Jisusi na Jitasuga wao waliondoka na kuniachia maagizo ya kusimamia mauaji haya. Kabla ya kufanyika mauaji haya wauaji niliowataja walifika fika kuchunguza nyumbani kwa Inaro Jipoya na walipelekwa na Mandago s/o Jisusi na baada ya kupachunguza ndipo tarehe 01.9.2021 mauaji yalifanyika. Katika makubaliano yetu na wauaji tuliwaeleza anaetakiwa kuuliwa ni WILE d/o NGUSA mke wa INARO ila wao waliamua kuwaua wote."

The first accused's confession was that he and his two siblings who are the second and third accused persons herein formed an ill intent of killing their sister-in-law, Wile Ngusa the wife of Inalo Jipoya. That, in fortification of their plan, they procured Shija Lutonja and Maduhu John to execute the murder at the cost of Tshs 1,800,000/=. That, the reason for the murder of Wile Ngusa is witchcraft beliefs. The accused persons believed that she killed their parents and was bewitching their families and livestock. Just like the second accused's caution statement, in this caution statement, the first accused persons stated that their intention and procurement of the murder was only in respect of Wile Ngusa and not their brother, Inola Jipoya. The confession in the caution statement of the third accused person, Jitasuga Jipoya Majiku is by and large, a replica of the above confessions.

It is a cardinal law that, a confession voluntarily made by a suspect before a police officer, a justice of peace, or any other reliable witness is admissible as evidence and may be relied upon to mount a conviction even in the absence of any corroboration. Principally, every confession is presumed by law to have been voluntarily made unless otherwise objected. The voluntariness of a confession is underscored under section 27(1) of the Evidence Act, Cap 6 R.E. 2022 as the distinctive feature of every confession. The import of this provision which has been extensively litigated is now settled. A confession should not be acted upon unless it was voluntarily procured as underlined in the case of **Nyerere Nyague vs Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 TanzLII where the Court of Appeal, while endorsing its previous decisions, summarized the principle above and the procedure by which the voluntariness or otherwise of a confession can be tested it instructively stated thus:-

“.....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). **Secondly**, if an accused intends to object to the admissibility of a statement/confession, he must do so before it is admitted, and not during cross examination or during defence (See **SHIHOZE SENI AND ANOTHER v R (1992) TLR. 330, JUMA KAULULE v R** Criminal Appeal No. 281 of 2006 (unreported)).

In the present case, no objection was made at the admission of all the four confession statements. The objections were belatedly made in the course of defence and sightly, during the cross examination of PW2 and PW3. The

objections were mainly in the form of retraction. None of the accused persons repudiated to have made the above confession. All had a common assertion that their confession was an abstract story fabricated to avoid further beatings and torture inflicted on them to induce their confession. On the strength of the authorities above, I am of the firm view that the accused persons' belated objections were misguided and inconsistent with the trite law that, an objection to the confession must be made before its admission as stated by the Court of Appeal in the authorities above cited and in **Emmanuel Lohay and Udagene Yatosha v. Republic**, Criminal Appeal No. 278 of 2010, CAT where the Court of Appeal while cementing this position stated thus: -

"It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross-examination or during defence - **Shihoze Semi and Another v. Republic** (1992) TLR 330. 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."

Similarly, the accused herein missed the boat by belatedly making their objection in their defence and cross-examination. By failure to make their objection at the admission stage they forfeited their right to have the voluntariness of such confessions ascertained in trial within a trite which would have been conducted had they objected at the right time. In the foregoing, and much as I am fully aware that in a capital offence such as the one at hand allegations of torture should not be taken lightly, having

examined the evidence as a whole, I have observed that the belated objection was a mere afterthought and an attempt to rescue their boat from capsizing or sinking hence attracts no weight.

Having overruled the objection, I will now turn to the assessment of the weight as the law demands that, even if a confession is found to be voluntary and admitted, the trial court has a duty to evaluate the weight to be attached to such evidence given the circumstances of each case (see **Tuwamoi V Uganda** (1967) E.A 91). Essentially, for a confession to attract weight capable of mounting a conviction, it must be a confession in its real sense meaning that, it must contain an admission of all the ingredients of the offence as stated under section 3(1)(c) of the Evidence Act Cap R.E. 2022. Intrinsically, therefore, a statement of an accused person would not be regarded as a confession unless its maker admits to all the essential ingredients of the offence with which he is charged (see **Anyungu and Others v. Republic** (1968) EA 239 and **Khalid Mohamed Kiwanga & Another vs Republic** (Criminal Appeal 223 of 2019) [2021] TZCA 467). Thus, in this case, it must be ascertained whether the accused persons' confession statements pass the test above.

I will start with the extra-judicial statement of the second accused, Nsukuma Jipoya Majiku (Exhibit P3). In this statement which I reproduce below, the second accused stated as follows:-

"Kweli tukio lilitokea kweli tulilitengeneza tulikaa kikao na kaka zangu wako wawili tukashauri kuwa tumtafutie wakatakataji wa mapanga shimeji yetu yetu (**WILE IKOMBE**) sababu

alikuwa anasumbua katika ukoo wetu mchawi, ameua baba, akamuua mama hawa wote wazazi wetu na baadhi ya watoto wetu, alipowatoa wazazi wetu akaanza kujitapa kuwa amewatoa wakubwa sasa hivi hakuna wa kumpinga atakavyopanga. Na kweli tukaona kwa hali hii katika ukoo wetu atatusumbua ndiyo tukamtafutia watu ila mume amekatwakatwa bahati mbaya, kilichotufanya chuki zituingie kwa majonzi ya wazazi wetu na watoto wetu tukaona tutoe roho moja ili kuokoa roho nyingine. Shija Lutonja, Maduhu John ndio wauaji. Tuliwalipa Tshs 1,800,000/= ili kumuua **Wile Ikombe**. Sina zaidi ni hayo tu.”

Undoubtedly, the statement above fails the test as it exhibits an appalling disparity with the substance of the information by which the accused persons were arraigned in court. As much as the maker of this document admitted to have planned the murder of his sister-in-law and to have procured the murderers at the cost of Tshs 1,800,000/= facts which resonate with the allegations in the instant case, the name of the victim of the murderous intent is dissimilar to the names of the deceased herein. The murderous intent in the two counts against which the accused persons herein stand charged was in respect of Wile Ngusa. Inversely, in the extrajudicial statement above, the common murderous intent was to exterminate Wile Ikombe. As no reconciliation was made as to these two names, there are no materials to support a finding that the confession concerned the murder of Wile Ngusa. As matters currently stand, such a finding would be solely based on conjecture or postulation to which no court can base its decision as court decisions are grounded on law and evidence as opposed to conjecture and postulations. Accordingly, the extra-judicial statement of the second accused

person which was admitted as exhibit P3 is disregarded and accorded no weight for want of the missing linkage between it and the case at hand. Similarly, no weight is accorded to the evidence of the justice of the peace as it was solely based on the extra-judicial statement which I have discounted.

As for the three caution statements, they reveal the following common confessions: that, the three accused persons had a common murderous intention to kill Wile Ngusa who was their sister-in-law. That, they jointly procured Shija Lutonja and Maduhu John to execute their murderous intent and that, the consideration for the execution of the murderous intent was Tshs 1,800,000/= contributed by all the accused persons. That, further to the brutal murder of Wile Ngusa and contrary to the previous plan and agreement, the murderers also killed their brother Inalo Jipoya.

Going by the principles above, for these confessions to stand and support a conviction, they must disclose the accused persons' admission to all the essential ingredients of murder to wit, the murderous intent understood in legal terms as malice aforethought (*mens rea*) and the unlawful act of killing (*actus reus*). The latter ingredient is conspicuously missing from all three confession statements. While all the confessions contain an admission of the murderous intent, none of them bears an admission of the *actus reus*. The consistent confession is that none of the accused person dirtied his hands. Rather, they procured Shija Lutonja and Maduhu John to do the dirty work. Under the circumstances, the confession was partial as it did not have all the

ingredients of murder. For it to attract weight and support a conviction, it required a corroboration of independent evidence showing that, the murder was indeed executed by Shija Lutonja and Maduhu John. No such evidence was presented, hence there was no corroboration. Surprisingly, even though the 2nd accused's confession shows that the murderers went to the deceased's home a day before the murder and were escorted by Mandago Jisusi, the prosecution found no need to summon this witness who would have helped to establish the missing link, albeit remotely.

Similarly intriguing, was the prosecution's omission to join these two culprits and to say something about them. PW3 and PW4, being investigators of the case were expected to say something about these two culprits but they were conspicuously mute until when they were prompted in cross-examination. The answers they gave were equally wanting. PW4 stated that Shija Lutonja and Maduhu John are still at large and they are in pursuit of them but when asked if he has been to their village which was mentioned in the second accused's caution statement, he responded negatively showing that there have been no concerted efforts to arrest these two culprits.

In the foregoing and considering that none of the accused persons confessed to have met the two culprits after the incident or to have received a notification from them that they discharged their contractual obligation, this court has entertained a serious doubt on whether it was Shija Lutonja and Maduhu John who killed the deceased. Further doubt is entertained from the fact that Inola Jipoya who was also killed in the incident was not the subject

of the murderous contract between the accused persons herein and Shija Lutonja and Maduhu John. Thus, it may not be far-fetched to think as I do that, the deceased were possibly killed by a culprit(s), different from Shija Lutonja and Maduhu John and for a different reason.

That said, it is obvious that the prosecution has miserably failed to prove their allegations against the accused. Accordingly, all the accused persons are found not guilty and are consequently acquitted of the two counts of murder. It is further ordered that they all be released from custody unless they are otherwise held for a different offence.

DATED and DELIVERED on this 4th day of June 2024.




J.L. MASABO
JUDGE
4/6/2024

Delivered remotely through virtual court this the 4th day of June 2024 in the presence of all the accused persons, Mr. Godfrey Songoro, SA for the Republic, Ms. Salma Musa, learned counsel for the 2nd accused person also holding brief for Mr. Peter Ndimbo, Counsel for the first accused persons and Mr. David Rutayuga, counsel for the 3rd accused person. The right of appeal is fully explained.




J.L. MASABO
JUDGE
4/6/2024