

**IN THE HIGH COURT OF TANZANIA
(GEITA SUB-REGISTRY)
AT GEITA
CRIMINAL SESSIONS CASE NO. 53 OF 2022**

**REPUBLIC
VERSUS**

SHEMAS S/O ARNOLD JUMA

J U D G M E N T

Date of last Order: 16/04/2024
Date of Judgment: 19/06/2024

K. D. MHINA, J.

This case was transferred from the High Court (Mwanza Sub-Registry) following the establishment of the High Court (Geita Sub-Registry) on 12 December 2023) by G.N No. 853B dated 22 November 2023.

What triggered the arrest and arraignment of the accused person, Shemas s/o Arnold Juma, were the following information and facts resulting from the police investigation.

The accused was residing with his wife, Kulwa James, at Kakumbi

village, Mbogwe District. On 21 August 2021, the accused and his wife were blessed with a daughter whom they named Anna, popularly known as Hadija.

After the child's birth, the accused started to feel that the child was not his because the child did not look like him or her mother.

The accused person started to hate the child, and he decided to kill her.

On 29 September 2021, the child started to experience stomach aches, and the accused used that opportunity to execute his plan to kill. Therefore, he took the child and informed her mother that he was taking her to the hospital. He used a motorcycle, popularly known as "*bodaboda*". While on that boda boda, he strangled the child to death. When he arrived at Lugito Village, he asked the "boda boda" rider to stop the motorcycle so that he could take the child to his mother (the accused's mother).

However, he took the deceased's body, threw it in a sewage chamber and went back to his wife and informed her that he left the child at his mother's place so that she may be taken to Bugando Hospital.

When his wife wanted to visit the child at Bugando Hospital on the following day, the accused person asked her to relax as the child had been referred to Muhimbili Hospital because her health condition was not good.

After a month, the deceased's body was found and taken to the hospital for post-mortem examination, where it was discovered that the cause of death was due to suffocation.

When the efforts of the wife requesting to visit her child at the hospital proved futile, she decided to report the matter at the police station. Later, the police discovered that the child who was found dead at Lugito Village was the same child who the wife of the accused person reported.

That led to the arrest and interrogation of the accused person, **Shemas s/o Arnold Juma**, who was later indicted at the Court and stands charged with the offence of Murder c/s 196 and 197 of the Penal Code, Cap 16 R: E 2019.

In the information, it was alleged that the accused person, on 19 October 2021, at Masumbwe village within Mbogwe District in Geita Region, did murder one ANNA SHEMAS @ HADIJA, henceforth the deceased.

When the charge sheet (the charge) was read and explained to the accused person, he pleaded not guilty. During the Preliminary Hearing conducted under Section 192 of the Criminal Procedure Act, Cap. 20 R.E. 2022, the accused admitted only his name and arrest and that he was

interrogated.

The Republic thus brought **eight witnesses** to prove its case. The witnesses were: **PW1 (Gaudencia Aloyce)**, a civilian who found the deceased body and reported it to the police station; **PW2 (Dr. Casmir Lubango)**, who conducted post-mortem analysis; **PW3 (Monica Kuswiya)**, who introduced herself as the neighbour of the mother of the deceased and the accused person; **PW4 (Hamis Mashauri Kadi)**, Chairman of Kakumbi Hamlet; **PW5 (Kulwa James)**, the mother of the baby; **PW6 (Mussa Lubinza)**, motorcycle ("bodaboda") rider/ driver; **PW7 (WP 5982 Detective Sergeant Grace)**, investigator of the case; and **PW8 (H 8250 Detective Corporal Alex)** a police officer who recorded the cautioned statement of the accused person.

Besides, they tendered three (03) exhibits, which were admitted as follows: **Exhibit P1**, the Post-mortem report; **Exhibit P2**, the Sketch Map; and **Exhibit P3**, the cautioned statement of the accused person.

The Republic was represented by Mr. Godfrey Odupoy, and Ms. Kabula Benjamin, learned state attorneys, while the accused person was represented by Ms. Elizabeth Msechu, learned advocate.

Briefly, the prosecution evidence was as follows: **PW5 (Kulwa James)**, the mother of the baby, testified that she lived with the accused person as husband and wife at Kakumbi Village in the house that belonged to Mwana Enoka and at that time, she was pregnant. At the time of delivery, she was escorted by his neighbour Monica to the Hospital at Masumbwe area, where she delivered through surgery a baby girl whom they named Hadija.

When she was cross-examined, she stated that when she was pregnant, she was attending the clinic as required but did not tender the clinic card and that the accused person was her husband, though they were not officially married.

The neighbour, **PW3 (Monica Kuswiya)**, testified that she lived in Kakumbi village with her husband, Francis Enock, in a house that belonged to Regina Enock, her husband's sister. In May 2021, the accused person and his pregnant wife rented in the same house.

Later, in August 2021, she escorted Kulwa James to Masumbwe Health Center, where she gave birth to a baby girl through surgery.

When cross-examined, she stated that the accused person and Kulwa James were husband and wife.

Further, **PW5** testified that later, when she was one month and two weeks, the baby became ill because she started to cry frequently, and the accused person decided to take her to the hospital. PW5 stated at that time, she had still not recovered from surgical wounds.

After thirty minutes, the accused person returned without a baby and informed her baby remained with his mother, who would take her to the hospital.

She further stated that she did not know the accused person's mother and started to cry until the Hamlet executive officer went to the house, and she explained to him what had happened.

According to PW3 evidence, the baby was always crying during the night, and her navel composed pus; the accused person took the baby and said he would take her to Bugando Hospital in Mwanza. That day, he took the baby around 18:45 hours but returned around 20:00 hours without a baby, and when asked, he said his mother had taken the baby to Bugando Hospital.

The Hamlet chairman, **PW4 (Hamisi Mashauri)**, testified that one day in September 2021, around 20:00, when he was at Kakumbi Village Centre, he heard noises coming from Regina Enock's house. At the house, he was the accused, along with other tenants. When he asked what had

happened, the accused person told him that he had taken the baby to the hospital and that the baby was with his (accused) mother. After that, he advised the accused that since the baby was one month and two weeks old, he should take his wife, the child's mother, to where the child was, and he agreed to do so.

When cross-examined, he stated that the accused person lived in Regina Enock's house.

In his evidence, **PW6 (Mussa Lubinza)**, who owned a motorcycle and used it for hire, commonly known as "bodaboda," stated that in October 2021, he carried the accused person as a passenger from Kakumbi Village to Masumbwe. He was with a baby covered in clothes except the legs.

When they arrived at Lugito area near the Chadema Party Offices at about 18:00 hours, the accused requested he stops. When he stopped, the accused dropped off, told him to wait 15 minutes, and went behind the Chadema Offices. The accused returned without a baby, and when he asked him, the accused said he had left the baby with his mother.

On 12 December 2021, when a woman police asked him if he had ever carried a passenger who had a baby, he agreed and informed her that he remembered that passenger and even had his phone number.

When cross-examined, PW6 stated that they knew each other with the accused person. Also, he did not know the age of that baby.

PW1, Gaudencia Aloyce, a resident of Lugito hamlet in Masumbwe, testified that on 19 October 2021, they found the body of the baby in a pit latrine near Chadema Offices. Therefore, she reported the matter to Masumbwe Police Station.

After the arrival of police officers, the body of the deceased was taken to the Hospital.

When cross-examined, she stated that she arrived at the scene around 08:00 hours after attending the community prayer (sala ya jumuiya) and found few people. Further, she stated that the deceased body was identifiable and she was of a female baby lying on the back, though it started to decompose.

In her evidence **PW7, WP 5982, Detective Sergeant Grace** testified that on 19 October 2021, they received a report from a certain woman that there was a dead body of a baby found in a pit. The OC-CID and other police officers went to the scene near the Chadema offices at Masumbwe. At the scene, they found the body of a baby thrown in the pit. Then, she was instructed to open the case file for investigation.

Later, he visited the crime scene with the Ward Executive Officer, Grace Makanyaga, and drew a sketch map of the crime scene, which was behind the Chadema party offices. To that effect, she tendered;

i. Sketch map dated 19 October 2021 as exhibit P2.

Also, she met with the doctor who performed the Post-Mortem Report, collected that report and recorded his statement.

Dr. Casmir Lubango, **PW2**, who conducted the post-mortem on 19 October 2021, testified that the baby was female, aged a month or less, and the body started to decompose, though all body parts were intact.

In his analysis, he discovered that the deceased stomach was empty, which indicated that when she was thrown into the pit with water, she was already dead and that the death was caused by suffocation due to strangulation or squeezing her nose. To that effect, he tendered;

i. The post-mortem report as exhibit P1.

After a lapse of 14 days, they handed over the deceased body to the Street Chairman and health officer for the burial because there were no relatives who went to claim and collect the body.

According to **PW5 (Kulwa James)**, when the accused person did not return with the baby and upon the advice of the Hamlet chairman

(PW4), they travelled to Mwanza to see the baby after the accused told her that the baby was taken to Bugando Hospital at Mwanza but on the way, the accused told her that he received a message from his mother that the baby was referred to Muhimbili Hospital after she became seriously ill.

When she asked the accused to tell his mother to wait for her, he responded that they were in a hurry to send the child to Muhimbili Hospital, so they could not wait. When they arrived at Mwanza, they stayed in a guest house after the accused told her the baby had already been taken to Muhimbili Hospital. After three days, they returned to Masumbwe but not to their home. They stayed in a Guest House after the accused told her that they could not return to Kakumbi because, at Kakumbi, the baby was bewitched. Also, she was bewitched, which was why she was not recovering from the surgery.

After three days, they moved to a rented room, and the accused person went to Kakumbi to collect their domestic items. One day, after two months, the accused did not return home, and on the next day, she was informed by one of the accused's friends that he had been arrested due to a debt of TZS. 3,000,000/= and was at Masumbwe Police Station.

PW5 further testified that on 22 November 2021, she went to Kahama to visit the accused person's uncle, Baba Rebecca. Upon arrival,

Baba Rebecca told her that the accused person had informed him that the baby, Hadija, had died.

She reported the matter at Masumbwe Police Station, and while they were there, the accused person's uncle phoned the accused person's mother, who denied knowing either the baby or the mother of the baby.

The investigator, **PW7**, testified that on 30 November 2021, Kulwa James complained at Masumbwe Police station that the accused person took their baby on 18 October 2021, claiming to send the baby to the Hospital. However, he did not bring back the baby. At that time, the accused was at Kahama Prison facing another case.

Again, on 12 December 2021, Kulwa James returned to the police station and explained how the accused had taken the child and failed to return her. On 9 December 2021, after the accused person had attended his other case, he was detained at Masumbwe Police Station for interrogation.

When cross-examined, she stated that in her investigation, she visited Masumbwe Health Center and found the complainant's name in the register to prove that she had a baby but did not tender that register. Also, they did not conduct a DNA test to examine if the deceased baby was the same baby that belonged to Kulwa.

In his evidence, **PW8 (H 8250 Detective Corporal Alex)** testified that on 12 December 2021, he was assigned to record the cautioned statement of the accused person who was detained in remand.

Then, he prepared the room for interrogation. But before recording the statement, he informed the accused person of his alleged offence and his rights, such as to call a relative, friend, or lawyer and whether he was ready to be recorded.

The accused was ready and signed to acknowledge. He started to record the statement at 17:00 hours. To that effect, he tendered

- i. The cautioned statement of the accused person as Exhibit P3.*

Though admitted, the cautioned statement of the accused person was objected to its admission by the defence side for the reasons that there was non-compliance with section 57 of the Criminal Procedure Act.

Upon the closure of the prosecution's case, this court found the accused person with a case to answer; hence, his sworn defence is as shown below.

DW1, Shemas Arnold Juma, categorically denied having committed the offence charged.

He testified that he was a pastoralist who lived in Kihinga Village in Ngara District within the Region of Kagera. He did not have children and was not married.

He testified that on 12 December 2021, when he travelled from Kagera to the cattle auction at Bukombe, he was alleged to be a Burundian. Thus, he was arrested for the allegation of unlawful entry into Tanzania and taken to Masumbwe Police Station.

At the police station, he was beaten and given papers to sign so that he could be taken to the Hospital.

He concluded by testifying that three days after signing the papers, he was taken to the Court and charged with a Murder case. Therefore, he did not know or ever saw the deceased.

When cross-examined, he stated that though he was arrested in Mbogwe, he never lived at that place.

After the closure of the defence case and having considered the evidence on record, the main issue before this Court for determination is

whether the accused person is guilty of the murder of the deceased Anna Shemas@ Hadija. Thus, the prosecution has to prove the offence of murder under sections 196 and 197 of the Penal Code.

However, in proving the offence, the following ingredients must be established cumulatively and proved beyond reasonable doubt. I term these ingredients as sub-issues as follows;

One, whether the deceased named in the charge actually died.

Two, whether the death was as a result of an unlawful act (unnatural cause).

Three, whether it was the accused person who actually caused the death of the deceased and,

Fourth, whether the killing of the deceased was with malice aforethought.

In discharging the above duty, it is essential to outline some of the important principles as far as the evidence in this case is concerned.

First, is on the onus and standard of proof in criminal cases. In criminal cases, the onus is always on the prosecution to prove the case and never shifts away from the prosecution. This is the cardinal principle of criminal law: the duty of proving the charge against an accused person always lies

on the prosecution. See **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 (Tanzlii). No duty is cast on the side of the accused person to establish his innocence.

Further, the standard of proof in criminal cases is that which is beyond reasonable doubt. See **Lameck Gamaliel and another vs. The Republic**, Criminal Appeal No. 210 of 2012, CAT (unreported). Therefore, in case of doubts, the benefit must be on the accused side.

Two, on the guiding principles relating to circumstantial evidence. This is because, in this case, as per the evidence, there is no eyewitness who witnessed the killing of the deceased.

Third, on the principles relating to confessions by the accused persons. This is because, in this case, despite the objection to its admission and the accused evidence in defence that he was beaten, the cautioned statement was admitted in evidence.

Lastly, it is on the duty of defence in criminal trials. It is trite that the general duty of the accused person in criminal matters is only to raise doubt against the prosecution case and not otherwise. See **D.P.P vs. Ngusa Kejela @ Mtangi and another**, Criminal Appeal No. 276 of 2017, CAT (Tanzlii).

In determining the main issue, I will start with the first sub-issue: whether the deceased named in the charge sheet actually died. In the circumstances of this case, this is crucial.

The connection between the deceased body found at Lugito area and Anna Shemas@Hadija based on the evidence PW3 and PW5, that the accused person was the one who took the baby, saying that he was sending her to the hospital, but later the accused person returned alone and the baby was never seen again. According to them, she was a baby girl, and PW5 (the mother) stated that the baby was one month and two weeks at that time.

In his evidence, PW6 stated that in October 2021, he carried the accused and the baby in his motorcycle. When they arrived at Lugito area near the Chadema Party Offices, the accused dropped off, told him to wait, went behind the Chadema Offices, and returned without a baby.

The evidence of PW1 shows that the deceased body of a baby girl was discovered in a pit near Chadema Offices in the Lugito area.

PW2, the medical doctor confirmed that the baby was actually dead following the post-mortem examination he conducted on 19 November 2021, and fourteen days after the post-mortem, the deceased was buried

because no relative went to claim and collect the body. In his evidence, he stated the baby was a girl aged a month or less.

From the evidence above, it means the deceased was buried without being identified by PW5, and there is no evidence that any scientific methods were used to identify the deceased baby found at Lugito area near Chadema Party Offices.

Further, the evidence indicated when PW5 reported to the police that the baby was taken by the accused, who failed to return her, the deceased baby found at Lugito area was already buried. Thereafter, no exhumation and DNA tests were conducted.

Having analysed as above, even though no forensic analysis was conducted, it is my firm view that;

One, the evidence of PW3 and PW5 pointed out that the accused was the last known person to be seen carrying the baby, saying that he was taking her to the hospital. That was October 2021. After that, the baby's whereabouts were unknown. From that evidence, it is clear that the accused was the last person seen with the baby.

Regarding circumstance such as this, the Court of Appeal in **Sikujua Idd vs. The Republic**, Criminal Appeal No. 484 of 2019 (Tanzlii)

elaborated by holding that;

*"It is unsafe to link the appellant with the final days of Idd s/o Buturumbe. There are so many loose ends for circumstantial evidence to convict the appellant. As we suggested in **MARK S/O KASIMIRI V. R., CRIMINAL APPEAL NO. 39 OF 2017 (TANZLII), an accused person before convicting on circumstantial evidence must be the last person to be seen with the deceased. In the absence of a plausible explanation to explain the circumstances leading to death, he will be presumed to be the killer". [Emphasis provided]***

Applied this principle in this case, the accused person was the last person known to be seen with the baby (Anna@ Hadija) and boarded the motorcycle, promising PW5 to take the baby to the hospital.

Two, the evidence of PW6 indicated that in October 2021, at Lugito area, the accused person, who was with the baby, dropped off from his motorcycle, told him to wait, went behind the Chadema Offices and returned without a baby, claiming to have left the baby with his mother.

Third, the evidence of PW1 that on 19 October 2021, they found the lifeless body of a baby girl in a pit near Chadema Offices at Lugito area.

Therefore, the place where the accused person dropped and returned without a baby was the same place where the body of the deceased body was found.

Fourth, the evidence of PW2 that the baby sent to him for examination was a girl aged a month or less.

In addition, there was a cautioned statement from the accused person (Exhibit P3). At the trial, when objecting to the admission of the cautioned statements, the counsel for the accused stated that the statement was recorded in contravention of section 57 of the CPA. Further, in his defence, the accused person said he was beaten and later was told to sign the papers so that he could be sent to the hospital.

Though the objection was not based on voluntariness but, since the accused in his defence raised the issue of torture and inducement, this court is entitled to evaluate the statement after hearing both the prosecution and defence cases.

The law is clear that when torture or inducement is raised, the courts should always be cautious in relying on the statement.

How to treat that "*cautiousness*", the Court in several cases, provided for a way forward when torture is alleged and when the statement is repudiated or retracted.

In the **Nuru s/o Venevas and others vs. Republic**, Criminal Appeal No.431 of 2021 (Tanzlii), it was held that;

"It is trite principle that confession evidence which has been retracted or repudiated cannot be acted upon to found conviction, and it is always desirable to look for corroboration in support of a confession which has been repudiated or retracted."

Further, in **Nuru s/o Venevas and others vs. Republic**, Criminal Appeal No.431 of 2021 (Tanzlii), it was held that;

"...the court will only act on the confession statement if corroborated in material particulars by independent evidence..."

Therefore, the two cited cases above suggest that, **first**, it is important to look for corroboration once the statement is repudiated or retracted. **Second**, there must be independent evidence to corroborate the repudiated or retracted statement.

In the cautioned statement, it is alleged that the accused person confessed to hiring PW6's motorcycle, taking the child and dumping her in Lugito area.

That evidence in the cautioned statement is corroborated by the evidence of PW3, PW5 and PW6. Thus, the cautioned statement was supported by the evidence of prosecution witnesses.

Further, though the accused person, in his defence, alleged to be beaten and induced to sign the statement, in my view, he failed to raise doubt on that issue.

In **Dickson Elias Nsamba Shapwata and another vs R**, Criminal Appeal No. 92 of 2007 (Tanzlii), where the Court of Appeal held that;

"In order to effectively challenge a confession, a person is practically obliged to give evidence to show how the threat, inducement or promise caused him to make the confession as their mere existence is not enough to make the confession involuntary.

One should be able to say that without it, the person would not have the statement".

Therefore, based on the holding of the above-cited case, what the accused person stated was not enough to prove the torture or that he was induced to sign the statement. The allegations remain mere allegations without being substantiated as the law requires. Thus, the cautioned statement was voluntarily recorded and reliable, and I accorded it the weight it deserved.

Thus, in cumulative, even though there was no forensic evidence, the above evidence pointed out that the body found in Lugito area by PW1 and examined by PW2 was actually the body of Anna@ Hadija. The prosecution evidence adduced at the trial does not suggest that there is more interpretation than the lifeless body found at Lugito was the body of Anna Shemas @Hadija.

Therefore, it is an established fact that Anna Shemas @Hadija is dead.

Reverting to the second sub-issue on whether the death was as a result of an unlawful act (unnatural cause), this should not detain me long.

PW2, the medical doctor who conducted an autopsy and prepared the post-mortem report (Exhibit P1), testified that though the deceased body was dumped in a pit with water, he found the stomach to be empty. He said that indicated the deceased was thrown in the pit while already

dead. Further, he discovered that the cause of death was suffocation due to strangulation or squeezing of the nose. This is also according to exhibit P1, which proved the death was caused by suffocation due to strangulation or squeezing of the nose.

Therefore, the deceased was strangled or squeezed her nose, which prevented her from breathing, leading to her death. This is an unnatural death; consequently, she was murdered.

Coming to the third sub-issue on whether it was the accused person who actually caused the death of the deceased, there is no dispute that, in this case, there is no eyewitness who witnessed the killing of the deceased.

Further, on 19 October 2021, when the deceased body was found, it was not identified as who she was, either by the persons who found the body or the police officers. At that time, PW5 had yet to report to the police station, believing the accused story that the baby was taken to Muhimbili Hospital for treatment. It was not until 22 November 2021 when the accused uncle informed PW5 that the baby had died after she reported the matter to the police station.

Therefore, on 19 October 2021, the lifeless body of a baby was found, and 14 days later, when it was buried, police officers had no clue who was

the deceased baby, and PW5 had no clue that the baby had died.

Thus, in this case, there is a question of the body of crime (***Corpus delicti***).

In criminal law, the concept of corpus delicti was developed by English law. In the early stages of the concept, the law was that without a body, there could be no trial for murder—simply, “no corpse, no trial.”

This view had its origin in the 16th Century by the English Jurist Sir Mathew Hale, who stated;

"I would never convict any person of murder or manslaughter unless the facts were proved to be done, or at least the body found dead."

But later, the law changed, and convictions were sustained on proof of corpus delicti through circumstantial or other evidence.

In our country, the Court of Appeal of Tanzania had an opportunity to discuss this issue in the case of **Hosea Francis @Ngala and another vs. Republic**, Criminal Appeal No. 408 of 2015 (Tanzlii). In that appeal, the High Court convicted the appellants despite the lack of physical remains alleged to be of the deceased (corpus delicti). In acquitting the appellants, the Court of Appeal insisted that in such a situation, there must be circumstantial evidence to prove that case. It held that;

"There was clearly a misapprehension of evidence for the learned trial judge to still regard the unsubstantiated statements over bones and blood-stained stone as providing the circumstantial evidence linking the appellants to the death of the deceased".

Therefore, in a situation when there is a lack of physical remains alleged to be of the deceased (corpus delicti), the death and the evidence connecting the killers and the deceased can be circumstantial.

Having observed as above, the question is whether there is circumstantial evidence to connect the accused person with the murder of the deceased.

On this, the law relating to circumstantial evidence is very clear. In the cited case of **Hosea Francis @Ngala (Supra)**. The Court of was pointed out that;

"This Court has always insisted that circumstantial evidence directed against an accused person must not be capable of more than one interpretation and must irresistibly lead to an inference that it was the accused person who is responsible for the death of the deceased".

On this, as alluded to in the first-sub issue, the connection between the accused person and the death of the deceased based on the evidence of PW3 and PW5, that the accused person was the one who took the deceased, saying that he was sending her to the hospital, but later the accused person returned alone and the deceased was never seen again.

Therefore, the principle applicable here is the same as in the first-sub issue of the last person to be seen with the deceased. See the cited case of **Sikujua Idd (Supra)**.

The evidence indicates that the accused person was the last person known to be seen with the deceased.

Again, the evidence of PW6 shows that in October 2021, he carried the accused person in his "bodaboda". When he arrived at Lugito area, the accused person, who was with the baby, dropped off from his motorcycle, told him to wait, went behind the Chadema Offices, and returned without a baby, claiming to have left the baby with his mother.

In connection to that, the evidence of PW1 was that on 19 October 2021, they found the lifeless body of a baby girl in a pit near Chadema Offices at Lugito area.

The evidence above, indicates that none other than the accused person took the deceased, killed her and dumped her body at Lugito area. The area where PW6 stopped, and the accused person dropped from the motorcycle with a baby but returned without her was the same area where PW1 found the deceased body.

The evidence does not suggest any other plausible explanations to explain the circumstances leading to the death of the deceased as than the evidence that the accused person was the last person to be with the deceased and the deceased was strangled or squeezed, leading to her death and then dumped in a pit.

In **Bahati Makeja vs. Republic**, Criminal Appeal No. 118 of 2006 (Tanzlii), the Court of Appeal held that;

The law on circumstantial evidence is well settled. In 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 guilt.

All in all, a survey of decided cases on the issue in this country and outside jurisdiction establishes that such evidence must satisfy these tests.

(1) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established beyond a reasonable doubt;

(2) those circumstances should be of a definite or conclusive tendency unerringly pointing towards the guilt of the accused; (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 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

From above, the circumstances found in the evidence of PW1, PW3, PW5 and PW6 coherently and firmly indicate that it was the accused person who caused the death of the deceased.

Further, the circumstances found in the evidence of PW1, PW3, PW5 and PW6 form a complete chain and point toward the evidence that no one else other than the accused person caused the death of the deceased person.

In addition, in the cautioned statement, the accused person had confessed to causing the death of the deceased. His confession was as follows;

"Nakumbuka mnamo tarehe 18/10/2021 majiraya saa 18:00hrs huko katika kitongoji cha Kakumbi kijiji cha Kakumbi Kata ya Lugunga Tarafa ya Ilolanguru Wilaya ya Mbogwe na mkoa wa Geita nikiwa huko maeneo ya nyumbani kwangu mimi pamoja na mke wangu aitwaye KULWA D/O JAMES na mtoto mchanga ANNA D/O SHEMASI ambaye alikuwa ni mgonjwa wa tumbo na hivyo mimi niliomba mke wangu anipe ruhusa ya kwenda kumpeleka mtoto huko katika kituo cha afya Masumbwe na mke wangu alikubali na mimi nilitafuta usafiri wa pikipiki na kuumpata dereva wa boda boda aitwaye MUSSA S/O LUBINZA na kukubaliana kumlipa shilingi 2,000/= na tulianza safari ya kwenda Masumbwe na mimi nilimbbeba mtoto huyo na kisha kumkaba kwenye shingo na kumbana mdomo pamoja pua na baada ya muda nilimuchilia huyo mtoto na baada ya hapo alifariki lakini

sikumueleza huyo dereva wangu wa boda boda mpaka tulipofika huko maeneo ya kitongoji cha Lugito kijiji na Kata ya Masumbwe nilimuomba yule bodaboda asimamishe pikipiki na bodaboda alikubali hivyo nilishuka na kuondoka ka miguu mimi pamoja na mtoto ANNA D/S SHEMASI na miimi kwenye eneo ambalo kulikuwa na msingi mkubwa na pembeni kulikuwa na shimo kubwa la choo ambalo lilikuwa wazi na hivyo nilimfunga huyo mtoto kwenye kitenge na kisha kumtopa mtoto huyo kwenye shimo na kisha kurudi kwenye eneo la pikipiki nilipoiacha na nilimkuta dereva wa bodaboda MUSSA S/O LUBINZA na aliniuliza mtoto yuko wapi na mimi nilimweleza nimemkabidhi mtoto huyo kwa mama yangu mzazi aitwaye ANNA D/O NOAH. Hivyo alikubali na tukaanza safari ya kurudi huko nyumbani Kakumbi...”

Though there were no eye witnesses but, this confession was corroborated by the circumstances in which PW1, PW3, PW5 and PW6 testified in their evidence. That it was the accused person who took the deceased from home and dumped her at Lugito area where he was found dead. Therefore, the confession was corroborated.

Further, the accused person failed to cross-examine on that particular important issue of confession to murder the deceased.

On this, in **Paulina Samson Ndawavya vs. Theresia Thomas Madaha**, Civil Appeal 45 of 2017 (Tanzlil), the Court of Appeal held that:

"That failure to cross-examine a witness on a particular important point may lead the court to infer that the cross-examining party accepts the witness' evidence and it will, be difficult to suggest that the evidence should be rejected. ...

We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account".

Therefore, the failure to cross-examine PW8 on the important issue of the confession that he killed the deceased means the accused person accepted that evidence.

I understand this is not an absolute rule. But to impeach that evidence,

One, there must be proven illegality regarding the document containing evidence. See **Majaliwa Ernest vs. The Republic**, Criminal Appeal No. 465 of 2022 (Tanzlil).

Two, failure to cross-examine must be on material evidence. See **Zakaria Jackson Magayo vs. The Republic**, Criminal Appeal No. 411 of 2018 (Tanzlii).

In this case, no material illegality was proved in respect of exhibit P3, and what the accused person failed to cross-examine was on the material evidence.

Therefore, the confession also indicates that the accused person killed the deceased person.

In my further analysis, I also found that the conduct of the accused person corroborates the circumstantial evidence in this case.

The conduct of the accused person after returning from Lugito area suggested that he was the one who killed the deceased person.

When PW4 advised him to take PW5, the mother to her child, the accused person agreed. But what happened from the following day intended to hide what he did. At first, he told PW5 that the baby was taken to Bugando Hospital at Mwanza by his mother. When they were going to Mwanza, the accused told PW5 that the baby was transferred to Muhimbili Hospital. Therefore, the accused person was doing that to conceal what he did.

Regarding this kind of evidence in **Sharifu Mohamed @ Athumani and four others vs Republic** Criminal Appeal No. 251 of 2018 (Tanzlii), at page 64, the Court of Appeal has this to say;

"The evidence of conduct is sufficient to render corroboration."

Also, **Pascal Kitigwa vs. Republic [1994] T.L.R 65** it was that;

"Corroborative evidence may be circumstantial and may well come from the words or conduct of the accused and, in this case, the appellant independently corroborated the evidence of the co-accused."

From above, it is trite law that an accused person cannot be convicted based on his lies. With or without lies of the accused person, the prosecution is still obliged to prove a case against an accused person beyond reasonable doubt. See **Thimotheo & Majidi Mussa Thimotheo vs. The Republic [1993] TLR 125.**

However, in this case, the accused's conduct not only can be treated as lies but also suggests that he committed the offence. His acts of hiding information about the baby by lying to PW5 amount to conduct that can corroborate circumstantial evidence.

From the above discussion, the circumstantial evidence led to the conclusion that it was the accused person who killed the deceased person.

The last sub-issue is whether the killing of the deceased was with malice aforethought.

On this, the entry point is section 200 (a) of the Penal Code, which reads;

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

This Court (Nangela, J) in **Republic vs. Erick s/o Thomas Mremi**, Criminal Sessions No. 20 of 2022, HC-Sumbawanga (Tanzlilii), while citing the decisions of the Court of Appeal of **Obadia Kijalo vs. Republic**, Criminal Appeal No. 95/2007 and **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994 (Both unreported) elaborated that malice afterthought may be demonstrated by looking at the motive for the offence and the conduct of the suspect immediately before and after the act or omission.

Also, may be inferred from various factors, including the type and

size of weapon which was used in the attack leading to the death of the deceased, the amount of force which the attacker used in assaulting the deceased, the part or parts of the body of the deceased, where the blow of the attacker was directed at or inflicted, the number of blows which the attacker made. However, one blow may be enough depending on the nature and circumstances of each particular case, the kind of injuries inflicted on the deceased's body and the utterances made by the attacker, if any, during, before or after the incident of the attack.

In this case, the evidence by the prosecution side proved that the accused person strangled the deceased to death and dumped her in a pit.

Further, according to his confession to PW8, his motive to kill the deceased was because he discovered that she was not his child. In exhibit P3 it was recorded that;

"Niliamua kumuua baada ya kugundua siyo mtoto wangu wa damu na niligundua hilo baada ya mtoto kuzaliwa na kumuona hafanani na mimi wala mke wangu".

Therefore, the acts above indicated the accused person's actus reus as the one who killed the deceased, and also, the mens rea to kill was established, and the motive behind that killing was revealed.

The accused person's intention to kill was to get rid of the deceased, believing that she was not her child because she did not resemble either him or PW5. So, he decided to brutally suffocate her to death.

Thus, the killing was not only with malice aforethought but also it was unlawful.

Before concluding, this court examines whether the defence case raised any reasonable doubt against the prosecution case.

The trite principle here is that it is the general duty of the accused person in criminal matters only to raise doubt against the prosecution case and not otherwise. See **The D.P.P vs. Ngusa Kejela @ Mtangi and another**, Criminal Appeal No. 276 of 2017, CAT (Tanzlil).

In this case, apart from a general denial of the commission of the offence, the accused persons raised the following issues.

One, the accused testified that he never lived and visited where the crime was committed. He was a resident of Kihinga Village in Ngara District within the Region of Kagera. He was arrested on 12 December 2021, when he travelled from Kagera to the cattle auction at Bukombe, for the allegations of unlawful entry into Tanzania. Therefore, in short, he raised the defence of alibi in his defence.

This should not detain me long because it was never raised by the defence before the commencement of the prosecution case or when they cross-examined prosecution witnesses. Therefore, I accord no weight to such a defence because it was brought contrary to Section 194(4) of the Criminal Procedure.

To cement my position, I quote the decision of the Court of Appeal in **Jason Pascal and another vs. The Republic**, Criminal Appeal No. 615 of 2020 (Tanzlii), where it was held that;

*In their evidence, the appellants claimed to have been arrested in Muleba at the residential house of a person called Hashimu. They did not, however, through their advocate, raise this defence while cross-examining PW1 and PW2. The trial court having regarded the defence raised in the appellants evidence as alibi, accorded it no weight for the reason that, it was not preceded by prior notice or particulars of alibi as per section 194(4) of the Criminal Procedure **For the reasons above discussed, it was quite right.** [Emphasis provided]*

Flowing from above, having analysed and considered the defence case, it fails to raise any doubt against the prosecution case.

Second, having analysed the accused person's defence as a whole, I don't see any aorta of doubt against the prosecution case. The story that he was arrested for unlawful entry in Tanzania is an afterthought, and I

have no reason to doubt the testimony of prosecution witnesses. Nothing suggested that the prosecution witnesses were not credible.

In **Goodluck Kyando vs. The Republic** (2006) TLR 363, it was held that;

"It is a trite law 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."

In this case, the prosecution witnesses are credible and deserve credence.

In the upshot and cumulatively, the prosecution side proves the case to the hilt against the accused person, and consequently, I find the accused person guilty of the offence charged.

Consequently, I convict him forthwith for the offence of Murder c/s 196 and 197 of the Penal Code.

It is so ordered.




K. D. MHINA
JUDGE
19/06/2024