

**IN THE HIGH COURT OF TANZANIA**  
**AT GEITA SUB REGISTRY**  
**CRIMINAL SESSION CASE NO. 75 OF 2023**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**BARAKA <sup>s/o</sup> SHIJA.....ACCUSED**

**JUDGMENT**

*Date of last Order: 18/04/2024*  
*Date of Judgment: 25/06/2024*

**K. D. MHINA, J.**

This is among the cases 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.

In this trial, Baraka Shija stands charged with the offence of Murder contrary to Section c/s 196 and 197 of the Penal Code [Cap. 16 R.E. 2022]

It was alleged that, on 23 June 2022, at Nyamhomang'o Village, within the District and Region Geita, the accused person murdered one Grace d/o Daudi. The accused person pleaded not guilty to the charge.

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 age and that Grace d/o Daudi was his wife. He flatly disputed all material facts read to him.

The Republic thus paraded **six witnesses** to prove their case. The witnesses were **Ass/ Inspector Kapinga (PW1)**, OCS of Nyakagwe Police Station; **J. 449 PC Kilian (PW2)**; the police officer who sent the accused to the justice of peace; **E. 7719 Detective Seargent Paschal (PW3)**, investigator of the case and a police officer who recorded the cautioned statement of the accused person; **Dr. Mlyakalamu Mataba (PW4)**, the medical practitioner who conducted post-mortem analysis; **Kulwa Daudi (PW5)**, the younger sister of the deceased; and **Bahati Kidaha Makoye (PW6)**, the acting ward executive officer who recorded the extra-judicial statement.

They also tendered four (4) exhibits, which were admitted as follows: Exhibit P1, Cautioned Statement; Exhibit P2, Sketch map; Exhibit P3, Post-mortem report; and Exhibit P4, Extra-judicial Statement.

The Republic was represented by Mr. Godfrey Odupoy and Ms. Kabula Benjamin, both learned State Attorneys. On the other hand, Mr. Bartholomeo Musyangi, learned counsel, represented the accused person.

Given the evidence adduced by both sides, the facts material to this case went as follows;

According to **PW5, Kulwa Daudi's** evidence shows that the accused and the deceased lived in Butobela Village after their marriage. However, the deceased left the marital home and returned home later.

On 24 June 2022, when she returned home from grinding millet, she found the deceased and the accused person at home; when she greeted them, the accused did not respond, but the deceased did.

Then, the deceased went to buy "mboga" at the village centre. When the deceased left, the accused asked her if the deceased would live again with him (Kweli huyu tutarudiana?). Thereafter, the accused spoke with his colleague via the phone and requested that person to send him an instrument (zana).

She further stated that the accused person left in the direction where the deceased went. Then, together with her mother, they heard an alarm, and when they ran to where the alarm came from, they found that the deceased had already died. The body was then carried to home.

The deceased had injuries on the left ear, and her head was covered by blood.

When she was cross-examined, she stated that her sister sent her to grind the millet at 16:00 hours, and their mother was not home at that time. Further, she stated that the incident occurred at 17:00 hours, and the alarm was raised near their home.

In his evidence **PW1, Inspector Kapinga**, on 23/6/2022, at about 20:00 hours, he received a phone call from Bahati s/o Kidaha Makoye, the Village Executive Officer of Nyamhomango, Village, that one Grace d/o Daudi was killed.

After that information, together with the doctor from Nyakagwe Dispensary, they went to the crime scene. At the scene, they found the deceased body lying facing up with a head injury in the left ear. Because it was night, the doctor requested the deceased relatives to take the body to their home, and he would examine the body on the following day.

On the next day, they went to the house where the body was kept, and the doctor examined the body. The doctor discovered that the deceased was hit by a heavy or sharp object, which caused the skull to fracture and bleeding.

After that, he assigned Detective Sergeant Paschal to investigate that killing. **PW3, E. 7719 Detective Sergeant Paschal** testified that he

started investigating after being assigned the case file on 24/6/2022 at 06:00 hours. At that time, the suspect had yet to be arrested.

At 12:00 hours, he was informed by phone that the accused had been arrested by civilians at Igudeja Village in Shinyanga Region. When the accused was sent to him around 12:00 hours, he took him to his office, where he introduced himself and informed him of his alleged offence. The accused was in a normal condition.

He further testified that he recorded the accused cautioned statement after giving him all his rights, such as calling his relative, friend, or lawyer when recording his statement. He stated that the office had a table and a chair.

After finishing the record, he read the statement to the accused, who signed it afterwards. He stated that the accused person confessed to killing the deceased. To that effect, he tendered;

*i. The cautioned statement dated 24 June 2022 as exhibit P1.*

After that, he instructed PC Kilian to send the accused to the justice of peace to record an extra-judicial statement.

Furthermore, he stated that on 25 June 2022, he visited the crime scene with the accused and the Village chairman, Mashaka Peji and drew the sketch map. To that effect, he tendered;

*i. Sketch map dated 25 June 2022 as exhibit P2.*

On his side, **PW2: J.449 PC Kilian** stated that on 24 June 2022, he was instructed by Sergeant Pascal to send the accused person, Baraka Shija, to the justice of the peace, one Bahati Makoye who was the Ward Executive Officer of Butobela Ward.

He waited outside when he handed the accused to the justice of peace. When the justice of peace finished recording the statement, he returned the accused person to him. The justice of peace also gave him the envelope, which he handed to Sergeant Pascal.

**PW6: Bahati Makoye Kidaha** stated that he was the Acting Ward Executive Officer (WEO) of Butobela. On 24/6/2022, around 17:00 hours, the accused person was sent to him by a police officer named Killian from Nyakagwe so that he could record that person's statement.

He asked that police to remain outside. He asked the accused if he was ready. However, before that, he inspected the suspect, who told him

he was feeling pain in his leg because he was beaten by the civilians who arrested him.

Then, he recorded an extrajudicial statement per the Chief Justice's guidelines. To that effect, he tendered;

*i. The extra-judicial statement dated 24 June 2022 as exhibit P4.*

The doctor who performed the autopsy, **Dr. Miyakalamu Mataba (PW4)**, stated that on 24 June 2022, while at Geita Regional Hospital, he performed an autopsy of the deceased. The body was sent by the police officer and the deceased relative. The deceased was a female, and the body started to swell.

Upon examination, he discovered three head injuries. One on the right side near the ear. The second injury was on the left side of the head, and the third was in the face.

The injuries were caused by a heavy object. Further, he discovered that there was bleeding in the nose and ears, which indicated that there was a brain injury which caused the bleeding. Therefore, the cause of death was a severe traumatic brain injury. After that, he prepared a post-mortem Report indicating the cause of death. To that effect, he tendered;

*i. The post-mortem report dated 24 June 2022 as exhibit P3.*

In his defence, **DW1, Baraka Shija** testified that on 22 June 2022, he was informed by his father-in-law that Grace Daudi was invaded by an unknown assailant when she was from the farm, and she was killed. He informed his father, Shija Mlingwa, about the incident, who permitted me to go to the funeral of my wife, Grace Daudi.

On 24 June 2022, at 10:00 hours, when he was on his normal brick-making duty, he was arrested by two police officers named Paschal and Kilian and a militia member named Jose Mnyama and taken to Nyakagwe Police Station.

While at the Police station around 16:00 hours, Paschal and Jose Mnyama requested to give the statement regarding the death of Grace Daudi. When he denied knowing, they did not believe him.

Between 16:00 and 17:00 hours, he was transferred to another lockup, where he was undressed and forced to tell the truth.

In his further defence, he denied being taken to the justice of peace. On 27/6/2022, the Village Chairman of Nyamhomango, with Paschal and Kilian, asked him again about Grace Daudi's death, and he maintained that he did not know.



When cross-examined, he stated that he was arrested before going to the funeral.

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 Grace d/o Daudi. Thus, the prosecution has to prove the offence of murder under sections 196 and 197 of the Penal Code.

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

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

**Two**, whether the death was unnatural.

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

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

Outlining some of the crucial principles regarding the evidence in this case is essential for discharging the above duty.

**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. In this case, the cautioned and extra-judicial statements were admitted in evidence without being objected to. However, in his defence, the accused stated that he was beaten, he did not confess to the police officer, and he was never taken to the justice of peace.

**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, I will start with the first and second sub-issues together. The sub-issues shall not detain me long because, given the evidence adduced at the trial, there is no dispute that Grace d/o Daudi is dead. This is according to the evidence PW1, the first police officer who visited the crime scene and found the lifeless body of Grace Daudi, and PW3, the investigator of the case. Also, the evidence of PW5, the younger sister of the deceased who, testified that when they went to the crime scene, Grace Daudi had already died.

Further, the evidence of PW4, the medical practitioner who conducted that autopsy and his evidence was substantiated by the post-mortem report (Exhibit P3) also confirmed that Grace Daudi was actually dead.

In Exhibit P3, it was indicated that the cause of death was due to severe traumatic brain injury caused by multiple strikes with a heavy object. In his evidence, PW4 stated that the deceased had three head injuries. One on the right side near the ear. The second injury was on the left side of the head, and the third was in the face. Further, he discovered that there was bleeding in the nose and ears, which he said indicated that

there was a brain injury which caused the bleeding.

Therefore, the deceased head was attacked and injured, which caused bleeding into the brain, leading to her death. This is an unnatural death. Therefore, she was murdered.

The following pertinent issue here is whether it was the accused person who killed the deceased. The determination of this will automatically dispose of the third sub-issue.

On this, it is common ground that there is no direct evidence or eye witness to connect the accused persons with the offence of murder. The prosecution case rests on circumstantial evidence from the testimony adduced by Kulwa Daudi (PW5) that when the deceased left thereafter, the accused person went in the direction of the deceased.

Also, the prosecution case rests on the accused person's confession through a cautioned statement (exhibit P1) and extra-judicial statement (exhibit P4).

Regarding circumstantial evidence, the law relating to it is very clear. In the case of **Hosea Francis @Ngala and another vs. Republic**, Criminal Appeal No. 408 of 2015 (Tanzlii). The Court of Appeal 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”.*

Furthermore, 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]*

Invoking the principles generated from the above-cited case versus the prosecution case adduced at the trial, I have the following;

From her evidence, PW5 did not say after how long since the deceased left to buy “mboga”; the accused person went in the same direction.

Further, it should be noted that no person saw what happened when the accused left the premises.

Therefore, in the absence of evidence of the longevity of time between the time the deceased left and the time the accused person left and the absence of a person who saw the accused and the deceased together after each one left at their own time created a lingering doubt on whether they met thereafter.

The doubts above on the events of the fateful day reduce the possibility that the accused person was the last person to be seen with the deceased person while she was still alive.

It is trite that in the principle of a last person to be seen with the deceased where strong evidence is absent to the contrary, the reasonable inference is that the accused is criminally responsible for the death of the deceased. See **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda vs. Republic** (2006) TLR 395

In the instant case, the prosecution evidence is doubtful as to whether the accused person was the last person seen with the deceased while she was still alive.

What remains are confessions by the accused person, and I will start with the cautioned statement (Exhibit P1).

At the trial, the admission of the cautioned statement was not objected to. However, during cross-examination, PW3 was questioned regarding the voluntariness when recording the statement. The accused, in his defence, also raised a complaint, alleging that he was beaten and that he did not confess to committing the offence. Thus, he raised the issue of torture and also repudiated the cautioned statement that he never confessed.

Given the circumstances, despite the cautioned statements being admitted during the prosecution's case, it is incumbent upon this court to evaluate them after hearing both the prosecution and defence cases.

Flowing from above, I am aware that failure to object to tendering of the exhibit or to cross-examine the document or evidence in law is taken to have been admitted by the accused. See **Anna Moises Chissano vs. The Republic**, Criminal Appeal No. 273 of 2019(Tanzlii).

However, as already alluded to above, in this case, PW3 was cross-examined on the voluntariness of the statement, and the accused raised that he was tortured and never confessed to the police officer.

The Court of Appeal and this court, on several occasions, had already provided a way forward when torture is alleged and when the statement is repudiated or retracted.

In **Nuru s/o Venevas and others vs. Republic**, Criminal Appeal No.431 of 2021 (Tanzlii), the Court of Appeal 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 **Tuwamoi vs. Uganda [1967] E. A.**, where it was held that;

*"As a matter of practice or prudence, the trial court should direct itself that It is dangerous to act upon a statement which has been retracted in the absence of collaboration in the same material particular, but that the court might do so if it is fully satisfied in the circumstance of the case that the confession must be true".*

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

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



In the instant case, there is no direct evidence from the prosecution witnesses to the cautioned statement of the accused person. However, that is not the sole criterion of corroborative evidence.

In **Pascal Kitigwa vs. Republic [1994] T.L.R 65** where 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."*

In the instant case, the circumstantial evidence of the independent witness (PW5) is weak and fails to establish that the accused person was the last known person to be with the deceased when she was still alive.

Further, there is no scintilla of evidence at all regarding the evidence on the conduct of the accused person. This is because;

In her evidence, PW5 tried to indicate quarrels between the deceased and the accused person. This can be seen when she stated that the accused person asked her if the deceased would live again with him. But in law, quarrels cannot be the basis of conviction.

Second, the evidence of PW3 indicated that the accused was arrested by the civilians at Igudeja Village in Shinyanga, thus suggesting that the accused fled after committing the offence.

Unfortunately, those civilians were not summoned to prove why they arrested the accused person, when he was arrested, whether he fled after committing the offence, and whether they arrested him at Igudeja Village, hence establishing corroborative evidence based on the accused person's conduct.

It is trite that the prosecution was not bound to summon any particular number of witnesses in the case, as credibility matters more than numbers.

Nevertheless, those civilians who were not called were very important witnesses.

In **Aziz Abdallah vs. The Republic** (1991) TLR 91, it was held that

*"Where a witness who is in a better position to explain some missing links in a party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one".*

Therefore, that failure entitles this Court to draw an adverse inference on whether the accused fled and was arrested by civilians at

Igudeja Village. No explanation was given for the failure to call the village chairman.

Thus, there was no evidence of conduct which could corroborate the cautioned statement.

Therefore, though exhibit P1 was admitted, the lack of corroborative evidence watered down its weight and, thus, does not deserve any credence.

Thus, what is left is exhibit P4 (the extra-judicial statement). Again, like in the cautioned statement, the extra-judicial statement was also repudiated. In defence, the accused vehemently denied the events leading to his supposed visit to the justice of peace and the subsequent recording of his statement. He stated that he was never sent to the justice of peace.

Therefore, the principles applicable are the same when the cautioned statement is repudiated.

Having gone through the exhibit P4, I found the following;

In clause 7, when the accused was asked when he was arrested by the police officers, he responded that it was 24 June 2022.

Further, when he was asked where he was arrested by police officers, he responded that he was arrested at Igudeja village- Bugarama I Shinyanga Village, and after that, he was sent to Nyakagwe Police Station.

In clause 6, the justice of peace indicated that he inspected the accused and found he was limping because he was beaten by the civilians.

From above, the extra-judicial statement indicated that the accused was arrested by police officers and not by civilians, contrary to what was testified by the PW3, the investigator and a police officer who recorded the cautioned statement.

Also, though the justice of peace wrote that the accused had pain and the pain was due to the beating by civilians, he did not state who told him that the accused person was beaten by the civilians. The passage reads;

*"Kwa ridhaa yake mahabusu Baraka Shija.*

*Nimekagua mwili wake. Matokeo ya ukaguzi wangu ni kama ifuatavyo;*

*Nimekagua mwili wake lakini anasikia maumivu sehemu ya mguu lakini hana jeraha lolote maumivu ambayo alipigwa na wananchi".*

Having gone through the statement no, where the accused person was asked or responded on who beat him.

In such circumstances, as elaborated above, it is very important to look for corroborative evidence, taking into account the allegations of torture by police.

The evidence of PW3 indicated that after arriving at the police station, he was interrogated, and his cautioned statement was recorded. Again, according to PW3, the accused was in good condition when he received him. But on the same day, when he was sent to the justice of peace under police escort, he was limping and found to have pains in his leg. There was a possibility that he was not free when he was taken to the justice of peace, who also happened to know that case as he was the person who informed PW1 about that murder. Therefore, corroboration is necessary.

As I alluded to earlier, in this case, there was no corroborative evidence to corroborate the confessions.

Further, the cautioned statement and the extra-judicial statement cannot corroborate each other in the circumstances of this case because evidence which needs corroboration cannot be corroborated. This is a holding in many cases, including **Ali Salehe Msutu vs. Republic [1980] TLR**, where it was held that;

*"...it is trite law that evidence which itself requires corroboration cannot corroborate another".*

From the above discussion, exhibit P4 is also unreliable and does not deserve credence.

Flowing from above, as cited earlier in the case of **Galus Kitaya** (Supra), the Court established a cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution and in **the D.P.P vs. Ngusa Kejela @ Mtangi and another**, Criminal Appeal No. 276 of 2017, CAT (Tanzlii), it was held that, 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.

In this case, it is my settled view that the prosecution failed to prove the case beyond reasonable doubt against the accused person while the accused person successfully raised doubts against the prosecution case because of the abovementioned reasons.

Consequently, this court finds the accused person not guilty. Thus, the information against the accused person for the offence of Murder c/s 196 and 197 of the Penal Code is hereby dismissed.

As a result, the accused person is acquitted and released forthwith from prison unless otherwise lawfully held.

It is so ordered.



**K. D. MHINA  
JUDGE  
25/06/2024**

**Court.**

Right to appeal explained to the parties.



**K.D. MHINA  
JUDGE  
25/06/2024**