

**IN THE HIGH COURT OF TANZANIA**  
**AT SHINYANGA**  
**CRIMINAL SESSION CASE NO. 79 OF 2020**  
**REPUBLIC**  
**VERSUS**

- 1. MAJUTO NGAMBA @ NTUMBI**
- 2. EDWARD MAGANGA @ TUNGU**
- 3. PASCHAL JANUARY @ MALOSHA**

**JUDGMENT**

6<sup>th</sup> & 30<sup>th</sup> December, 2022.

**S.M. KULITA, J.**

The accused persons, Majuto Ngamba @ Ntumbi, Edward Maganga @ Tungu and Paschal January @ Malosha stand charged with the offence of Murder contrary to Sections 196 and 197 of the Penal Code [Cap 16 RE 2002]. It is alleged by the prosecution that, on 26<sup>th</sup> January, 2020 at Segese village, within Kahama District, in Shinyanga Region, the accused persons murdered one Keflin d/o Masanja.

The facts presented by the prosecution, which gave rise to this trial are that; on 26<sup>th</sup> January, 2020 while the deceased was asleep with

her husband, they were invaded by three people. The invaders started attacking the victim who managed to shout for help. Two of the neighbours ran to the scene and managed to identify the 2<sup>nd</sup> accused person one Tungu. Tungu was arrested, and on interrogation he thereby mentioned the 1<sup>st</sup> and 3<sup>rd</sup> accused persons to have been his companion on the commission of the crime. The same were arrested and upon interrogation, they also confessed to have committed the crime. The victim's body was examined and the cause of death was revealed to be severe bleeding caused by multiple cut wounds on his body. As such, the accused persons were arraigned to court for murder.

When the information of murder was read to the accused persons during Plea taking and Preliminary hearing, they all pleaded not guilty to the information. Further, on 1<sup>st</sup> December, 2022 when the case came up for trial, the charge of murder was reminded to the accused persons and they pleaded not guilty thereto.

In discharging the duty of proving the charge against the accused persons, the prosecution summoned nine witnesses and tendered eight exhibits. The evidence of the prosecution and defense side can be summarized as follows:

Silas Zabron Kayanda testified as PW1. His testimony is to the effect that, he is the Doctor who conducted post-mortem for the

deceased's body. He mentioned the said deceased being Keflin Masanja. His observation is that, the deceased's body had wounds on the head, stomach and left arm. He stated that the cause of death was failure of heart to function due to severe loss of blood. He tendered to court the post-mortem report that he had filled after the autopsy and the same was admitted as exhibit P1.

E 9271 D/Sgt Festo who testified as PW2 stated that he is a Police Officer stationed at Bugarama Police Station, 2019. He said that on 26<sup>th</sup> January, 2020 he was ordered to go to the scene of crime where Keflin Masanja had been murdered. He went thereto and gathered information on the incident. The information revealed that, the 2<sup>nd</sup> accused person was identified to be among the killers of the deceased. He said that, in addition he drew sketch map of the scene of crime. He tendered it and the same was admitted in court as exhibit P2. He lastly stated that, all accused persons were arrested on 28<sup>th</sup> January, 2020 by the task force.

A Police Officer namely G 7695 Cpl. Selestine (PW3) testified that on 30<sup>th</sup> January, 2020 he together with other Police Officers took the accused persons to the Ward Executive Officer (WEO) for confession. He said that, he does not know why they used WEO as a Justice of Peace instead of the Magistrate. During the cross examination by the defense Counsel PW3 replied that they took the Accused persons to WEO as the

Justice of Peace instead of the Magistrate because the Magistrate was not present in the office.

Another witness for the Prosecution, F. 9940 D/Sgt Peter (PW4) testified to the effect that, he was among those in task force members. He said that they arrested the 2<sup>nd</sup> accused person who in turn, mentioned the other accused persons to have been his accompany in killing the deceased. He said that, he was given task of recording the caution statement of the 2<sup>nd</sup> accused person one Edward Maganga @ Tungu. He prayed to tender it to court as exhibit. After conducting trial within trial, the court admitted it as exhibit P3.

Alfred Benedicto Kanyama, a retired Police Officer testified as PW5. His testimony is to the effect that, as a Police Officer, he was assigned to record caution statement of the 1<sup>st</sup> accused person. He said that, he recorded it after he had given him his rights. After trial within trial the same was admitted as exhibit P4.

Gerald Hussein (PW6) testified that, at the material time, 26<sup>th</sup> January, 2020 he was a Village Chairman for Segese. He said that on that 26<sup>th</sup> January, 2020, he got an information that Keflin Masanja had passed away at her residential premise. He went to the scene, and while there, the second accused person was mentioned to have been identified. He further said that the information revealed that the 2<sup>nd</sup>

accused person was with other two persons. He then said that the deceased's body was found with wounds which were inflicted with a sharp object.

The 7<sup>th</sup> witness for Prosecution Abdallah Yusuph Kombo (PW7) testified to the effect that, he is a Ward Executive Officer (WEO) for Bulyanhulu in Msalala. He said that he is a Justice of Peace at his area of jurisdiction. He said that on 30<sup>th</sup> January, 2020, the Police Officers took the three accused persons to his office. He said that he was told that the said accused persons wanted to confess before him as a Justice of Peace for that area. He said that, in their confessions the accused persons admitted to have killed the deceased, Keflin Masanja with panga. PW7 further said that, the accused persons confessions followed after he had observed that they were all of good health and he had given them their rights. The witness prayed to tender the accused persons' caution statements and the same were admitted as exhibits P5, P6 and P7 for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accuseds respectively.

Abel William testified as PW8. His testimony is to the effect that, he lives at Segese. He added that on 26<sup>th</sup> January, 2020 at about 0100 hours while sleeping at his home, he heard a noise from his neighbor who is the deceased, Keflin Masanja. He described the said noise being in need of help, as she was invaded. He said that he went out with a

three batteries torch which has a high intensity light. He said that, through that torch light, he managed to identify one of the invaders being, the 2<sup>nd</sup> accused person one Edward Maganga @ Tungu. He said that, he is familiar with the 2<sup>nd</sup> accused person as they have been cultivating at the same place with him. PW8 added that, he used 15 minutes to observe the accused persons by using his torch light. He said that, after noting that the accused persons had pangas, for fear, he returned inside his house. He added that, he came out of his house after the other people had started to gather at the scene. When cross examined, he stated that, the deceased had no husband. He added that, he identified the 2<sup>nd</sup> accused person while they were about 7 (seven) meters distance away.

A/Insp Baraka who testified as PW9 stated that he is the one who recorded the caution statement of the 3<sup>rd</sup> accused person. He said that, after he had given him his rights, he started recording the same. He prayed to tender it in court. After the trial within trial being conducted, the same was admitted as Exhibit P8.

On these eight witnesses, the prosecution case got closed. In terms of the provisions of section 293(2) of the Criminal Procedure Act (CPA) the accused persons were found to have a case to answer. After being addressed in terms of section 293(3) of the CPA the accused

persons opted to testify themselves on oath. They had no witnesses to call.

Majuto Ngamba testified as DW1. His testimony is to the effect that, he lives at Bukoli in Geita. He said that, he was arrested on 28<sup>th</sup> January, 2020 at 0300 hours. He said that, he was taken to the police station where he was tortured to sign the caution statement which he had not made. He said that, he signed the same to save his life. He added that, on 29<sup>th</sup> January, 2020 he and his co-accuseds were taken to the Magistrate at Lunguya Primary Court for confession. DW1 alleged that they all denied to have committed the offence, thus they were taken back to police. Thereat police station, again they were tortured, this time severely as they denied to have confessed before the Magistrate. DW1 further stated that, on 29<sup>th</sup> January, 2020 they were taken to the WEO of Bulyanhulu for confession. He said that at the WEO's office they were just given papers to sign and for fear of further torture they signed them. Lastly, the witness denied to have committed the charged offence.

Edward Maganga and January Malosha testified as DW2 and DW3 respectively. Their testimony is as the same as what the 1<sup>st</sup> accused person has testified. The difference is on the kinds of torture they faced

and their respective places they reside. On that account, I will not reproduce it herein.

That is marked the end of both parties' evidence. In view of the above evidence, the following issues call for determination: -

1. Whether the victim's death was unnatural. (if yes),
2. Whether the accused persons are responsible for the death of the victim. (if yes),
3. Whether the accused persons with intention/malice aforethought killed the victim.

Concerning the first issue, whether the victim's death was unnatural, my observation is that, from both sides' testimonies, it is not in dispute that Keflin Masanja is dead. According to the post-mortem report which has been admitted in court as Exhibit P1, the cause of the death of the victim is hemorrhagic shock. Clarifying that scenario during his oral testimony before the court PW1, the Doctor who conducted the autopsy stated that, it is failure of the heart to function due to the great loss of blood in the victim's body.

Further, the admitted post-mortem report shows that, the deceased's body was observed to have big cut wound on her stomach and other

multiple cut wounds. Such multiple cut wounds prove that, the victim met unnatural death. As there is no evidence disapproving this fact, I find no need of dwelling much on this issue. The issue is positively answered that, the deceased's death was unnatural.

Concerning the second issue as to whether the accused persons are responsible for the killing of the victim, Keflin Masanja, the prosecution side depends on the following; **first**, visual identification as testified by PW8 and, **secondly**, the retracted/repudiated confessions of the accused persons.

I am going to discuss those matters on their reliability starting with the issue of identification as testified by PW8 one Abel William. The main issue is, with the above shown testimony of PW8, can we say with certainty that the 2<sup>nd</sup> accused person was properly identified at the scene of crime?

Proper identification presupposes whether circumstances at the material time were favorable for a correct identification. See, **Paschal Petro Sambula @ Kishuu and 2 Others vs. Republic, Criminal Appeal No. 112 of 2005, CAT at Arusha.**

Also, in a good number of cases, it was held to the effect that, even when one testifies to have known the invaders before, be it his relatives or friends, mistaken identity can always be made. This is so when the conditions are not favorable for proper identification. See, **Issa Mgara @ Shuka v. Republic, Criminal Appeal No. 37 of 2005, CAT at Mwanza** where it was held;

*"As occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made"*

While in mind of those positions of the law, I am forced to ask myself as to whether PW8 properly identified the 2<sup>nd</sup> accused person at the material time.

PW8 testified that, when he heard the deceased shouting for help, he got out with his torch. He said that the torch had very intense light as it uses three batteries. He said that, he lighted the same towards the accused persons and managed to identify the 2<sup>nd</sup> accused person. He added that, he lighted to the 2<sup>nd</sup> accused person for 15 minutes, it was after they had finished killing the deceased. He concluded that, he observed the 2<sup>nd</sup> accused person while he was about 7 meters away

from the killers. As he feared to be attacked, he ran into his house and upon his arrival at the scene later he narrated it to the people who had gathered thereat.

On the face of it, this kind of evidence is unrealistic, thus not reliable. It is due to the following reasons; it is impossible for the witness who had fear of being attacked by the bandits/killers to light a torch pointing to them/killers for 15 minutes within a distance of 7 (seven) meters away. It follows then, if he managed to do that, then he was strong and courageous enough not to return back to his house and lock himself inside.

Secondly, every reasonable person will wonder, killers who by fear of being noticed choose to commit their crime at night, then why should they stay out of the deceased house for about 15 minutes before they go away after they had finished killing the deceased? As there is no evidence suggesting that the accused persons did something else at the deceased's house other than killing the deceased, this adds up some doubts.

Thirdly, the killers chose night to commit crime so that they could not be identified, now why should they see someone lighting a torch towards them, yet they remain there for 15 minutes? The answers to

these questions show that, the testimony of the PW8 is not reliable as it contains unrealistic things. On that account, I am settled that, PW8 did not identify the 2<sup>nd</sup> accused person.

As for the issue of accused person's caution statements and the extra judicial statements, I have the following to say; the record is clear that, all accused persons' confessions were objected that, they were not made by them and that they were tortured to sign the same. The law is settled on the retracted/repudiated confessions in the case of **Michael Luhiye v Republic [1994] TLR 181** in which it was held;

*"It is always desirable to look for corroboration in support of a retracted confession before acting on it but a court may convict on retracted confession even without corroboration."*

As both, caution and extra judicial statements of each accused person is either retracted or repudiated, can they be used to corroborate each other? The answer is **"not"**. This is because, corroborating evidence must be independent as it was so held in the case of **Remigius Hyera vs Republic, Criminal Appeal No. 167 of 2005, CAT at Iringa** (unreported). On that account, the evidence

(confessions) which require corroboration are not independent evidence which would qualify to corroborate other confessions.

With regard to the above quoted excerpt, the issue is whether on the prevailing conditions of this case, can it be safe to convict the accused person basing on the retracted confession without the same being corroborated?

First, it should be noted that, when the said confessions were tendered in court, the accused persons objected for the reasons that, they were not made by them and that they were compelled to sign them and they actually did so in order to save their lives, as they were tortured. I reserve my decisions on the same.

Concerning the extra-judicial statements, throughout all accused persons' testimonies, they stated that they were first taken to Lunguya Primary Court before a Justice of Peace who is a Magistrate. To them, they stated to have denied to have committed the offence charged. They further alleged that, following their denial, they were taken back to the police station where they were tortured due to their denial to confess before the Magistrate. They then added that, on the following day they were taken to another Justice of Peace who is the WEO for Bulyanhulu.

On the same point, in his testimony PW3 who is among the Police Officers who had taken the Accused persons to the WEO stated that, he does not know as to why it was decided that they should take the accused persons to WEO instead of a Magistrate. Meanwhile the same witness stated during the cross examination that they had taken the accused persons to WEO because the Magistrate at Lunguya Primary Court was not in the office.

With this evidence in record, I hesitate to agree that this is a fit case to convict the accused persons by using their purported confessions which are uncorroborated. The fact that the extra-judicial statements of the accused persons were recorded by the WEO instead of the Primary Court Magistrate of Lunguya casts a doubt. The said doubt is cemented with the testimony of PW3 which differ on the reason for taking the accused persons to the WEO instead of the Primary Court Magistrate.

The extra judicial statements being recorded by the WEO, convinces much to believe the accused persons testimonies, that they were tortured to sign the extra-judicial statements. As the extra-judicial statements have elements of torture, such smell cannot leave the other confessions (caution statements) safe, as they were recorded at the

police station by the Police Officers themselves, whom the complaints of torture are directed. Thus, as alluded, I am settled in mind that this is not a fit case to find conviction of the accused persons basing on uncorroborated confessions. Falling of this confession evidence makes the prosecution side to remain with no evidence to rely upon.

On that account, I am of the settled mind that, the prosecution side has failed to prove the case at the required standard. I thus proceed to find the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons not guilty of Murder of Keflin d/o Masanja, hence acquitted. They should be released forthwith, unless they are held for some other lawful courses.



  
**S.M. KULITA**  
**JUDGE**  
**30/12/2022**

