

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT TARIME**

**CRIMINAL SESSIONS CASE NO. 164 OF 2022**

**THE REPUBLIC**

**VERSUS**

- 1. KIJA JUMA MASASILA**
- 2. EMMANUEL JUMA MASASILA**
- 3. MANONI SUMAKU MASHULUBU**
- 4. PETER MASALU MAGINGIRA**

**JUDGMENT**

*22<sup>th</sup> & 27<sup>th</sup> February, 2023*

**M. L. KOMBA, J.:**

The accused persons namely KIJA D/O JUMA @MASASILA, EMMANUEL S/O JUMA @ MASASILA, MANONI S/O SUMAKU @ MASHULUBU and PETER S/O MASALU @ MAGINGIRA hereinafter referred to as the 1st, 2nd, 3rd and 4th accused persons respectively are facing the information of Murder c/s 196 and 197 of the Penal Code Cap 16 [R. E 2019 now 2022]. It was stated in the particulars of the offence that the accused persons are alleged on 13 day of January, 2022 jointly and together at Rigicha Village within Serengeti District in Mara Region murdered one **WANKURU D/O MWITA**. The charge was read and explained to the accused persons and each of the accused persons entered a plea of not guilty the act which attracted a full trial.

The prosecution paraded four witnesses namely **PW1 Amos Kabadurwa** (Hamlet Leader) **PW2 H. 5098 DC Daniel**, **PW3 Hamis Abdul Kabila**(a Clinical Officer) and **F. 3785 D Sgt Proches**. Moreover, prosecution had Exhibit P1 (sketch map), Exhibit P2 (post mortem report) and Exhibit P3 (Caution Statement of the 3<sup>rd</sup> accused). The defence side paraded four witnesses who are accused persons without any exhibit.

Facts of the case stated that **WANKURU MWITA** who was residing at Rigicha village was murdered on the night of 13<sup>th</sup> January 2022 in her house and her body was discovered in the morning of 14<sup>th</sup>Jan, 2022 with multiple cut wounds on various parts of the body lying in the pool of blood. When the body was examined by PW3 Hamis Abdul, he reported that the death was caused by severe bleeding as was narrated in Exh P2 (post mortem report). Prosecution alleging that all accused persons named herein are responsible for that killing.

**PW 1 (Amos Kabadurwa)** a Mpakani Hamlet leader informed the court that on 14/01/2022 when he was at his farm, he received a phone call from Ligwa who informed him about the murder which occurred in their village. He arrived at the locus in quo and find some people who informed him of the murder of Wankuru Nyamhanga and he saw the

body of Wankuru and informed village chairman Mr. Mkoka whom then called the police. It was the evidence of PW1 that they then raised an alarm (piga yowe) where villagers gathered at the scene and in short time police and doctor arrived at the scene. He testified in court that he saw the body of deceased it had two wounds; one at the forehead and the other at the backside of the head. He confessed he did not see either of the accused butchering the deceased.

**PW2 H. 5098 DC Daniel** testified that he was involved in investigation of the murder incident which took place at Rigicha village. On 14/01/2022 he went to Rigicha village in company with other police officers including Proches, Astone, Elbariki and himself. Basing on information from informer he said it was easy to arrest 1<sup>st</sup> and 2<sup>nd</sup> accused (KIJA D/O JUMA @ MASASILA, EMMANUEL S/O JUMA @ MASASILA) who were at the mourning so it was easy to arrest them. PW2 is the one who draw the sketch map of the scene of crime (exhibit P1) and that he was assisted by deceased's son, Mhono Nyamhanga. He further informed the court that he conducted interrogation with the 2<sup>nd</sup> accused which started around 19.00 hrs of 14/01/2022. According to PW2, the second accused confessed to be involved in the murder of Wankuru in collaboration with other three people. He informed the court

while in cross examination that he did not tender cautioned statement of 2<sup>nd</sup> accused but what he is informing the court is true. He did not saw any of the accused persons slaying the deceased apart from being told by the 2<sup>nd</sup> accused.

**PW3 Hamis Abdul Kabila**, a clinical officer informed the court in his testimony that he was informed by police of the incidence at Rigicha village and he accompanied police officer to the scene of crime. He said when they entered in the house of deceased, they found the body of an aged woman laying on bed with blood surrounding it, in examination he saw two wounds, one on the forehead and the other one at the back side of the head. It was testimony that the cause of death was severe bleeding though he did not indicate cause of wound as from sharp or blunt object as he confessed during cross examination. From that observation he prepared an examination report Exh. P2. Further, he said he did not see any of the accused cut or murder the deceased person.

**PW4 F.3785 DSgt Proches** informed the court that he was among the police officers in the section who were assigned duty to arrest suspects of the killing at Rigicha village. On 15/01/2022 around 02.00 hrs together with other police officers went to Rigicha village and started arresting suspects one after another and managed to arrest four

suspects and around 05.00 hrs they completed their task. He further informed the court that they arrived at Mugumu Police station around 07.15 hrs and surrendered suspects to RCO. Witness was ordered to record information from one accused, caution statement of the 3<sup>rd</sup> accused. He tendered the caution statement of 3<sup>rd</sup> accused which was recorded under S. 58(3) of the CPA and which was admitted as Exh. P3. In that Exh. P3 accused confess to participate in the killing of deceased, Wankuru Mwita together with 2<sup>nd</sup> and 4<sup>th</sup> accused.

It was the PW4 testimony that accused were hired by 1<sup>st</sup> accused to terminate life of the Wankuru Mwita who was the mother-in-law of 1<sup>st</sup> accused on account that, Wankuru was bewitching 1<sup>st</sup> accused children. It was further explained in that caution statement after the killing, all 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused went to witch doctor for them to be cleansed for their wrong so that they could not be noticed.

PW4 further informed the court that he was investigator of this case and that under that capacity he had an opportunity to read all documents in case file and noticed statement of all important witnesses were already recorded. He said even the post mortem report was in file and it shows the cause of death was cut by sharp objection at the backside of head and forehead, there was also the statement of Kija with the whole story

of sickness of her child, statement of Emmanuel Juma who also confess to participate in killing together with 3<sup>rd</sup> and 4<sup>th</sup> accused on promise of being paid Tshs. 500,000/=.

During cross examination, PW4 repeated that he read post mortem report and insisted the wound was from cut by sharp object. When he was asked why he did not take accused person to justice of peace as they all confessed he replied that it was not mandatory to take accused person because they confessed free without reservation. According to him, a person can be taken to justice of peace if he hesitates on some issues in his confession and insisted all accused were arrested the night of 15/01/2022. PW4 while under cross examination informed the court that Exh P3 indicated that it was recorded under sections 52 up to 58 of the CPA.

Upon closing the prosecution case and this court to rule out that the *prima facie* case has been established against the accused, leading by their advocates, Mr. Onyango Otieno and Samson Samo, accused persons entered their defence.

**DW1 (Kija Juma Masasila)** who is the first accused informed the court that in the night of 13/01/2022 there was a crime occurred in her homestead (katika mji wake) that herself and 3<sup>rd</sup> accused planned and

killed Wankuru Mwita Nyamhanga alleging the deceased was bewitching her (1<sup>st</sup>accused) children. Elaborating in court, this witness explain how they plan to kill Wankuru, that DW1 is the one whom engaged the 3<sup>rd</sup> accused to help her kill the deceased, her grandmother. They agreed to execute their ill motive in the night of 13/01/2022. She said on the fateful day 3<sup>rd</sup> accused went at the place where DW1 stays with the deceased and found deceased was not asleep, they agreed to wait for her to fall asleep and 3<sup>rd</sup> accused showed up again after some time when Wankuru was in deep sleep.

It was the testimony of DW1 that she opened the door of the room where deceased was sleeping then 3<sup>rd</sup> accused entered, with the help of torch flash they saw the bed and Wankuru. She said it was 3<sup>rd</sup> accused who cut Wankuru with machete and they disappeared.

**DW2 (Manoni Sumaku Mashulubu)** who is the 3<sup>rd</sup> accused testified that the 1<sup>st</sup> accused informing him that her mother-in-law (Wankuru) was practicing witch craft and bewitch her children and that on 13/01/2022 DW2 went to 1<sup>st</sup> accused place and they agreed to kill Wankuru for payment; DW1 promised to pay him 500,000/= after completion of that mission. It was his testimony that around 20:00 hrs DW2 appeared to deceased but Wankuru was not asleep, he hide at

some place and when Wankuru fall asleep around 21:00 hrs, DW1 followed him and they went straight to Wankuru house, where DW1 opened the door, and DW2 entered into Wankuru's room while holding machete and 1<sup>st</sup> accused was holding torch. They found Wankuru was sleeping backward and DW2 cut her head and when she turns around to see what was going on DW2 cut her again in front of the head. He insisted that mission was accomplished by two people only, himself and DW1 who is the 1<sup>st</sup> accused. During cross examination he informed the court that when he was battering deceased, 2<sup>nd</sup> and 4<sup>th</sup> accused were not around.

**Emmanuel Juma Masasila** testified as **DW3** who informed the court that in the morning of 14/01/2022 he heard yowe (alarm) from public and when he on the way to attend that alarm he discovers it was from her young sister (1<sup>st</sup> accused) homestead. When he reached there, he found police and doctor and people were instructed to proceed with burial service. It was his testimony that while DW3 and other people were preparing a place to put the body of deceased, police arrested him together with 1<sup>st</sup> accused and were taken to Mugumu Police station. On the day, that is 14/01/2022 he said he was taken to investigation room where he was tortured so that he can agree that he participated in

killing of Wankuru but, this witness said he did not participate in that murder.

**DW4 (Peter Masalu Magingira)** testimony goes like this, he was arrested in the night of 15/01/2022 on allegation that he was involved in the killing of Wankuru who died in their village. He said when he was informed by the police that he was participated in the said killing he was tortured but he know nothing about the killing.

Before I move a step further to determine this case, I find it important to recall some important principles in criminal justice extracted from law and practice. In criminal cases, it is a cardinal principle that it is upon the prosecution side to prove their case beyond reasonable doubt as per section 3 (2) (a) of the Law of Evidence Act [Cap 6 R. E 2022]. The burden of proof cannot shift to the accused person. In the case of **Samson Matiga vs. Republic**, Criminal Appeal No. 205 of 2007, CAT at Mtwara (unreported) went further providing the meaning of the stated principle that; -

*'What it means, to put it simply, is that the prosecution evidence must be strongly as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence'.*

The above guidance will lead this court to determine whether the offence has been proved against the accused persons or not in regard to law and court practice.

Now, in this case, the accused was charged under section 196 of Cap 16 which establishes the offence of murder. It is therefore pertinent for the elements of the offence to be proved before a conviction can be entered against the accused. The section provides:

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

There are four elements requiring proof in the offence of murder. **First**, there must be death of a person. **Second**, the death must be a result of an unlawful act or by an unlawful omission. **Third**, the prosecution's evidence must satisfy, beyond reasonable doubt, that the accused is the one who killed. **Fourth**, the killing must be preceded by a pre-meditated evil intention which is malice aforethought.

Concerning the 1<sup>st</sup> and 2<sup>nd</sup> elements, it is undoubted during prosecution and defence evidence that Wankuru d/o Nyamhanga(the deceased) died and that her death was unnatural one. Despite the fact that the accused did not dispute the deceased's death, the evidence of PW1, PW2, DW1, DW2, DW3 and DW4 and exhibit P2 (post-mortem examination report)

proved that there is death of Wankuru Mwita and the death was due to severe bleeding by cuts wound, unnatural death. **The vital question is whether the deceased was murdered by the accused persons who were before this court.**

From prosecution there is no an eye witness, and therefore the only evidence or exhibit relied upon by the prosecution to connect accused persons with the murder is the Cautioned Statement of 3<sup>rd</sup> accused. The statement was recorded by PW4 who testified in court, not only that he recorded statement of the 3<sup>rd</sup> accused which was admitted as Exh. P3, but also that he was investigator of the said crime.

Apart from PW4, prosecution also relied on testimony of PW2 who recorded caution statement of 2<sup>nd</sup> accused though it was not tendered. He testified in court his participation in investigation of this crime and is the one who draw the sketch map.

I took time to study and read Exhibit P3 where the 3<sup>rd</sup> accused statement was recorded. The exhibit was made under various provisions of law hence it is difficult to know what were pre requisite conditions to observe. Provisions which seem to be listed that the statement were made from, among others, are section 52, 53, 54, 55, 56, 57 and 58. All these sections provides different conditions to be observed prior, during

and after recording and to different accused. It gives the court hard time to make a follow up of all those provisions cited.

However, after I hardly studied the evidence of PW2 and PW4 I found a **lot of discrepancies that tainted prosecution** evidence. **First**, PW2 told this court that he was among the team of police officers who went to Rigicha village on 14/01/2022 for investigation purposes, he was with PW4 and that they arrested **1<sup>st</sup> and 2<sup>nd</sup> accused**. Unlike, PW4 who told this court that he went to Rigicha village the night of 15/01/2021 and started arrest around 02.00 hrs. **Second**, PW2 informed this court that 1<sup>st</sup> and 2<sup>nd</sup> accused were arrested while at mourning place in Rigicha village so it was easy for them to be arrested. Unlike, PW4 who informed this court that they **arrested all accused** from one house to another and the houses were located at different parts of the village. This shows the arrest was not easy.

**Third**, from the testimony of PW2, they arrested 1<sup>st</sup> and 2<sup>nd</sup> accused while at mourning place and took them to Mugumu police station and that while at the scene he draw sketch map. This story suggested it was day time as he manage to draw sketch map. Unlike, PW4 who told this court that arrest was conducted at night from 02.00 hrs and ended around 05.00hrs this is night.

**Fourth,** PW3 informed this court that he examined the body of Wankuru d/o Mwita and found with two wounds and that the cause of death was due to severe bleeding. During cross examination he confessed he did not write in Exh. P2 cause of wounds and therefore he did not inform the court cause of wound. Unlike, PW4 investigator of the crime who told this court that he read post mortem report which show the cause of death was cut by sharp object.

I wonder how comes the team of police detectives who were sent for the serious mission at Rigicha village give different stories about the date, time and number of accused arrested. Investigator of the crime failed to read what was write by an officer who examined the deceased body. Am in doubt if the crime was investigated. Above analysis make difficulty for this court to rely on Exh. P3 which was written by an officer who failed to read post mortem report. To me reading is easier task than writing. Am asking if what was written in Exh. P3 was correct and am asking myself if all other submission made by PW3 was correct or real happened.

As I stated early above, the cardinal principal in criminal law is that the burden of proof always lied on prosecution shoulders. There are over abundance authorities on this stance. See the decision of the Court of

Appeal in **Gaius Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 CAT at Mbeya where it was held as follow;

'It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. In the case of **John Makolebela Kulwa Makoibeia and Eric Juma alias Tanganyika** [2002] T.L.R. 296 the Court held that: "A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt'.

As far as the prosecution evidence in this case are concerned, it raises a huge doubt due to the contradictions between material witnesses PW2 and PW4. I am of the views that, the contradictions arose between PW2 and PW4 evidence are not minor, they go to the root of the case. The discrepancies dented the prosecution case as the PW2 and PW4 are only material witnesses who went to scene and investigate the crime. It is the settled position that contradiction can be considered as fatal if it is going to the root of the case. See **Sebastian Michael & Another vs. The Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018, CAT at Mbeya.

In the case at hand, I found hardly to believe which witness between PW2 and PW4 who were both at the scene of crime, Rigicha village collecting information and arrest accused was telling the truth. PW2 stated that the 1<sup>st</sup> and 2<sup>nd</sup> accused were arrested during day time of 14/01/2022 while on the other hand, PW4 told this court that the all accused were arrested between 02:00 hrs and 05:00 hrs of 15/01/2022. Moreover, PW2 informed this court that cause of death of deceased is severe bleeding while on the other hand, PW4 said cause of death was cut by sharp object. This contradictions is not minor as it can answer two questions whether the death was unnatural and it was accused persons who cause the death of the deceased.

The Court of Appeal in the case of **Mohamed Said vs. The Republic**, Criminal Appeal No. 145 of 2017 held that a witness who tell a lie on a material point should hardly be believed in respect of other points. See also **Zakaria Jackson Magayo vs. The Republic**, Criminal Appeal No. 411 of 2018, CAT at Dar es salaam.

In this case, I find difficult to believe testimonies of PW2, PW3 and PW4 as they contradicted each other on important points. This makes their testimonies to contain lying at some points. I also find difficult to believe the contents of Exh.P3. I have gone through the testimonies of the

prosecution witnesses, their testimonies are tainted with contradictions, and it is not safe for the court to rely upon their testimonies. There is no evidence without doubt to support the conviction of accused persons from prosecution.

Considering defence of accused persons. DW1 who was staying with deceased, she informed the court how she together with 3rd accused planned and execute the killing of the deceased. She said she opened the door of the place where deceased was and 3rd accused cut the deceased with machete and they disappeared. In her elaboration which was a confession to this court, she said, she did that because she allege deceased to bewitch her children.

DW2, the 3rd accused informed the court that he cut the deceased with a machete following the allegation that deceased was bewitching DW1 children. He informed the court, when entered in her room they found deceased sleeping by her stomach where DW2 cut backside of the deceased head by using machete. When deceased turned around to see what was happening, DW2 said he cut her again in the forehead. DW3 and DW4 denied to know anything about the killing.

This court finds what was explained in court by DW1 and DW2 is a confession. Facts in their expression which lead to the occurrence of the

crime is collaborated with Exh. P2 that deceased had wounds, one at the backside of her body and the other at the forehead.

It is a trite law that, the best evidence in a criminal case is one in which the accused person confesses his guilt. This is the settled position of law as it was stated in a number of Court of Appeal decisions including the case of **Jacob Asegile Kakune vs. Republic**, Criminal Appeal No. 178 of 2017, in which the Court of Appeal cited the case of **Mohamed Haruna Mtupeni vs. Republic**, Criminal Appeal No. 259 of 2007, whereby the Court stated;

*'The very best of witnesses in any criminal trial is an accused person who freely confesses his guilt.'*

See also **Muhongwa Simu vs. Republic**, Criminal Appeal No 480 of 2019 that if admission was freely taken, is the best evidence to be relied upon than any other evidence in criminal charge and does not need corroboration if not repudiated.

Am asking myself whether 1<sup>st</sup> and 3<sup>rd</sup> accused did it intentionally. Associating my knowledge of criminal law on **actus reus** and **mens-rea** in crime, in this offence of murder and the provision of section 196 of Cap 16 that;

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

Malice aforethought can be established when one intentionally causes the death of another person. The court analysed how malice aforethought can be established while celebrating the case of **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994 (unreported) by looking at (1) the type and size of the **weapon** if any used in the attack; (2) the **amount of force** applied in the assault; (3) the part or **parts of the body** the blows were directed at or inflicted on; (4) The **number of blows**, although one blow may, depending upon the facts of the particular case be sufficient for this purpose; (5) The **kind of injuries** inflicted (6) the utterances made by attacker; (7) the conduct of attacker before and after the killing.

From the testimony of DW1 and DW2, accused persons used machete to attack the deceased, **machete is a dangerous weapon** by its nature, DW2 used **much force** as evidenced that deceased was found died in bed where the crime took place, part of the body where blow was directed was head, that the first blow was directed at the backside and the second at the forehead, that show intension of killing the deceased.

Though the number of blows was only two, there were very strong as the deceased died on the spot. Kind of injury was cut wound at the head which is very sensitive area. Also the conduct of the accused before the killing show that they intended to kill the deceased as they planned the whole pikn together. At first they found the deceased was still awake and they decided to wait until she fall asleep. In general, malice aforethought has been proved in the case at hand as was established in the case of **Enock Kipela vs. Republic** (supra).

It was DW2 who hold machete and cut, but he did that with the aid of DW1 whom they had prior meeting on preparation of commission, DW1 opened the door and she had a torch which its flash help them saw Wankuru while sleeping. I find common intention in 1<sup>st</sup> and 3<sup>rd</sup> accused as provided under section 23 of the Penal Code Cap. 16 which reads: -

*S. 23. 'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'*

For common intention doctrine to be invoked, there must be two or more people who have shared common intention to pursue an unlawful

act and in the execution of the pre-planned plan the offence was committed by both or some of them. The doctrine was well elaborated in the case of **Diamon S/O Malekela@ Maunganya vs. R**, Criminal Appeal No. 205 of 2005, the Court of Appeal held that;

*"Much has been said and written on "common intention" as a basis of criminal liability. Suffice it to say here that the doctrine of common intention, as distinguished from similar intention, can only be successfully invoked where two or more persons form a common intention to prosecute an unlawful purpose and they commit an offence and are eventually jointly charged and tried together'.*

See also the case of **Issa Mustapha Gora & Another vs. R**, Criminal Appeal No. 330 of 2019.

In terms of section 23 of Cap. 16, the 1<sup>st</sup> and 3<sup>rd</sup> accused persons had a common intention to prosecute an unlawful purpose that resulted in the commission of the offence of murder.

Ultimately, I find **Emmanuel Juma Masasila 2<sup>nd</sup> accused and Peter Masalu Magingira 4th accused** not guilty and I hereby acquit them of the offence of murder contrary to section 196 and 197 of the Penal Code [CAP 16 R.E 2019 now 2022]. I order **Emmanuel Juma Masasila and Peter Masalu Magingira** to be released from the prison unless they are otherwise lawfully held.

Moreover, from their own confession I hereby convict the accused **Kija Juma Masasila** 1<sup>st</sup> accused and **Manoni Sumaku Mashulubu** 3<sup>rd</sup> accused for the offence of murder contrary to sections 196 of the Penal Code, [Cap 16 R. E. 2019 now 2022].

Dated at **Tarime** on this 27<sup>th</sup> February, 2023

  
**M. L. KOMBA**  
**Judge**

### **SENTENCE**

1<sup>st</sup> and 3<sup>rd</sup> accused has been convicted for the offence of murder contrary to section 196 and 197 of the Penal Code, the offence when proved has only one punishment. My hands are tied, I have no other alternative than sentence **Kija Juma Masasila** 1<sup>st</sup> accused and **Manoni Sumaku Mashulubu** the 3<sup>rd</sup> accused to suffer death by hanging.



  
**M. L. Komba**  
**Judge**  
**27<sup>th</sup> February, 2023**

**Court:** Right of appeal is fully explained.

  
**M. L. KOMBA**  
**Judge**  
**27<sup>th</sup> February, 2023**