

IN THE HIGH COURT OF TANZANIA

AT SHINYANGA

CRIMINAL SESSION CASE NO. 59 OF 2021

REPUBLIC

VERSUS

NG'WAGI BUNZALI @ MASELE

JUDGMENT

4th & 31st July, 2023.

S.M. KULITA, J.

The accused person herein, one Ng'wagi Bunzali @ Masele stands charged with the offence of Murder, contrary to Section 196 of the Penal Code [Cap 16 RE 2019]. It is alleged by the prosecution that, on 24th December, 2019 at Kitangili area, within Shinyanga Municipality, in Shinyanga Region, the accused person murdered one Asha Ramadhan Juma.

The facts presented by the prosecution which gave rise to this trial are that; the victim was a resident of Kitangili area within Shinyanga Municipality. That, on 24th December, 2019 the victim's neighbours noted her missing. They decided to report the matter to their street leader. They then decided to break her door which was looked to have been locked from outside, and found the victim lying dead. The matter

was reported to police and investigation commenced. The cause of death was found to be strangulation. Further, the victim's body was found to have been raped and the pubic hair roughly shaved. In the course of investigation, on the 4th day of January, 2020 the accused herein was arrested. Upon being searched, he was found with some of the deceased's items, to wit a Mattress and the NIDA identity card. That, the accused person was interrogated and confessed to have killed the victim. He was thus arraigned to court for murdering the victim, Asha Ramadhan Juma.

When the information of murder was read over to the accused person during Plea taking and Preliminary hearing, he pleaded not guilty to the information. Further, on 26th June, 2023 when the case came up for trial, the information of murder was reminded to the accused person who maintained his plea of not guilty.

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

Dr. Kambi Athuman Buteta testified as PW1. His testimony was to the effect that, he is a Doctor at Shinyanga Region Referral Hospital. He said that, on 27th December, 2019 while at his working place, he was

required to conduct autopsy of the female victim namely Asha Ramadhan Juma. He said that, he conducted the same and found out that, the cause of death was missing of oxygen in the brain which was caused by strangulation. He also stated that the victim's body had bruises on the legs and front party of the neck. He also observed that the victim was raped and her pubic hair shaved. The said PW1 filled the Post Mortem Report (PMR), the same was tendered to court and admitted as exhibit P1.

The 2nd witness for prosecution, E 6968 D/Sgt Joseph (PW2) testified that, he is a Police Officer attached in the Criminal Investigation Department (CID) at Shinyanga Police Station. He said that on 4th January, 2020 he was required to interrogate the accused person who was under police custody at Shinyanga Police Station. He took him from lock up for the investigation room. He added that, after he had given him all his rights, he then recorded his statement from 1600 to 1830 hours. He said that, in his statement the accused confessed to have participated in killing the victim.

Habiba Jumanne (PW3) testified to the effect that, she is a Street Leader at Kitangili in Shinyanga and that, on 25th December, 2019 she was informed that the victim was missing while her door was locked from outside, the thing which was unusual. She went thereto and

ordered the door to be broken. Upon the door being broken, they found the victim lying dead on the floor. She added that, she made a call to police who arrived thereat and they all entered into the house. PW3 told the court that, the deceased's body had no underwear and the bed had no mattress. The witness said that on 12th January, 2020 she was called by Police who wanted her to witness the accused person leading them to a place where he had committed the offence. She said that, the accused herein led them up to the victim's room. PW3 added that, the victim was living with her son.

Insp. Bosco Isdory Komba testified as PW4. The said witness stated that, he is a Police Officer attached in the CID Department at Shinyanga Police Station. He said that, with the help of their informer they managed to arrest the accused person at Nhelegani area on the 4th day of January, 2020. He added that, upon been searched on his body the accused was found with NIDA card of the victim and a mobile phone. He said that identity card has the name and photograph of the deceased. He said that, they prepared a Seizure Note after which, he together with the Street Chairman one Sophia Shitobile signed. The said NIDA card and certificate of seizure were tendered and to court and admitted as exhibits P2 and P3 respectively. The witness went ahead contending that, the accused confessed to have killed women including

the victim herein for witchcraft beliefs and that, the properties he had stolen from the victim were the said NIDA card and the Mattress. The witness continued stating that, on 8th January, 2020 while at home he received a phone call from his fellow Police Officer informing him that, the accused wanted to take him to a place where he had hidden the properties stolen from the victim. He said that, he went with the accused, street leader and fellow police officer to a place where the accused said to have hidden the stolen properties. He said that, at the place they really found a mattress. He provided the specification that it was green colored with red/white colors. PW4 said that, they prepared a seizure certificate for it. The said certificate was tendered and admitted to court as exhibit P4. The mattress was also tendered, it was received and admitted as exhibit P5. The witness identified the particulars he had mentioned in each exhibit.

Another witness for prosecution was SSP Eliachim Magambo Kimonge (PW5) who testified to the effect that, in 2019 he was the Head of CID department (OC-CID) for Shinyanga District. He said that, on 25th December, 2019 he received a call from the Street Leader one Habiba informing him on the death of the victim. He said that, he together with other policemen went to the scene and found the victim's body rounded with "khanga" on the neck, pubic hair roughly shaved and

the bed had no mattress. They noticed that the victim was strangled to death. They thus took the deceased's body to hospital. In his further evidence PW5 stated that, the accused was arrested and led the Police Officers to a place where he had hidden the victim's mattress. He added that on 12th January, 2020 the accused and Police Officers went to the scene where the accused narrated on how he had committed that murder. He said this was done in the presence of the street leader.

F 6576 D/Sgt Mussa testified as PW6. This witness testified to the effect that, in 2019 he was working at Shinyanga District Police Station. On 4th January, 2020 while on Task Force for tracing people who kill women and shave their public hairs for witchcraft beliefs, they got information on the accused's involvement on it. He said that, through their informer, they managed to arrest the accused person. When they conducted a body search on him they found him possessing the victim's NIDA Card. He said that the said identity card has the deceased's photo while the mattress had the green color with red/white colors flowers. He went on stating that, on 8th January, 2020 they were told that the accused had confessed and wanted to lead them to a place where he had hidden the stolen mattress. He said that, they joined and together went to witness the same. He said that, with the help of the accused

person the mattress was actually found. The witness identified the said exhibits when shown to him before the court.

Another witness for prosecution one Sophia Heneriko (PW7) testified that, in 2019 she was a Chairperson for Nhelegani village. She said that on 4th January, 2020 she witnessed the arrest and search of the accused person. The witness said that in that search, the NIDA Card of the victim was retrieved from the accused cloth pocket. She again witnessed another search, this was in the accused's room which was conducted on 8th January, 2020. She said that in that search the victim's mattress was retrieved. Specifying the mattress PW7 stated that its cover was light green colored with red/white flowers. She identified it before the court. As for the deceased's NIDA card she identified it with the victim's photo. When cross examined in connection with the statement that she had made at the police station, that it doesn't tally with her testimony, the witness' statement was admitted to court as exhibit D1 for contradiction.

The last witness for prosecution, Said Mohamed Yusuph (PW8) testified to the effect that, the victim is his mother and that they were living at Kitangiri area. She said that on 24th December, 2019 he had gone to his aunt's resident at Ndala for Christmas cerebration. He said that, on 26th December, 2019 he got information that his mother had

been killed. He added that, when he reached at home he found the victim's NIDA Card, Mattress and a bag not available. He also stated that, he was 14 years of age by the time her mother passed away but he remembers the specifications of the victim's mattress and the deceased's NIDA identity. He clarified and later on identified them with deceased's photo for the identity, and the green colored cushion with white/red flowers for the mattress.

On these eight witnesses as I said earlier, the prosecution case got closed. In terms of the provisions of section 293(2) of the Criminal Procedure Act (CPA), the accused person was found to have a case to answer. After being addressed in terms of section 293(3) of the CPA, the accused person opted to testify alone on oath.

The Accused Person, Ng'wagi Bunzali @ Masele testified as DW1. His testimony is to the effect that, he was arrested on 3rd January, 2020 while he was coming from farming. He said that, he was bodily searched but found with nothing wrong. He was taken to the police station where he was tortured to confess on the murder of the victim herein. He stated further that, one of police officers showed him the identity card alleging that it was found in his possession while not. DW1 said that he doesn't know the same. He said that on 7th January, 2020 he was taken to his

home where search was conducted. He said that, nothing was found in connection to the victim's murder. He added that, the mattress was not retrieved from his house but planted for this case. On the caution statement, he said that he was made to sign something which he did not know. He also denied to have known Sophia and Habiba as street leaders whom he met with during his arrest. When cross examined, he stated that, he was searched before the other people but not Sophia. About calling witnesses to testify for him he stated that, he is in remand custody, hence he couldn't.

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

1. Whether the victim met unnatural death (if yes),
2. Whether the accused person is responsible for the death of the victim (if yes),
3. Whether the accused person with intention/malice aforethought killed the victim.

Concerning the first issue, whether the victim met unnatural death, firstly, from both sides' testimonies, it is not in dispute that Asha Ramadhan Juma is dead. According to the Post Mortem Report which

was admitted to court as Exhibit P1, the cause of death of the victim is strangulation.

The admitted Post Mortem Report shows that, the deceased's neck and legs were found with bruises. The evidence shows further that, the victim was found naked, her pubic hair roughly shaved and a piece of "khanga" surrounded her neck. The said khanga being found tied on the deceased's neck and presence of bruises thereon is an indication that the deceased was strangled. The same applied to the Doctor's (PW1's) opinion that the source of death was missing of oxygen in the brain which was caused by strangulation. Such circumstances prove that, the victim met unnatural death. As there is no evidence to disapprove this fact, I find no need of dwelling much on this issue. It is thus positively answered that, the deceased Asha Ramadhan Juma met unnatural death.

Concerning the second issue, whether the accused person is responsible for the killing the victim, the prosecution side depends on circumstantial evidence and oral confessions of the accused person. In this judgment I will endeavor into discussing one after the other to see their impacts in the case at hand.

I am alive with principle of law concerning circumstantial evidence which provides that, for a conviction to stem on circumstantial evidence, it must be the evidence that leads to no other conclusion than only one that, the accused person committed the offence. See, **Juma Salum Singano v. Republic, Criminal Appeal No. 172 of 2008, CAT at DSM** in which it was held;

"We agree with both learned counsels that to sustain a conviction on circumstantial evidence the evidence must irresistibly point to the guilt of the appellant"

Further, I am alive with the holding in the case of **ALLY BAKARI & PILI BAKARI V. R [1992] TLR 10 (CA)** that;

"Where the evidence against the accused is wholly circumstantial, the facts from which an inference adverse to the accused to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be drawn"

The above quoted principle of law calls for all facts which lead to an inference that the accused is guilty, must be proved beyond

reasonable doubt. As such, it is upon the court to verify as to whether this condition has been met.

In this case, the evidence by the prosecution witnesses shows that, the victim's body was found lying dead in her room while locked from outside. PW3 stated that, the victim's bed was found with no mattress on it. Further, the victim's son who testified as PW8 stated that, the victim's bed once had a mattress, but it was not found on bed after her death. PW8 showed further that, even the victim's NIDA card and a bag were missing too.

Further, the evidence of PW4 showed that, he arrested the accused person following the information that he killed the victim, Asha Ramadhan Juma. His evidence showed further that, he searched the accused's body and found him with the victim's NIDA Identity card (exhibit P2). He then filled the seizure certificate (exhibit P3).

On the other hand, the accused person does not dispute of being arrested and bodily searched. He also doesn't dispute on the signing of the certificate of seizure, and the search being witnessed by some people to whom he mentioned, Shaban Ndizu and Anna Swea. What the accused person disputes is that, he signed the documents without

knowing what they were, and that he was found with nothing during that search.

When I look on the seizure certificate, exhibit P3, the same shows that, Shaban Ndizu and Anna Swea were among the people who witnessed the search. And they both signed on it. If these witnesses never seen the victim's NIDA identity card being retrieved from the accused person, why should they sign the said exhibit P3? It should be known that, these witnesses for search were free agents, which means that, they were able to ask the arresting officers on any situation that they found to be inconsistency with accused person's justice. In this situation, the accused person wants us to believe that the said witnesses for search did not see the victim's NIDA identity card being retrieved from him, yet they chosen to remain mute. I do not buy this argument of the accused person.

The same applies to the accused's house/room search where the victim's mattress was retrieved. Unlike the body search which was done on 4th January, 2020, this was done on 8th January, 2020. Despite the interval of days passed between the two searches, the time which the accused person's mind had cooled down and known the offences he was likely to face, yet the accused wants this court to believe that, he signed

its seizure certificate without knowing it. The evidence shows that, both searches were evidenced by street leader who testified as PW7, the leader whom the accused person showed to have no quarrel with.

During trial, Advocate for the Accused person, Mr. Geoffrey Tuli challenged the testimony of Sophia Heneriko Shitobela (PW7) that her evidence collides with the statement that he had made at the police station. It is on the fact that the said witness stated in her police statement that on 4th December, 2019 at 1500 hours she was at home while in her testimony she stated that on that date and time she was at Nhelegane, a place where the accused person was arrested. He tendered the said statement to challenge the said fact. The same was admitted as exhibit D1. In my view the said statement can also have the meaning that by that time the said person was not in the office. Be it noted that PW7 is a Public Servant, she is the Suburb Chairman for Nhelegane. It means she uses to spend her day time in the office for all working days, and we know that sometimes the public servants use to work even in weekends or over the working hours for the working days, when necessary. Such a minor contradiction between the witness' testimony before the court and her statement recorded at the police station is something possible and the same is curable through overriding

objective principle if it doesn't go to the root of the case as it is for this case. Thus, I don't find the said contradiction fatal to the extent of expunging her (PW7's) testimony or to declare the whole case lacking merits. Furthermore, apart from the said PW7, the other witnesses, to wit PW4 and PW6 testified that they were with her in searching the Accused after his arrest at Nhelegane on that 4th December, 2019. Therefore, however it is, the evidence that the accused person was bodily searched and found with the victim's identity card is sufficiently proved even in exclusion of PW7's testimony.

I understand that, the accused person has no duty of proving his innocence, but to raise the doubts on the prosecution case. However, the raised doubts must be convincing. On this, I would expect the accused person to have called as his witnesses, the persons who witnessed the search and his wife, whom he said to have been present during the home search. A mere saying that, he failed to call them as he is in custody, does not convince this court, as it is not him who goes out to serve his witnesses with summons. His duty was just to mention them as his witnesses plus the place at which they can be found. The duty to summon them is not upon him but the institution legally tasked with that duty.

As long as the accused person failed to convince this court in his testimony, particularly on the retrieved victim's properties from him, and as the law goes that, every witness is entitled to credence and must be believed and his testimony accepted, unless there are good reasons for not believing a witness, as stated in the case of **Goodluck Kyando vs Republic [2006] TLR 363**, I find no chance to disbelieve the prosecution witnesses who testified that, the accused person was searched and found with the victim's NIDA identity card and Mattress.

The evidence by PW8, the victim's son shows that, he left the victim's premises on 24th December, 2019 and went to his aunt for Christmas cerebration. Further, the evidence by PW2 and exhibit P1 the victim's death occurred on 25th December, 2019. This means that, the time interval between which the victim's son (PW8) left the victim's premises and the victim's death was very short. The concept that can easily be observed from the evidence adduced is that, within that short interval of time, the victim was killed and her properties which includes the mattress and the NIDA Card identity were retrieved from the Accused. And as long as the victim's door was then locked from outside, obvious the killer is the one who had taken the victim's properties.

With that proposition, I would expect the accused person to have brought his evidence stating on how those victim's properties came into his hands. Unexpectedly, the accused person testified to have not known the victim at all and that the properties were not found in his possession.

In the essence, failure of the accused person to provide a reasonable answer on how the victim's properties went into his hands, circumstantially show that, this piece of evidence, points to nothing but the accused person killed the victim and used that chance to steal the victim's properties.

Having determined the issue of circumstantial evidence as shown above, I remain with the evidence of oral admission/confession. It is settled in law that, an oral confession of guilty made by a suspect before the reliable witness(s), be it a civilian or not, may be sufficient by itself to ground conviction against the suspect. See **The Director of Public Prosecutions vs Nuru Mohamed Gufamrasul, [1988] TLR 82**. See also **Mohamed Manguku vs Republic, Criminal Appeal No. 194 of 2004** quoted in **Posoho Wilson @ Mwalyego vs Republic, Criminal Appeal No. 613 of 2015**, and **Tumaini Daudi Ikera vs Republic, Criminal Appeal No. 158 of 2009** (all unreported).

However, in those authorities it has been insisted that the oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him. It therefore means that, even where the court is satisfied that the accused person made an oral confession, still the trial court should go an extra mile to determine whether the oral confession is voluntarily made. If not it should not be regarded. What amounts to an involuntary confession has been provided for under section 27(3) of the Evidence Act [Cap 6 RE 2019] which states;

"(3) A confession shall be held to be involuntary if the court believes that it was induced by any threat; promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority."

It was testified that, the accused confessed before PW4, PW5 and PW6 as the one who killed the deceased. The interlocutory question is whether the accused was a free agent when giving his statement before the said PW4, PW5 and PW6.

In his testimony, PW4 stated that, after apprehending the accused, he searched and interviewed him in connection with the killing of the victim and the accused admitted to have killed her in corporation

with other persons. The Accused also told him the things that he had stolen from the victim and later on led them to retrieve the victim's mattress. A similar testimony was echoed by PW5 and PW6.

In my view, it could not be easy for the Police to discover the victim's mattress from where it was hidden, if not they were not told by the accused person. The victim's mattress (exhibit P4) was actually retrieved regarding the information that the accused had given to Police. Thus, the said information given to Police by the accused person was relevant to determine that the accused person involved in the killing of the victim and stealing of her properties, and that he disappeared soon after the murder incident. Section 31 of the Evidence Act [Cap 6 RE 2019] states: -

"When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant"

It is the stance of the law that, a confession leading to discovery is reliable. In the instant case, the accused's confession led to the

discovery of the victim's mattress which went missing soon after the commission of her murder. In **John Peter Shayo and 2 others vs Republic (1998) TLR 198** quoted in **Tumaini Daudi Ikera vs Republic, Criminal Appeal No. 158 of 2009** (unreported) the Court observed as follows;

"(i) Confessions that are otherwise inadmissible are allowed to be given in evidence under section 31 of the Evidence Act 1967 if, and only if, they lead to the discovery of material objects connected with the crime, the rationale being that such discovery supplies a guarantee of the truth of that portion on the confession which led to it

(ii) As a general rule, oral confessions of guilt are admissible though they are to be received with great caution, and section 27(1) and 31 of the Evidence Act 1967 contemplates such confessions"

See also **John Shini vs Republic, Criminal Appeal No. 573 of 2016** and **Melkiad Christopher Manumbu and 2 Others, Criminal Appeal No. 355 of 2015** (both unreported).

In his defense, the accused person alleged to have been beaten by Police Officers so as to compel him to admit the killing. If so it was, the accused person would have tendered PF3 in proving the same. Had it been true he would have not been received in the prison for custody. Alternatively, the accused would have tendered any prison documents to prove the said allegation, as in such situation he must have undergone the medical treatments.

The accused has admitted to have no quarrel or any misunderstanding with two of the Police Officers who witnessed on his confession. This means that they had no reason to lie against him. As such, the allegation that he was beaten up is not true, and basing on the credence of PW4, PW5 and PW6, it is the finding of this Court that, the accused person's oral confession was nothing but the true account of what transpired.

For the above reasoning, I find that the accused person's admission before the Police Officers, PW4, PW5 and PW6 was for all purposes and intend, a valid confession in terms of section 31 of the Evidence Act [Cap 6 RE 2019] and that it is sufficient by itself to ground conviction against him for the charged offence.

When this determination is added with the above shown circumstantial evidence, this issue is answered in affirmative that, the accused person is responsible for the killing of the victim, Asha Ramadhan Juma.

Concerning the last issue, whether the accused person killed the deceased with malice aforethought. This issue tends to prove whether the accused is guilty of Murder or Manslaughter. In the case of **Enock Kipala Vs Republic, Criminal Appeal No. 150 of 1994** (unreported), the Court had an occasion to consider a situation like the one at hand. In doing so, the court stated;

"Usually, an attacker will not declare his intention to cause death or grievous harm. Whether or not had that intention must be ascertained from various factors, including the following:

(i) The type and size of the weapon, if any used in the attack;

*(ii) **The amount of force applied in the assault;***

*(iii) **The part or parts of body the blows were directed at or inflicted on;***

(iv) The number of blows, although one blow may, depending upon the facts of a particular case, be sufficient for this purpose;

(v) The kind of injuries inflicted;

(vi) The attacker's utterances, if any, made before, during or after the killing; and

(vii) The conduct of the attacker before or after the killing. (Emphasis supplied)

In connection with the above excerpt, as it has been provided in the Post Mortem Report (exhibit P1) that the victim's body had bruises around her neck and on her legs. Neck is a vulnerable part of the human body. The evidence shows that, the victim was strangulated with "khanga". On those premises, it is thus right to conclude that, the accused person had intended to strangulate the deceased to death and he actually executed it. If his intention was not to kill, the attack could have not been directed to the neck, which is a vulnerable part of the human body.

On account of the above stated reasons, I find this issue too answered in affirmatively that, the accused person killed the victim with malice aforethought.

All said and done, with this evidence, and for want of evidence from the defense to create reasonable doubt, I am settled in mind that, the prosecution case has been proved beyond all reasonable doubt as required by law.

In view thereof, the accused person herein, Ng'wagi Bunzali @ Masele is found **guilty** of the offence of **Murder**, contrary to the provisions of sections 196 and 197 of the Penal Code [Cap 16 RE 2019] and he is accordingly convicted.



A handwritten signature in blue ink, appearing to read "HK", is positioned above the printed name of the judge.

S.M. KULITA
JUDGE
27/07/2023