IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA REGISTRY

AT MWANZA

(ORIGINAL JURISDICTION)

CRIMINAL SESSION CASE NO. 244 OF 2016

THE REPUBLIC.....PROSECUTOR

VERSUS

YOMBYA S/O KISUMO MASALA.....ACCUSED

JUDGMENT

Date of Last Order:05.10.2022
Date of Judgment: 17.10.2022

M. MNYUKWA, J.

The accused person, one YOMBYA S/O KISUMO MASALA, stand charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [RE: 2002] now [RE: 2022]. The prosecution alleged that, on the 17th day of November, 2015 at around 20.00 hrs at Bwanga Village within Chato District in Geita Region, YOMBYA S/O KISUMO MASALA, did murder one KATALINA D/O SAHAN. The accused

person was arraigned before the court and denied the charge hence the full trial which involved calling of four (4) prosecution witnesses and one witness for the defence.

During the trial, the prosecution side that is the Republic was represented by, Mr. James Pallangyo, Ms. Winfrida Ernest and Monica Matwe the learned State Attorneys while Mr. Ernest Makene, a learned advocate represented YOMBYA S/O KISUMO MASALA, the accused person.

The trial was conducted with the aid of three assessors namely; Shija Malale (52 years), Jumanne Nkana (58 yrs) and Hawa Swedi (56). I thank the counsels for their time and efforts in the finalization of this case and I extend my thanks to the gentlemen and lady assessors who sat with me and stated their opinion based on the facts of the case. In summing up, the Gentlemen and Lady Assessors, gave their opinion whereas, in their opinions, both opine to find the accused YOMBYA S/O KISUMO MASALA not guilty of murder as charged.

The prosecution called a total of four witnesses to wit, PW1 was Rebecca John Sonoko, PW2 was Selestine Bwire, PW3 was Mr. Abel Mbasa Mangándu and PW4 Inspector Mbachi. The prosecution also tendered exhibits which are the Sketch Map (Exhibit P1), the Post-Mortem Report

(Exhibit P2) and the Extra Judicial Statement of the accused (Exhibit P3), the certificate of seizure (exhibit P4) and the machete (exhibit P5).

At the trial Rebecca John Sonoko (PW1) testified that, she is a Resident Magistrate at Bwanga Primary Court who was working at Buseresere Primary Court from the year 2012 to 2016. She testified that, on 26.11.2015 while at her working station at around 16.00 hours, the accused person was brought to her office with one police officer named Matete who informed her that, the accused person wanted to have his extra judicial statement recorded. She went on that, the police officer left the accused person with her and the court clerk one John Bosco Maiga.

She went on that, she introduced herself to the accused person who also told her that, he wanted his statement to be recorded and he was not forced or promised any favour. PW1 instructed the court clerk John Bosco to inspect the accused if at all he had fresh scar and the court clerk told her that, the accused person had no fresh scar. She testified further that, after the accused was examined, she informed the accused of his rights and that, the statement would be used against him in evidence and accused agreed that he was aware that he was accused of the offence of murder and he was therefore willing and voluntarily ready to have his statement recorded.

The accused told her that, his name was YOMBYA S/O KISUMO MASALA and he was arrested on 24.11.2015 and sent to the police station for the murder of his mother-in-law one KATALINA D/O SAHAN with his fellows for the allegation of witchcraft. The accused told her that, they killed the deceased by cutting her with machete.

PW1 went on that, after she had recorded the accused statement, she read it over to him and asked him if he has anything to add and the accused told her that, the statement was correct. The accused signed the extra judicial statement with a thumb print and also PW1 signed. PW1 pointed to the accused who stood at the dock that, he was the one who made his statement before her.

When she was further examined, PW1 identified the extrajudicial statement based on her handwriting, her signature, the accused signature and the official stamp of Buseresere Primary Court. PW1 prayed to tender the accused's Extra judicial statement as an exhibit and it was duly admitted as exhibit P3. PW1 further testified that, she did not know the accused before he was brought to her to have his statement recorded.

PW2 Selestian Bwire an adult 45 years of age testified that, he was living at Chato until 2016 and the accused person was his good friend. On 20.11.2015 he received a call from OCCID of Chato District that, the

accused person wanted him to witness while his statement was taken at the police station. He testified that, he went to the police station and met with the accused and he witnessed when the statement of the accused was recorded and the accused person admitted to have killed the deceased, who was his mother-in-law for the reason that, the deceased bewitched and killed his son. He testified further that, after the statement was recorded, the police officer read it over and the accused appended his thumb print as a signature and he signed as well as the police who recorded it.

When cross examined, PW2 insisted that he and the accused were friends and he pointed him at the dock.

PW3, Abel Mbasha Mangándu, aged 48 and a resident of Chato testified that, from 2012 to 2019 he was a chairman of Nyabimanga small village. On 17.11.2015 at around 20.00 hrs he received the information about the murder of the deceased and he went to the scene and found the body of the diseased lying on the cattle shed with multiple cuts. He went on that, he reported the matter to the police who came on the scene of crime with a medical doctor. He further testified that, on 26.11.2015 at around 12.00 hours, he accompanied the police officers and the accused person to the house where the accused was living and that, he witnessed

a search conducted by police and they recovered the Machete used to kill the deceased.

He further testified that, after the search they fill in a certificate of seizure and he signed and he also identified the machete which has black handle and rust. PW3 identified the accused by pointing him at the dock.

PW4, Inspector Mbachi, aged 42 years and a police officer, stated that, he is now working as a police officer at Chato police station and in 2015, his working station was at Bwanga Police station. He testified that, on 17.11.2015 while at Bwanga police station he was informed of the incidence of murder and they went to the scene of crime accompanied with OCCID of Chato District. On 26.11.2015 he accompanied the other police officers to the accused house where they conducted search and recovered a machete which was used in the killing. He further testified that, they fill in a certificate of seizure which he identified and prayed the same to be admitted in court which was admitted as exhibit P4.

PW4 went on testifying that, the machete recovered was kept in police custody and given a label BWG/IR428/2015 and he was able to identify the same.

When he was further examined, PW4 testified that he handled the machete to the police officer surgent Majani who handled it over to the

person who was keeping the exhibits. He prayed the same to be tendered as exhibit and was admitted as exhibit P5.

The prosecution did not have another witness, therefore, the case was marked closed. After the prosecution case marked closed, this Court ruled out that, the accused persons YOMBYA S/O KISUMO MASALA, in terms of section 293(2) of the Criminal Procedure Act (CPA), [Cap. 20 RE:2019], (Now RE: 2022) has a case to answer and was addressed in terms of section 293(2)(a) and (b), (3) and (4) of the CPA, whereas the accused chose to defend on oath without calling witnesses.

YOMBYA S/O KISUMO MASALA, (DW1) 60 years, and a resident of Bwanga denied to have committed the offence charged and testified that, he is a farmer who lived with his wife called Pili Juma whose father is Juma Madoki and her mother is Ester Malekana and he has two children. He testified further that, he was arrested on 18.11.2015 and kept in police custody till 25.11.2015 without being told the reason of his arrest and on 25.11.2015 he was transferred to Chato police station, where he was interviewed on the death of Katalina Sahan, but he denied and was forced to admit. He testified that, he did not confess before PW1 that he killed the deceased, but he only told her the story of his arrest. He denied the deceased to be his mother-in-law claiming that his mother-in-law is called

Ester and not KATALINA D/O SAHAN the deceased, who he only knew as a fellow villager. He testified further that, he was taken to his home and that, the police officer planted the machete in his house and that, he did not know how the police officer planted the machete in his house, which was in the police car.

When cross examined, DW1 stated that, he knew the deceased as his fellow villager and PW3 was a chairman and they do not have any grudges. He also testified that, he knew PW1 only when his statement was recorded, and that he does not have any grudges with PW2.

After the testimonies from both the prosecution and defence, the death of the deceased KATALINA D/O SAHAN was not disputed by either party and the evidence of exhibit P2, the post-mortem examination report proved that her death was unnatural. I am now tasked to determine who caused the death of KATALINA D/O SAHAN.

It is the principle of law that, the prosecution side is required to prove the case against the accused person and the standard as stated under section 3(2)(a) of the Law of Evidence Act, Cap. 6 RE: 2019 (now RE: 2022) is that of proving beyond reasonable doubts. To make sure that, no innocent person is convicted of flimsy evidence, the Court of Appeal of Tanzania put it clear in the case of **Mohamed Haruna @**

Mtupeni & Another vs R, Criminal Appeal No. 25 of 2007 (unreported) that: -

> *"...in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond* a *reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution* case *and not on the basis of the weakness of his defence."*

Therefore, the accused is not placed with a duty to prove his innocence as reflected for under Section 110 and Section 112 of the Evidence Act, Cap.6 [RE: 2019], now [RE: 2022] and underlined in the case of **Joseph John Makune v R** [1986] TLR 44 where the Court of Appeal of Tanzania held that:

> *"The cardinal principle of our criminal law is that, the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence..."*

The accused person YOMBYA S/O KISUMO MASALA who stands his trial before this court is accused of MURDER whereas, it is the requirement of law that, the prosecution must prove the act of killing and connect the act of killing with evil intention of the dourer (malice aforethought). Under Section 196 of the Penal Code, Cap. 16 [RE: 2019] the law provides that:-

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

Therefore, in determining whether it was the accused person who killed the deceased, the act of killing and the state of mind that, the perpetrator intended to kill must be proved beyond reasonable doubts against the accused.

First of all, as I have earlier on indicated, there is no doubt that, KATALINA D/O SAHAN is now the deceased and the evidence of Exhibit P2 proved that, the death was unnatural and that, the cause of death was due to *"severe blood loss due to multiple cuts wounds"*. Hard-heartedly, the multiple-cut wounds were brutally inflicted by using a heavy and sharp object, therefore, the assailants did it with malice aforethought and there is no dispute that, the assailant intended to kill. From that point, it is my findings that, whoever inflicted the wounds did it with malice aforethought in terms of Section 200 of the Penal Code, Cap.16 [RE:2019] now [RE: 2022].

Secondly, what is essential now, is to weigh whether the prosecution managed to prove to the standard required that, it was the accused person YOMBYA S/O KISUMO MASALA who killed KATALINA D/O SAHAN, the deceased.

From the evidence of PW1, PW2, PW3 and PW4, no witness testified before this court to have witnessed the accused person committing the offence charged. On records, first, we have the evidence of PW1 who recorded the extra-judicial statement of the accused. Secondly, the evidence of PW3 and PW4 who testified in line with tendered exhibits P4 and P5 which connects the accused person with the offence charged. And thirdly, the evidence of PW2 whose evidence was in relation to the accused caution statement which was not tendered in court as exhibit.

I will start with examination of the evidence of PW3 and PW4 in relation with the tendered exhibit P4 and P5. PW3 testified that, he was taken to the accused home to witness the search which was conducted on his presence and police, including PW4 who recovered a machete which was claimed to be a murder weapon discovered by the accused in his room and handled over to the police. PW4 in connection to the search conducted, he testified and tendered two exhibits that is Exhibit P4 a certificate of seizure and exhibit P5 a machete which is claimed to be a murder weapon. From this piece of evidence, there are two legal aspects to be tested. First, the legality of the search and second the aftermath of the search and chain of custody of the recoverable alleged murder weapon.

On the first aspect, I review the law relating to search and seizure with particular interest on the requirement of a search warrant. The law, is clear under section 38(1) of the Criminal Procedure Act [Cap 20 RE: 2019] now [RE:2022] read together with paragraphs 1(a), (b) and (c) and 2(a) and (d) of Police General Order (PGO) No. 226 on the manner in which search has to be conducted. On the part of the Criminal Procedure Act, Cap. 20 RE: 2019 now (RE: 2022), Section 38(1) provides as follows:

"38 -(1) Where a police officer in charge o f a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place

(a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be."

In tandem with what is stated on the Criminal Procedure Act, Cap. 20 R.E 2019(now R. E 2022) the Police General Order (PGO) No. 226 paragraphs 1(a), (b) and (c) and 2(a) provides: -

1. *The entry and search of premises shall only be affected, either: -*

a) on the authority of a warrant of search; or

b) in exercise of specific powers conferred by law on certain Police Officers to enter and search without warrant

c) Under no circumstances may police enter private premises unless they either hold a warrant or are empowered to enter under specific authority contained in the various laws of Tanzania.

2. *(a) Whenever an O/C (Officer In charge) Station, O/C. C.I.D. [Officer In Charge Criminal Investigation of the District], Unit or investigating officer considers it necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The person named in the warrant will conduct the search."*

From the evidence of PW3 and PW4, it is with no doubt that the search conducted to the house of the accused was done without warrant and in contravention of the mandatory requirement of the law. In other words, for a search into private premises to be a lawful search, it must be conducted by either an officer in charge of a police station or another police officer with a search warrant as per the provisions of section 38(1) of the CPA and Police General Order No. 226 paragraphs 2(a) quoted above.

The Court of Appeal in the case of **The Director Of Public Prosecutions vs Doreen John Mlemba,** Criminal Appeal No. 359 of 2019 stated that: -

> *In our view, the meticulous controls provided for under the CPA and a clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies seeking to protect individual citizens' rights to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania.*
>
> *It is also an attempt to ensure that unscrupulous officers charged with the mandate to investigate crimes do not plant items relating to criminal acts in peoples' private premises in fulfilling their undisclosed ill motives"* see also **Badiru Musa Hanogi v. R,** Criminal Appeal No. 118 of 2020 (unreported).

Nonetheless, that is not to say that, on each occasion that a search needs to be conducted, it must be preceded by issuance of a search warrant. There are exceptions, which are not subject of this case, but one of such exceptions is where an intended search is to be conducted on emergency basis under Section 42 of the Criminal Procedure Act Cap. 20 R.E 2019 (now R.E 2022) or under circumstances envisaged under paragraph 1(b) of the Police General Order quoted above.

From the evidence in record, PW4 testified that, he was informed by OC-CID that he was to accompany the police officer with the accused to conduct search in the accused's residence. Based on the fact that, the accused was arrested on 18.11.2015 and the search was conducted on 26.11.2015, the search in this case was not a search in an emergence.

In any event, it would not have been difficulty to procure a search warrant in order to comply with the law. The search of the house in question, was conducted with no lawful mandate or authority and I have no doubt holding that, the search of the house from which the machete alleged to be a murder weapon was recovered, was an illegal search.

On the second aspect, is the aftermath of the exhibit tendered as evidence in court (exhibit P5) which was procured illegally. Going to the records, when exhibit P5 was admitted the objection was as to

contradiction on the number marks and not on the manner in which it was procured. For that reason, the prosecution could not invoke section 169 of the CPA cap 20 RE: 2019 (Now 2022). My point of determination is whether exhibit P5 which was obtained from an illegal search can be relied upon by this court to enter conviction against the accused person. The Court of Appeal of Tanzania in **Badiru Musa Hanogi v. R,** Criminal Appeal No. 118 of 2020 (unreported) once confronted with the similar situation it held that: -

> "*Unfortunately, the trial court did not realize that the motorcycle was illegally seized hence it could have not taken that course. Conversely, it went ahead to receive, admit it as exhibit and acted on it to ground the appellant's conviction. That was irregular and disentitled the trial court the right to act on illegally obtained evidence...*"

It is my findings that, the exhibit illegally obtained cannot be relied on to enter conviction against the accused person. See also, **Mbaruku Hamisi and Four Others v. R,** Consolidated Criminal Appeals No. 141, 143 and 145 of 2016 and 391 of 2018 (unreported) and **Shabani Said Kindamba v.** R, Criminal Appeal No. 390 of 2019 (unreported). For that reason, the machete seized cannot be relied by this court to enter conviction against the accused person.

Going now to the evidence of PW1 in regard to the accused's extra judicial statement, which was also tendered as exhibit P3, PW1 testimony was to the effect that, the accused voluntarily made the statement before her as per section 62(2) of the Magistrate Courts Act Cap 11 RE: 2019(now R.E 2022) and the Chief justice Guide on the Justice of peace. In his defence the accused did not rebut that, he made the statement but he denied to have confessed to have killed the deceased. First, it is no doubt that, the extra judicial statement of the accused admitted in court can be relied upon solely on the conviction of the accused person. (See **Maige Nkuba vs The Republic,** Criminal Appeal No. 551 Of 2016.)

Secondly, I proceed to examine the evidence of PW1 and exhibit P3 against the evidence of DW1. Going to the records, when PW1 gave her evidence and subsequently tendered exhibit P3, the accused person was equally, given the right to cross examine PW1, but he did not cross examine PW1 over the contents of the extra judicial statement until when DW1 entered his defence.

In the case of **Vicent Homo vs The Republic,** Criminal Appeal No. 337 of 2017 (unreported) where the Court referred with authority the case of **Emmanuel Lohay and Another v. The Republic,** Criminal Case No.

278 of 2018 (unreported), when confronted with the similar situation as this present case, it was held that: -

> *"It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross-examination or during defence -* ***Shihoze Semi and Another v. Republic*** *(1992) TLR 330. In this case the appellants 'missed the boat' by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence."*

From the wording of the cited case above, DW1 had a chance to object the exhibit on its contents, at a time when it was tendered by PW1 for it was cleared for admission including being read aloud before the trial court after being admitted. For that reason, the claim by DW1 is an afterthought. Having ruled that, it is no doubt that, the extra judicial statement implicates the accused person who in his own words admitted to have killed the deceased KATALINA D/O SAHAN. Admittedly, the confession made by the accused on exhibit P3, equals the evidence of PW3 and PW4 who went to the scene of crime and witnessed the body of the deceased. PW3 and PW4 testified to have witnessed the body of the deceased which had multiple cut wounds on various parts of the body such as in the neck, breast, head, left leg and her hand was completely

cut off. This explanation also matched the findings of the medical doctor on exhibit P2. In fine therefore, this court is of the solid opinion that, exhibit P3 implicates the accused person on the offence charged and this court therefore relies on it to convict the accused.

This court relies on Exhibit P3 to convict the accused since it is a trite position of the law that, the best evidence in the criminal cases is that evidence when the accused admits on his own words on the commission of the offence. See the case of **Godfrey Kitundu @ Nalogwa and Another vs Republic**, Criminal App. 96 of 2018 (unreported) and **Republic vs. Khamis Said Bakari,** Criminal Sessions Case No. 119 of 2016 (unreported) where this Court, Hon. Korosso, J. as she then was, held as follows: -

> *"It is trite law that the best evidence in a criminal trial, is that of an accused person who confesses to have committed the crime."*

Upon going through Exhibit P3 one may not hesitate to form the view that the story contained on it is so detailed to the extent that it is coming from the person who actually participated on it.

In his evidence DW1 tried to negate that, the deceased was not his mother-in-law, however in Exhibit P3 the accused narrated that his former wife was called Helena d/o Antony to whom they are now separated, who

is a daughter of the relative of the deceased and that means they were related with the deceased as family. Therefore, his evidence adduced before the court which trying to negate that fact that, the deceased was his mother-in-law, is an afterthought.

In the upshot, I have reached the following conclusion, the law is settled that, the accused ought to be only convicted on the strength of the prosecution evidence, I am satisfied that, the prosecution's evidence is credible and reliable. I do not think that, the positive evidence of PW1 and the confession by the accused on exhibit P3 is shakeable. I am not in accord with all assessors that the prosecution failed to proved their case beyond reasonable doubt against YOMBYA S/O KISUMO MASALA the accused person. In the event, I find that YOMBYA S/O KISUMO MASALA is guilty as charged. I, therefore, convict him for murder contrary to sections 196 and 197 of the Penal Code Cap. 16 [RE: 2019](now R.E 2022)

DATED at MWANZA this 17th October, 2022

M.MNYUKWA

JUDGE

17.10.2022

SENTENCE

Since YOMBYA S/O KISUMO MASALA, the accused has been convicted of murder, I hereby sentence him to death by hanging.

M.MNYUKWA

JUDGE

17.10.2022

Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

17.10.2022

Court: Judgement delivered in the presence of the accused person and the counsels of both parties.

M.MNYUKWA

JUDGE

17.10.2022