

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 18 OF 2022

THE REPUBLIC

VERSUS

MAKARIUS FLAVIANI KOMBA

JUDGEMENT

Date of last Order: 28/12/2022

Date of Judgement: 18/01/2023

U.E. Madeha, J.

To begin with, the accused person; Makarius Flaviani Komba is charged with the offence of murder contrary to sections 196 and 197 of the Penal Code (Cap. 16, R.E. 2019). It is alleged by the prosecution side that on 10th October, 2021 at Ruhira Village within Songea District in Ruvuma region the accused person had murdered one person who is none other than Anna Luoga. When the charge was read to the accused person, he denied having murdered the deceased.

On the same note, during the hearing Mr. Grey Uhagile, Ms. Generoza Montana, and Ms. Tumpale Laurance, the learned State's Attorney together joined forces to represent the prosecution side. On the contrary, the accused person enjoyed the services of Mr. Zuberi Maulid and Mr. Lazaro Simba Learned Advocates. I appreciate the learned counsel from both parties for their co-operation.

In a bid to prove the charge for murder against the accused, the prosecution paraded a total of seven (07) witnesses and four (04) exhibits which are none other than: an axe exhibited as "exhibit P1", the certificate of seizure which was exhibited as "exhibit P2", the Post-Mortem Report which was exhibited as "exhibit P3" and the sketch map of the crime scene which was exhibited as "exhibit P4". Briefly, the evidences of the prosecution are to the effect that;

Firstly, PW1, Simon Frank Luoga in his sworn testimony stated that early in the morning on 11th October, 2022 he got shocking upon receiving a sad information that one Anna Luoga was murdered at her farm in Ruhira hamlet within Parangu Village in Songea District.

Actually, after receiving such sad information he went together with his neighbour to the deceased's home whereby they only met her children. Moreover, they went at Peramiho hospital where also they were told that the information on murder was reported and the Police Officers were on the process of going to the crime scene for investigation. At that time there were many people at the police station. In addition, they went together to the crime scene and everyone had his own means of transport.

It is important to note that, having arrived at the crime scene also the police officers arrived and they were accompanied by a doctor. On the same note, outside the deceased's house there was nothing, then the police officers entered inside the deceased's house where they saw the deceased's body which was roaming at the mouth and nose. As a matter of fact, he was able to identify the body of the deceased since they were living together as neighbours in the same village.

Furthermore, after identifying the deceased's body, it was given to the doctor for examination and later on it was ordered that the body should be sent to the hospital for further examination.

It is worth considering that, **PW2 H. 5646 PC Amadeus**, in his sworn testimony he testified that he works as a police officer at Peramiho Police Station. On the 11th October, 2021 at around 05:00 hours in the morning he was at work. While at work, one Jackson Lumato with two (02) others including the accused came and informed him that they had brought the accused who was suspected to have committed murder at Ruhira in Parangu Village.

At the same time, the accused was carrying an axe which they informed him that the accused person used it to kill Anna Luoga. After receiving such terrifying information, he acted accordingly by filing an investigation file with number PER/IR/502/2021. In addition to that, he also received an axe and informed the Police Officer in-charge who reported the matter at Songea Central Police Station where a team of investigators was assigned to accompany them for investigation. PW2 tendered an axe and it was admitted as an "exhibit P1" and the certificate of seizure which was admitted as exhibit P2.

To add to it, **PW3 Jackson Andrea Lumato** in his sworn evidence testified that he lives at Mwengemshindo street and he is involved in agricultural activities at Parangu Village near to the deceased's farm. Notably, on 10th October, 2021 at around 21:00 hours, while at his farm at Ruhira hamlet, the accused person being accompanied with Neema Sanga went to his house. Upon arriving at his house, the accused person told him that he was in the farm cutting grass whereby Anna Luoga came and provoked him by using harsh word about him. Acting on impulse, he had to beat her with an axe and she died.

It is true that, the accused was seeking for assistance so as to escape the killing. On the contrary, he told him not to run away because he will be assisted on that matter. In addition, he told him to go home and have a rest. He also promised the accused person that he will help him.

Furthermore, the accused agreed on the idea he was given. Immediately, he reported the matter to his neighbours who went with him to arrest the accused person. They went to the deceased's house whereby they saw her body lying on its back lifelessly and it was naked from the stomach downwards in fact it was roaming in the nose and mouth.

As a matter of fact, they sent the accused person to the village authority. Upon arriving they were ordered by the Village Executive Officer to send the accused person to the Police Station. It was on the 11th October, 2021 at around 05:00 hours. It seems to be true that, the accused person when asked he admitted to have murdered Anna Luoga.

On the same note, they went to the crime scene and the doctor examined the body of the deceased person. After examination the body was given to the relatives of the deceased for burial and funeral arrangements.

It is important to note that, PW3 managed to identify the accused person who is none other than the one who was standing at the dock, exhibit P1 (an axe) and certificate of seizure (exhibit P2).

PW4, Dr. Tupokigwe Edina Brown, who is working at Peramiho hospital in her sworn evidence testified that on the 11th October, 2021 she was requested by the Police Officer to go at Ruhira in Parangu Village for Post Mortem Examination of the body of the deceased person. Basically, she was accompanied by the Police Officers to the crime scene. When they reached at the deceased's house they saw the body lying on its back and

she examined it and took some sample so as to take to the laboratory for further examination.

In fact, after examining the body they handed it over to the relatives of the deceased for burial and funeral arrangements. Also, she stated that she wrote the report whereby she prayed for it to be admitted as an exhibit and it was admitted as exhibit "P3".

Moreover, PW4 further testified that in her examination she discovered that the cause of death was lack of oxygen and she had head injury. Additionally, the tongue of the deceased was hanging outside the mouth and she had a swollen face. Actually, the neck had finger print and bruise which showed that she was robbed.

Also, the body had a small injury on the face which was caused by blunt object. Besides, the body she also saw an underwear. When she examined the sexual organs of the deceased, she found that it had mucus mixed with blood. As a matter of fact, she used a microscope and found that the mucus had dead sperm. Conclusively, she discovered that there was a forced sexual intercourse termed as rape.

In addition, **PW5, Christina Odila**, in her sworn testimony testified that on 11th October, 2021 as a Village Executive Officer of Parangu Village she was informed by the Village Chairman that, during night hours at Ruhira hamlet there was murder incident.

She was told by the Village Chairman that Jackson Andrea Lumato is the one who knows about the incident. She had to call Jackson Andrea Lumato through a mobile phone and she was told that Makarius Flaviani Komba was arrested for the cause of death of Anna Luoga.

On the same note, he ordered them to bring the accused at the Village Office. When the accused was brought at the Village Office, he admitted to have killed Anna Luoga. Similarly, he ordered the accused to be sent to Peramiho Police Station immediately.

At the same time, they had an axe which was said to be used to kill the deceased person. Therefore, PW5 identified exhibit P1. Likewise, she stated that she managed to see the exhibit since they were in the Village Office and the office had electricity light.

PW6, G. 8051 D/CPL Tryphone in his testimony testified that he is a police officer at Songea Central Police Station. On 11th October, 2021 he was at his office during his normal daily routine whereby he was given an exhibit. It seems to be true that, the exhibit was an axe which he was told that it was used in a murder case with file number PER/IR/502/2021 from Peramiho Police Station. Notably, he kept that axe properly in the exhibit room until it was tendered in Court as an exhibit. To crown it all, he was given exhibit P1 and was able to identified it.

PW7, E. 8161 D/Sgnt. Mussa in his sworn testimony testified to the effect that he is working at Songea Central Police Station as an investigator. On 11th October, 2021 he was informed by his head of investigation department ASP. Mabula that at Parangu Village in Ruhira hamlet there was murder case and they were supposed to go for investigation.

As a matter of fact, they went at Peramiho Police Station where the case was reported. In fact, they saw the accused who was arrested and he was actually in custody at Peramiho Police Station. Basically, the accused was introduced to be Makarius Flaviani Komba. Also, they were shown an axe which they were told that it was used to kill the deceased person.

Principally, after that they went to the crime scene. However, before going to the crime scene they went to the Village Office and they requested the Village Chairman to go together with them to the crime scene.

To add to it, they were also accompanied by the doctor from Peramiho hospital. After arriving at the crime scene, he drew the sketch map and he was directed by Jackson Andrea Lumato in drawing the sketch map. He prayed to tender the sketch map as an exhibit and it was admitted as an exhibit 'P4'. He further stated that in that incident the deceased was Anna Luoga. Finally, they returned at Songea Central Police Station.

It is worth considering that, while at the Police Station he made an interrogation with the accused person and he told him that before the date of the incident, he had approached the deceased and requested her to have sexual intercourse with him but she refused. On that particular day of the incident, he was aware to the best of his knowledge that the deceased's husband was not present at home. Hence, at around 20:30 hours he went to the deceased's house in order to have sex with her. Surprisingly, upon arriving at the deceased's home, he requested to have sex with her but she strongly refused. Being provoked he pushed the

deceased down and forced her to have sex with him unwillingly. Consequently, after a long period of time he found that the deceased was suffocating. He immediately left her and went home where he told Jackson Lumato what had happened. In fact, he was advised not to run away.

However, after that he was arrested and sent to the Police Station. In that regard, PW7 managed to identify the accused who was standing at the dock. Also, he identified exhibit P1 (an axe).

On the other side, the accused person that is none other than, **DW1, Makarius Flaviani Komba** in his sworn testimony stated that on the material date he was living at Ruhira in Parangu Village and he was working in the farm of PW3 who is the father of his wife.

Basically, on the 10th October, 2021 he went to the farm with an axe. When coming back from the farm he was actually carrying an axe and grasses on his head. Strange as it may sound, he was accused to be a thief. The sound was a woman's voice and when it came closely to him that person pushed him and he felt down.

Since he didn't see that person, he continued with his journey, he went home and told his wife and (PW3) what has happened. Notably, PW3 told him that he might go home and rest, he will save him on that incident.

It is a fact that, he went home with his dear wife and after having dinner they went to sleep as usual. In fact, at around 21:00 hours PW3 come with two (02) other people so they managed to arrest him. In that case, they ordered him to go to the Village Office where they went and met PW5 who testified that he admitted to having killed Anna Luoga but PW5 failed to give any written statement to prove that he confessed to have killed her. Then he was taken to Peramiho Police Station carrying an axe. On the same note, upon arriving at the Police Station PW3 gave his statement. Moreover, the Police Officer who recorded his statement told the Court that he confessed to have committed that offence. To add to it, DW1 also testified that he was taken to a Primary Court which was adjacent to Peramiho Police Station and he never confessed to have killed the deceased person. In fact, he gave the same statement that he had given to PW3 and his wife actually there was no different statement given whatever has been stated by PW7 is totally not correct.

As a matter of fact, DW1 also testified that when he was at Songea Central Police he was taken by PW7 and another police Officer who sent him to the investigation room where he was interrogated but he denied to state speak anything. Instead, he told them that his statement has been recorded at Peramiho Police Station. Unfortunately, he was thoroughly beaten however he never recorded any statement before PW7. Finally, DW1 denied to have committed the offence and he prayed for the mercy of the Court.

It is important to note that, the above is the evidence given in Court against the accused by the prosecution's side and the evidence of the defence, on the charge of murder. On the same note, after the closure of the hearing of the defence side, both parties preferred to submit their final submissions in this case. The final submissions presented by the prosecution and defence side are as follows:

To start with the prosecution's final submission, the prosecution's learned counsel submitted that the prosecution paraded a total of seven (07) witnesses establishing the circumstantial evidence that is strong enough to ground the conviction against the accused for the offence of murder contrary to sections 196 and 197 of the Penal Code (supra).

Principally, he submitted that the evidence from the prosecution side incriminates the accused person for the offence he is charged with before this Court. Moreover, they argued that PW3 (Jackson Andrea Lumato) in his testimony is to the effect that on 10th October, 2021 while at his farm located at Ruhira hamlet in Parangu Village, within Songea District he was visited by the accused person who was in the company of his wife Neema Sanga. Similarly, the said Neema Sanga is the step daughter of PW3 and they both reside in the same farm but in different huts. The accused told PW3 that he had just killed Anna Luoga who was also their neighbour. PW3 told the accused that he will help him go back to their hut promising him that would help him to escape.

Surprisingly, upon being arrested the accused admitted to have committed the offence whereby they arrest the accused with an axe that was used by the accused to commit the offence of murder.

To add to it, he contended that the accused person confessed to PW3 that he had killed the deceased. It is true that, an oral confession which is made by a reliable person and may be used to find the accused liable. To crown it all, he cited with approval the case of **Posolo Wilson @ Mwalyengo v. Republic**, Criminal Appeal No. 63 of 2015 (unreported) at

page 7 the Court of Appeal had the following to say in regard to oral confession and its evidential value:

"It is settled that an oral confession made by a suspect, before or in the presence of reliable witness, be the civilian or not may be sufficient by itself to found conviction against the suspects."

Furthermore, he emphasized that the accused person confessed before PW3 and PW5 who is the Village Executive Officer where he was taken after being arrested. As a result, he argued that the two witnesses to whom the accused person confessed to have committed the offence were reliable and credible witnesses, considering that PW3 being a civilian and the relative of the accused person and PW5 being a local leader. He stated further that PW3 and PW5 were witnesses of the truth and their testimonies ought to be believed and there was nothing to fault their credibility.

Basically, the confession made to PW5 and PW3 by itself was sufficient to ground the conviction. As a matter of fact, there was also corroborative evidence of confession leading to the discovery of the weapon used to kill the deceased. This stance was stated in the case of

Mboje Mawe and Three Others v. Republic, Criminal Appeal No. 86 of 2010 (unreported). He further submitted that the prosecution side proved its case beyond a reasonable doubt.

In regard, to the final submission written by Mr. Zuberi Mauridi the accused's learned counsel, he submitted that, the genesis of implicating an accused person on this very serious offence of murder is solely based on the information of one Jackson Andrea Lumato (PW3), who testified that on 10th October, 2022 he was at his farm located at Parangu.

Notably, at around 19:00hrs his daughter one Neema Exavery Sanga arrived together with her husband one Makarius Flaviani Komba (the accused) and thereafter the accused narrated to him that he had gone to take grasses but while carrying them back home, one, Anna Luoga (the deceased) confronted him of being a thief and uttered harsh words.

Furthermore, he testified that he went at the crime scene together with Madaba, Safari and Wilson Sanga. Neither of these witnesses were brought by the prosecution to testify. It was prudent for the prosecution side to call: Neema Exavery Sanga, Madaba, Safari and Wilson to support

what was stated by PW3. He contended that, this raise a lot of doubt and this Court is invited to draw an adverse inference.

To put in a nutshell, he stated that all these witnesses who ought to be summoned by the prosecution are found within the locality of Songea District and they were listed during committal and in the list of prosecution witnesses and in the memorandum of facts during plea however no reasons were adduced for failure to bring those witnesses. He cited with approval the decision of this Court's decision in **Azizi Abdallah v. Republic** [1991] TLR 71 at page 72 where under holding thereof it was stated:

"... the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who form their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

Basically, he argued that when all is said and done, the cumulative effect of the foregoing is that there is doubt in the prosecution case.

Actually, the doubt, in respectful opinion, has to be resolved in favour of the accused.

Furthermore, he submitted that, PW7 E. 8161 D/Surgent Mussa, testified to the effect that on 11th October, 2021 while discharging his normal duties as a Police Officer working at Criminal Investigation Department was informed by his superior one ASP Mabula, that at Peramiho in Parangu Village there is an incidence of murder and required him to visit at the crime scene.

However, before he arrived at the crime scene they went at Peramiho Police Station where they found the accused therein who had already been arrested. Thereafter they went to the crime scene together with the accused being in contravention of the testimony of PW1 during the cross examination who denied the accused to have been at the crime scene.

Therefore, it is his humble submission that this contradiction by the prosecution witnesses goes to the root of the case and this Court should consider it in assessing on the credibility of witness PW7 and PW1 as both were present at the crime scene. This contradiction therefore should be resolved in favour of the accused person.

To crown it all, he emphasized that according to the testimony of PW7 as investigation officer who stated that he had recorded the cautioned statement of the accused and the accused person admitted to have committed the offence. On the contrary, the said caution statement was not tendered in Court as exhibit. The omission by the prosecution to tender the caution statement of the accused to support the evidence of PW7 is a drawback on the prosecution. As a result, failure to tender the statement created a gap in the prosecution case and hence casts doubt on the side of the prosecution.

To make it clear, he further argued that, Dr. Tupokigwe Edina Brown (PW4) who conducted the medical examination in the body of the deceased person (exhibit P3) testified that the deceased one Anna Luoga died and in fact, the immediate cause of the death was manual strangulation and she noted nail bruises on the left side of the deceased's neck. However, PW3 failed to prove his findings on the nail bruised found in the deceased's body. On the other hand, there were no finger print marks taken from the deceased to compare with those of the accused taking into account that while this incidence was under investigation the accused was already under custody but nothing was done. He emphasized

that this clearly raises a doubt that if the same would be taken will render acquittal to the accused.

Basically, he further argued that, PW4 testified that the deceased was undressed and thus made her to conduct further examination regarding her genital part. In fact, upon examination she revealed that the deceased before being killed she was raped and that there was penetration into vagina and sperm cells found therein of which until now the said sperms are stored at medical laboratory.

As a matter of fact, the said sperm cell sample contended to have been found into the deceased body by PW4 was not brought in this Court so as to support her evidence. On the same note, PW4 during cross – examination stated that there was no any sample taken from the accused person so as to match with those found on the deceased's body. Conclusively, the evidence of PW4's casts doubt on the side of the prosecution as the same was based on mere words without any medical prove thereto.

On the other hand, he argued that the narrated story by PW4 on the case of the death of the deceased differs from PW1, PW2, PW3, PW5 and

PW6 who testified in this Court. All other prosecution's witnesses contended that the cause of the deceased's death was due to being hit by an axe. Although, on the side of PW4 he contended that the immediate cause of death was manual strangulation as shown in exhibit P3. In that case, it is the humble submission of the defence side that, this contradiction goes to the root of the prosecution case.

As a matter of fact, he further averred that, it is a requirement of the law in criminal cases that the burden of prove lies to the prosecution side. The law imposed an obligation for the prosecution to prove the case beyond reasonable doubt. For clarity and easy reference section 3(2) (a) of the Evidence Act (Cap. 6 R.E, 2019) which provides that:

"A fact said to be proved when (a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;"

Consequently, he emphasized that, the above position is also stated in the case of **Said Hemed v. Republic** [1987] TLR 117 and the case of **Nathaniel Alphonse Mapunda and Another v. R** [2006] T.L.R. 395, where the court stated that:

"In criminal cases, the standard of proof is beyond reasonable doubt where the onus shifts to the accused it is on a balance of probabilities. It is not the truthfulness of the defence which exempts the prosecution from accomplishing the duty of proving the accused's guilty since the only obligation which lies on the accused person is to cast doubt on the prosecution case and not to prove his innocence."

For more emphasis, further reference was obviously seen in the stance which was fortified in the case of **Mohamed Matula v, Republic** [1995] TLR 3 where the Court insisted that:

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence".

In that regard, he stated that the only issue that need determination by this honorable Court is on whether the prosecution have proved case of murder contrary to sections 196 and 197 of the Penal Code (supra) against the accused beyond reasonable doubt? To crown it all, he stated that the

term beyond reasonable doubt was defined in the case of **Magendo Paul & Another v. Republic** (1993) TLR 2019 where the Court held that:

" ... for a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed".

To add to it, he further stated that in this case, the accused was charged under sections 196 and 197 of the Penal Code (Cap.16 RE 2019) which establishes the offence of murder. It is therefore pertinent for the elements of the offence to be proved before a conviction that can be entered against the accused. The section provides that:

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

On the same note, he further itemized that, there are four (04) elements requiring proof in the offence of murder. **Firstly**, there must be death of a person. **Secondly**, the death must be a result of an unlawful act or by an unlawful omission. **Thirdly**, the prosecution's evidence must satisfy, beyond reasonable doubt, that the accused is the one who killed

that person. **Fourthly**, the killing must be preceded by a pre-meditated evil intention (malice aforethought).

To add to it, he further struggled that there is no dispute that murder is a very serious offence which upon conviction attracts the death penalty. That being the case, it is always expected that its investigation and eventual prosecution would always be done with great care and seriousness. He argued that basing on the evidence adduced by prosecution side it is contradictory, inconsistency and create a lot of doubt that has to be decided in favour of the accused. He emphasized further that the prosecution side failed to call material witness who ought to have been summoned and no any reason was adduced while all of them are within locality can easily be traced.

As much as this case is concerned, he thought that the whole prosecution evidence centered on hearsay evidence purported to be received from accused himself, in the absence of any other evidence, the prosecution case was to stand or fall on the word of the accused regarding the alleged events of the day.

Besides that, he highlighted that having gone through prosecution's side in relation to circumstance of which the said incidence occurred it creates a doubt that there is possibility that the alleged offence was committed by someone else who is not in Court. Reference is made to the evidence of PW7 and in relation to the sketch map admitted as exhibit P4 during cross examination.

Apart from that, he admitted that where the house of the deceased is located there is a road used by passerby under which there is no restriction of any person to reach there at any time. Also, he stated that near the deceased's body a bush knife was found but no explanation was given regarding to the said instrument, taking into account that even the bush knife is among the blunt object. Finally, he argued that all those circumstances raise doubt in prosecution's case.

Notably, he pointed that on premises of what is submitted herein above, it is his humble submission that, there is no water tight evidence to directly link the accused to the murder of the deceased. As a matter of fact, none of the prosecution witnesses levelled to prove the charge of murder against the accused as the evidence is merely hearsay.

To add to it, he submitted that the prosecution failed to summon the key witnesses in order to testify. Thus, this Court cannot depart from the standard of proof in criminal cases, that the prosecution ought to have proven its case beyond reasonable doubt. It is his humble submission that, the prosecution has failed to prove its case against the accused in the required standards in criminal cases. He emphasized that the remedy in this circumstance is to acquit the accused from the alleged charges as the same were not proven by the prosecution.

On the other hand, this Court look closely and thoroughly at the evidence which shows that PW1 went to report this matter at the Police Station that Anna Luoga had been killed. They went to the scene of the crime at the deceased's house with the Police Officers, and the doctor PW4 saw the body of the deceased without wounds.

Principally, PW1 said that he did not see the killing of the deceased, so PW1 is a witness who was actually told that Anna Luoga is dead and he never witness the killing. The second thing is the identification of the deceased's body; when he looked at the deceased, he saw that the deceased did not have any wounds.

On the same note, PW2's testimony shows that he is a Police Officer whose testimony is similar to that was given by PW3, who is the father-in-law of the accused. PW2 said that he was told that the accused was the one who killed the deceased by using an axe. The accused did not refuse to hand over the axe and said that he had carried the axe by PW3 to take it to the Police Station and it was admitted as an exhibit.

Furthermore, PW2 continued to issue a certificate of seizure where it was related to the seizure of the axe. The accused objected on the admissibility of a certificate of seizure for seizing the axe. The Court overruled the objection and proceeded to receive as an exhibit P3.

If it is carefully considered, the evidence of PW2, is evidence that he was told that the deceased that is none other than Anna Luoga was killed by the accused by using an axe. Even though, he was not present at crime scene. He stated that the accused arrived with an axe that was used to carry out the murder.

In that case, he recognized the axe that was said to have been used to kill the late Anna Luoga. PW2 also testified that he saw the deceased was dead however he had not been hit by any sharp object.

This Court does not deny the fact that the accused was sent at the Police Station with an axe, which is an exhibit P1, but there is doubt on whether the said axe was used to kill the deceased. As much as the evidence witnesses are concerned, PW1 and PW2 found the deceased dead, but they testified that he was not killed by a blunt or sharp object. Therefore, the evidence of PW1 and PW2 needs to be corroborated with other evidence in order to form part of the same transaction. The two (02) witnesses have not proved the offence of murder against the accused. Likewise, PW2 and PW3 both explained that the accused had gone to cut grass and met Anna Luoga (the deceased) who started to give harsh words to him.

In fact, it seems that PW2 and PW3's evidence is similar, but what differentiates these two (02) people is that PW2 is a Police Officer whose evidence is all based on what PW3 told him. Consequently, their evidence is based on the testimony of PW3, who told his colleagues that the late Anna Luoga died after being cut by an axe of the accused.

If carefully considered, the evidence given by PW3 that he carried an axe to the Police Station and stated that the axe had been used by the

accused to kill Anna Luoga. Obviously, the question to be asked is whether PW3's evidence was so connected to the fact in issue that the accused killed Anna Luoga with an axe (exhibit P1).

The filled post-mortem examination report was received as exhibit P3. According to the doctor's explanation (PW4), the deceased was not hit by an axe. As a matter of fact, she had a wound on her face that was caused by a blunt object. One good question to ask is, the blunt object used to cause the wound on the deceased's face was an axe? The doctor also said that the deceased was found dead and the death was caused by strangulation and she was found with bubbles on her body. To crown it all reference is made by quoting what the doctor (PW4) said in his testimony as follows:

"The deceased died because she suffocated due to forceful strangulation. she had wounds that were caused by blunt force; her tongue was striking out at her face, and she was bleeding. The deceased had a swollen neck on the left side; there was a mark aligned on the neck, and one mark was on the right side. The instrument used shows that it is an abrasion of the head and that there was force being shown, and the marks show that the deceased was

strangled by using her thumb. Moreover, there was a wound on the right side with a length of one centimetre that was caused by the blunt object”.

To add to it, PW4 continued she examined the vagina and the cheeks of the vagina of the deceased and were torn and mucus mixed with the blood was found on the private parts and she sent the sample for test to the laboratory. As a matter of fact, the initial examination showed that there was dead sperm. In fact, they decided to keep the specimen in the laboratory so that they could help them in the future. On that observation, they reached a conclusion that there was forceful sexual intercourse.

With respect to the evidence, I have considered the evidence from both sides and the law. As per the prosecution evidence, the cause of death was a result of asphyxiation due to strangle on the deceased's neck caused by lose of breath. In particular, it is my view that for the conviction of murder to stand, according to section 196 of the Penal Code (supra), the prosecution has to prove the following major issues as follows:

1. Who murdered the deceased? Does the killing amount to the murder?

2. Whether the prosecution proved the case against the accused beyond a reasonable doubt.

To start with the first issue, of who murdered the deceased and does the killing amount to murder? If you carefully look at the testimony given by the Medical Doctor (PW4), the cause of death was a result of asphyxiation due to strangle on the deceased's neck caused by loos of breath.

To add to it, the second thing the doctor (PW4) testified that the deceased had a wound on her face which was caused by a blunt object. Looking at the evidence of other witnesses on the question of the facial wound where all the prosecution witnesses said that there was no wound on the face of the deceased person (Anna Luoga) and if there was a wound everyone would have seen it.

As far as I am concerned, the question to be asked is whether an axe is a blunt object? To the best of my knowledge, I am of the view that the doctor's (PW4) evidence needs to be corroborated with the evidence of other witnesses. The doctor's (PW4) evidence explains that the deceased was hit with a blunt object but looking at the nature of the wound that was

described by PW4, it is not similar to being hit with an axe. It is true that, PW5 who was the Village Executive Officer, he explained that he met the accused person who was brought before him during night time and the accused told him that he had beaten the deceased with an axe. Actually, this was during the night hours and the issue of identifying the accused person at night hours was not explained by the prosecution. PW3 is a witness who confirmed that he had sent the axe that was used to kill the deceased, but he had not seen the incident of the accused hitting the deceased.

Principally, PW7 was the last witness who had written the cautioned statement of the accused but he never tendered the recorded statements of the accused to justify what he was testifying. In that case, the statements of PW7 in his evidence stated that the accused confessed before him as follows:

"... at around 20:00 hours at night the accused took an axe and go to cut the grass but his goal was to go to the deceased. After that, he could not find the deceased's husband. The accused came in and said that there were two (02) partitions in the deceased's room. Similarly, the accused asked for a relationship; but he refused; the

accused found the deceased that is none other than Anna Luoga in the room and dropped her down because her husband was not around; the accused said that he removed the deceased's underwear. Lastly, the accused raped the deceased”.

PW7's evidence, which is a cautioned statement, does not prove the offence of murder because, if it is true that, the statement belongs to the accused, why did they explain it and fail to tender before the Court as an exhibit. Since the cautioned statement of the accused person was not tendered as an exhibit, I disregard the evidence given by PW7 on the caution statement of the accused.

Looking at all the seven witnesses who testified on the side of the prosecution, the elements of the offence of murder which are the presence of *actus reus* and *mens rea* have not proved against the accused. There is no a single witness who saw the accused person at the crime scene. Also, it was alleged that the accused killed the deceased with an axe, but there is no evidence of an axe being used to kill the deceased.

As a matter of fact, the prosecution has failed to prove the presence of *actus reus* and *mens rea* as the basic rules of criminal law. The

prosecution has to prove that the accused committed the *actus reus* of the offence he stands charged with necessary *mens rea*.

Moreover, it is the duty of this Court to examine the evidence given by the prosecution side and find whether there are major contradictions that can be resolved in favour of the accused. Personally, I have weighed the prosecution evidence alongside with the evidence given by the defence side. I reckon the evidence tricked to me by the prosecution witnesses; that is, PW1, PW2, PW3, PW4, PW5, PW6 and PW7 and find that they are circumstantial evidence.

Their facts are not connected with the fact in issue which did not form the same transaction. It is obviously true that the accused, in his defence evidence, does not deny the facts that on 10th October, 2021, he was at Ruhira Ward in Parangu Village. It seems to be true that, he went to clear the farm that he was given by PW3. He was busy clearing the farm until evening hours when he decided to go home carrying a load of grasses. Later, he was on the way when he heard the voice of a woman who was speaking aggressively and calling him a thief and alleging that he stole from his husband's house. Surprisingly, after that he just saw himself

falling down and he saw the woman moving towards his direction and suddenly she pushed her down.

After that, he left with a load of grass and moved back home. It was around 16:00 hours in the evening when he heard the voice coming from the PW3 house and said that they would talk about it tomorrow. On the same note, he heard someone squeezing his ribs. PW3 took him to the Village Office. Then he was sent at the Police Station with an axe that belongs to his father-in-law (PW3).

The evidence of the prosecution side does not prove beyond reasonable doubt that he is the one who killed the deceased. The existing evidence is too circumstantial and needs to be corroborated with other evidence. Reference is made to the case of **Sadiki Ally Mkindi v. The Director of Public Prosecutions**, Criminal Appeal No. 207 OF 2009 (Arusha Feb, 2012), the Court held that;

"We would therefore set out the general rules regarding circumstantial evidence in criminal cases as elucidated in Sarkar on Evidence, Fifteenth Edition, Reprint 2004 at pages 66 to 68. These are:

- i. That, in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the in-involvement of the accused in the crime must clinch the issue of guilt.*
- ii. That, all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of the doubt.*
- iii. That, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.*
- iv. Where circumstances are susceptible of two equally possible inferences the inference favours the accused rather than the prosecution should be accepted.*
- v. There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the*

accused, and the chain must be such human probability the act must have been made by the accused.

- vi. Where a series of circumstances are dependent on one another, they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.*
- vii. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify a conviction, even though the party offers no explanation of them.*
- viii. If combined effect of all the proved facts taken together is conclusive in establishing the guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive."*

Exclusively, refer also the case of **Elisha Ndatanye v. Republic**, Criminal Appeal No. 51 of 1999 (Mwanza) the Court held that:

"Where the evidence against the accused is wholly circumstantial the facts from which an inference to the accused is sought to be drawn must be proved beyond

reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred”.

In his testimony PW7 testified that the accused's cautioned statement was recorded, however nothing was tendered before this Court to prove that the statements were recorded in order to strengthen the prosecution case. Before going further, I find it pertinent to refer to the case of **Yohanis Msigwa v. The Republic** (1990) TLR 148, the Court held *inter alia* that:

"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any facts. What is important is the witness's opportunity to see what he/she claimed to have seen, and his or her credibility."

As far as I am concerned, I have highlighted above the prosecution's side called seven (07) witnesses whose evidence are hearsay which are not admissible. Section 62 of the Evidence Act (Cap. 6, R.E.2022) it states that:

"62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say; (a) if it refers to a fact which could

be seen, it must be the evidence of a witness who says he saw it; (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; (c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:"

To add to it, the second issue is whether the prosecution proved the case against the accused beyond a reasonable doubt. Having gone through the evidence of the prosecution, it does not prove the occurrence of offence of murder against the accused person. Notably, if you look at section 62 of the Evidence Act (supra) and the statements of PW3, PW6 and PW7 do not bring the accused to be convicted for murder since their evidences are not direct evidence.

Also, considering the fact that the deceased was married and the prosecution did not bring her husband to testify where was he when his wife was beaten it rises a doubt. After passing through the prosecution's

evidence, it is not direct to amount conviction to the accused for a grave offence.

In the case of **Uganda v. Oloya Yovani Omeke**, Criminal Revision No. 157 of 1976 (High Court of Uganda at Kampala), the Court observed that the prosecution did not record his investigation properly, which violated a cardinal principle of criminal law that the burden of proving the charge beyond reasonable doubt is on the prosecution and the accused ought not to be convicted on the weakness of the defence but on the strength of the prosecution case.

Furthermore, looking at section 62 of the Evidence Act (supra) and the statements of PW3, PW6 and PW7 do not prove that the accused is guilty for murder. The witnesses didn't saw him directly hitting the deceased with an axe. Their statements are just hearsay. To the best of my knowledge, I have observed that the prosecution's evidence is not conclusive as it was elaborated in the case of **Uganda v. Oloya Yovani Omeke**, (supra).

The prosecution must establish a *prima facie* case. This is important because if no *prima facie* case is established, the Court always give an

accused person the benefit of doubt and acquit him. Reference is made to the case of **The Director of Public Prosecutions v. Morgan Maliki and Nyasa Makorii**, Criminal Appeal No 133 of 2013 (unreported), the Court held that:

"A prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence which he is charged or kindred cognate minor offence... the prosecution is expected to have proved all the ingredients of the offence or minor cognate are thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof".

Likewise, the accused must be convicted in the strength of the prosecution case. This stance is stated in many authorities including the case of **Christian Kaale and Rweikiza Bernard v. Republic** (1992) TLR 302, **Mohamed Said Matula v. The Republic** (1995) TLR 3, **Joseph John Makune v. Republic** (1986) TLR 44, **Agasto Emmanuel v. Republic**, Criminal Appeal No. 08 of 2020 (Mbeya HC) and the case of **John Makolobela & Others v. Republic**, Criminal Appeal No. 6 of 2000 it was stated that:

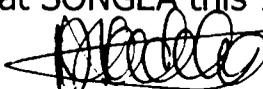
"A person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilty beyond reasonable doubt".

Basically, in all fairness under the prevailing circumstances of this case, this Court holds that the guilt of the accused was not proved beyond a reasonable doubt.

In view of the above doubts, I am satisfied to the best of my knowledge that the prosecution evidence is insufficient to find conviction to the accused person on the offence he stands charged. Consequently, I hereby acquit the accused person, one Makarius Flaviani Komba on the offence of murder contrary to sections 196 and 197 of the Penal Code (Cap. 16, R.E 2019). Order accordingly.

DATED and DELIVERED at SONGEA this 18th day of January, 2023.




U. E. MADEHA

JUDGE

18/01/2023

COURT: Right of appeal is explained to both parties, who is none other than Mr. Frank Chonja and Ms. Tumpale Lawrance (State Attorneys) for the Republic, the accused person and Mr. Denis Lazaro advocate for the accused person.



A handwritten signature in black ink, appearing to read "Madeha", written over a horizontal line.

U. E. MADEHA

JUDGE

18/01/2023