IN THE HIGH COURT OF TANZANIA

(IN MWANZA SUB-REGISTRY)

AT GEITA

CRIMINAL SESSIONS CASE NO. 89 OF 2021

REPUBLIC

VERSUS

MAWAZO S/O ANTHONY @ WAZO

JUDGMENT

Date of Last Order: 17/04/2023

Date of Judgment: 28/04/2023

KAMANA, J:

Sanda Nhano @Kajanja, now the deceased, met his death on 5th November, 2019 at Lwenge Village within the District and Region of Geita. Facts have it that on a fateful day between 2000hrs and 2100hrs, the deceased was warming himself at *kikome* when he was assailed by the accused Mawazo Anthony @Wazo. It was alleged by the Prosecution that in attacking the deceased, the accused used a machete to inflict blows on the deceased's body including on his head. According to the Prosecution, the accused committed the murderous act in the company of one Yusuph Martin who was still at large at the time of the trial.

It was the evidence of Emmanuel Petro Masondole (PW4), the Village Executive for Lwenge Village, that within the month of November, 2019, he received complaints from various *wananchi* that they had received phone calls through Number 0653 649 587 whereby the caller

was ordering them to send him the money. According to this witness, one of the *wananchi* who received the call is Elizabeth Nyangudu, the deceased's first wife who was called by the caller while at his office. PW4 evidenced that the caller threatened the widow that in the event of her failure to send him the demanded money, she would suffer death in a similar way to her husband's. The witness testified further that after he got that number, he informed the Police. As per this witness, what followed thereafter was the arrest of the accused.

Before this Court the accused was arraigned to answer Information of Murder contrary to sections 196 and 197 of the Penal Code, Cap.16 [RE.2019]. The accused pleaded not guilty hence full trial was held. At the hearing of this case, the Prosecution had the services of Ms. Winifrida Ernest Mpiwa, learned State Attorney. The accused was advocated by Mr. Simeon Yesse, learned Counsel.

In a bid to nail the accused, the Prosecution fielded Dr. Mikael Salamba Mashala (PW1), Sgt. Dickson (PW2), Det.Cpl. Venance (PW3) and Emmanuel Petro Masondole (PW4). Further, the Prosecution tendered Exhibits that were admitted. These are the Post Mortem Report (Exh.PE1) and the Cautioned Statement of the accused (Exh.PE2). The

accused did not have a witness save for himself. He also tendered no exhibit.

Having heard the Prosecution's witnesses and gone through the admitted exhibits, I found the accused with a case to answer.

At this juncture, I think it is relevant to, albeit, briefly visit some of the guiding principles that will be applied in the determination of this case.

One, it is a fundamental principle of law that the Prosecution has a burden to prove the guilt of the accused beyond a reasonable doubt, and such burden is never shifted to the accused unless otherwise stated by statute. According to section 3(2) (a) of the Tanzania Evidence Act, Cap. 6 [RE.2019], a fact is considered to have been proved if the Prosecution satisfies the Court beyond reasonable doubt that the alleged fact exists. This position has been accentuated in multitudinous cases including the case of **Mohamed Haruna @ Mtupeni and Another v. Republic**, Criminal Appeal No. 25 of 2007 (Unreported). In that case, the Court of Appeal had this to state:

"Of course, in cases of this nature the burden of proof is always on the prosecution. The

standard has always been proof beyond reasonable doubt.'

See: Woodmington v. DPP [1935] AC 462; **Jonas Boniphas Massawe v. Republic**, Criminal Appeal No. 52 of 2020 (unreported); **Pascal Yoya Maganga v. Republic**, Criminal Appeal No. 248 of 2017 (Unreported); and **Julius Mbwilo v. Republic** (Unreported), Criminal Appeal No. 351 of 2009 (Unreported).

Two, in the case at hand, the Prosecution is under the obligation to prove beyond reasonable doubt the following:

(a) There is a person who is dead.

(b) The death of that person is unnatural.

(c) The death of the person was premeditated in the sense that there was malice aforethought attributed to the accused.

(d) There is credible and cogent evidence that the accused is a perpetrator of the alleged killing.

See: Anthony Kinanila and Another v. Republic, Criminal Appeal No. 83 of 2021 (Unreported).

On whether a person is dead, Dr. Mashala (PW1) testified to perform an autopsy on the body of the person who was identified to him

as Sanda Nhano. This evidence is supported by the evidence of Emmanuel Petro Masondole (PW4), the Village Executive for Lwenge Village, who testified to have seen the deceased body at the scene of the crime. Further, according to the autopsy report (Exh.PE1), PW1 stated to have found the dead body of Sanda Nhano lying on the land surface. The Accused did not dispute this evidence other than maintaining that he does not know the deceased. With this kind of evidence, I do not hesitate to hold that the Prosecution has proved beyond reasonable doubt that Sanda Nhano is dead.

As to whether the death of Sanda Nhano is unnatural, according to the evidence of PW1 and PW2, the deceased's body was found with wounds on various parts of his body including on his head and arms. The Post Mortem Report evidenced that the deceased's body was found with multiple cut wounds. Specifically, the Report stated that the head had two wounds whereby the first wound was 5cm deep and the second one was 6cm deep involving a left ear that was chopped. Further, the Report stated that the left and second arms were completely cut. According to the Report, the deceased's body was found with a wound measured at 6cm and 7cm in depth and length at the back of the neck. The cause of death according to the Report was hemorrhagic shock

caused by multiple wounds (bleeding). Again, this fact as to the cause of death was not disputed by Defence. That being the case, I find no reason to doubt the Prosecution's evidence so far as the second ingredient is concerned.

Coming to the issue of the existence of malice aforethought, I think, before determining it, is logical to understand its meaning as provided by section 200 of the Penal Code, Cap. 16 [RE.2019] as follows:

> *'Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances—*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or*

not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.'

It is worth noting that the defunct East African Court of Appeal considered what constitutes malice aforethought in the case of **Republic vs. Tubere s/o Ochen** [1945] 12 EACA 63 where it stated:

'That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used and the part of the

body injured, and the conduct of the Accused before, during, and after the attack.'

Similarly, the Court of Appeal of Tanzania in the case of **Mark Kisimiri v.Republic**, Criminal Appeal No.39 of 2017 (Unreported) quoted with approval its observation in the case of **Enock Kipera v. Republic**, Criminal Appeal No. 150 of 1994 (Unreported) by stating:

'...usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained by various factors including the following: The type and size of the weapon used, the amount of force applied, part or parts of the body or blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances if any made before or after killing, and the conduct of the attackers before and after killing.'

I have considered the evidence of PW1 and PW4. I have also gone through the autopsy report. Mindful of the state of the deceased's body as testified by the witnesses and being alive at to what was stated in the autopsy report, I am convinced that the assailant premeditated the death of Sanda Nhano. With the magnitude of wounds in terms of depth, length and parts of the body that were inflicted, definitely the assailant aimed at causing death. Since, the Defence did not dispute this fact, I hold that the Prosecution proved the existence of malice aforethought in the commission of the murderous act beyond a reasonable doubt.

As to whether there is credible and cogent evidence that the accused is a perpetrator of the alleged killing, the Prosecution relied on the evidence of Sgt. Dickson (PW2), Det.Cpl. Venance (PW3) and Emmanuel Petro Masondole (PW4). Further, the Prosecution relied on the accused's Cautioned Statement (Exh.PE2).

PW4's testimony was that after informing the Police about the phone number which was used by the caller to extort money, on 10th December, 2019 he was called by Police Officers who requested him to meet them at Bugarama Village. Upon his arrival at Bugarama Village, the Village Executive for Lwenge Village was requested by Police Officers

to direct them to where the accused lived, which was at Nyaluhamu Hamlet within Bugarama Village.

At Mawazo's residence, according to this witness, the Police Officers surrounded his home unknowingly that Mawazo had already seen them. To their surprise, the accused came out of his house running to the bushes. They pursued and arrested him. The witness testified that after he was arrested, the accused was handcuffed but tried again to run away. In that process, he took and threw a mobile phone away into the bushes. According to this witness, the search was mounted and a mobile phone was found with one Tigo sim card and two Vodacom sim cards. The witness stated that he called number 0653 649 587 which was given to him by the deceased's first wife Elizabeth Nyangudu and the same responded in the mobile phone retrieved after the search. Then the accused was taken to Geita Police Station.

On 11th December, 2019, PW4 was again called by the Police Officers who requested him to accompany them to the accused's home. According to this witness, Police Officers told him that they wanted to go to the accused's home to retrieve a machete that was used to kill Sanda Nhano. The witness testified that the accused took them to where he hid the machete at the boundary of his farm. Thereat, the accused

retrieved the machete which was in the bush. While at the scene where the machete was found, the accused, according to the witness confessed to have used the machete in ending the life of Sanda Nhano. The witness testified further to have signed the seizure certificate as an independent witness.

When prompted by the learned State Attorney to recognize the seizure certificate for the purpose of tendering it, the once eloquent witness failed to recognize it. Further, to make things worse, the witness stated that the signature appended to the certificate is not his.

Sgt. Dickson (PW2) who participated in the arrest of the accused and during the retrieval of the machete had more or less the same evidence as adduced by PW4 regarding the arrest of the accused, mobile phone and the retrieving of the machete. However, according to this witness, the mobile phone was found in the pockets of the accused's clothes. Further, this witness did not testify that the accused's phone was called through number 0653 649 587 as alleged by PW4. Concerning the retrieval of the machete, the witness told this Court to have been informed by Inspector James Maanya that the accused after interrogation confessed to murdering Sanda Nhano and was ready to show where he hid the machete for the purpose of retrieving the same.

Coming to the evidence of Det.Cpl. Venance (PW3), he told this Court that he recorded the Cautioned Statement of the accused. In the course of recording such a statement, the witness testified that the accused confessed to having killed the deceased. According to the witness, the accused stated that he and Yusuph Martin decided to kill Sanda Nhano after he refused to give them money as he used to do in the past when they threatened him to end his life.

After a trial within the trial, the Cautioned Statement was admitted as Exh.PE2. I had dispassionately gone through the Statement. Succinctly, in the said statement, as stated by PW3, the accused is recorded to confess his evil deeds against Sanda Nhano.

In his defence, the accused was so brief. He admitted having been arrested on 10th December, 2019 at his home on the allegation of stealing electrical tools. He further admitted to have been taken to Geita Police Station where he was interrogated about the murder of Sanda Nhano. According to his evidence, he denied having a hand in the killing of Sanda Nhano. He testified to have been tortured by the Police Officers who wanted him to confess to participating in the alleged murderous act. According to this witness, following the torture, he gave in and appended his signature to the statement prepared by the Police Officers.

Having heard, the evidence adduced by both parties, I wish to start with the evidence of Emmanuel Petro Masondole (PW4). His evidence tried to link the accused with the murder of Sanda Nhano through the phone calls that were alleged to be made by the accused to extort money from *wananchi.* I asked myself a question so far as this piece of evidence is concerned. If it is true that some *wananchi* including the deceased's first wife were called by the number which was found in the possession of the accused, what caused the prosecution not to parade the said *wananchi* to testify on that issue? I am aware that during the Preliminary Hearing, Elizabeth Nyangudu, the deceased's first wife who is mentioned by PW4 as the one who was called by number 0653 649 587 was listed as a witness.

In this regard, I take the position that *wananchi,* particularly Elizabeth Nyangudu, who were called by number 0653 649 587 were key witnesses capable of connecting the facts of this case against the accused. In the absence of their evidence, doubt is created as to whether there were persons who were called by number 0653 649 587. If the persons who were called to testify were paraded as witnesses, the Prosecution and the Defence would have an opportune time to respectively examine and cross-examine them. Their absence leaves

much doubt about the truthfulness of the evidence adduced by PW4 taking into consideration that the witness testified to have not received any complaints from the deceased about extortion through the phone number.

It is trite law that the Prosecution is at liberty to field witnesses of its choice. However, the Prosecution's failure to field a material witness creates doubt as to its case. In the case of **Azizi Abdallah v. Republic** [1991] TLR 71, the Court of Appeal observed:

> *'The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with transaction in question are able to testify 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****.' (Emphasis added]*).

See: Separatus Theonest @ Alex v. Republic, Criminal Appeal No. 138 of 2005 (Unreported); **Lubelejea Mavina and Another v. Republic**, Criminal Appeal No. 172 of 2006 (Unreported); and **Samwel**

Dickson and Another v. Republic, Criminal Appeal No. 322 of 2014 (Unreported).

Fortified by the above authorities and considering that the Prosecution without assigning any justifiable reasons opted not to field Elizabeth Nyangudu as a witness, I draw an adverse inference against the Prosecution so far as the piece of evidence is concerned.

I further treat the said evidence of PW4 as hearsay evidence since he was told by some *wananchi* that they had been called by number 0653 649 587. It is trite law that hearsay evidence is no evidence in the eyes of the law. This position was enunciated in numerous cases including the case of **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 where the Court of Appeal stated:

> *'Their evidence was indeed hearsay. Hearsay evidence is of no evidential value. The same must be discredited.'*

See: Jadili Muhumbi v. Republic, Criminal Appeal No. 229 of 2021.

Concerning PW4's evidence that the accused threw the mobile phone in the bushes and that the same was retrieved after searching the bushes, when I test it against the evidence of Sgt. Dickson who testified

that the mobile phone was found in the accused's pockets, I find such evidence doubtful.

One, under normal circumstances, I hold doubt as to whether a person who was handcuffed as the accused was can run away and in the course of running, he can insert his hands in his pocket and take the mobile phone from it and throw it away in the bushes. It is my considered view that if that was the case, Sgt. Dickson (PW2) would have testified to that effect as this case hinges somehow on the issue of phone number 0653 649 587 which is alleged to have been found in the accused's mobile phone.

Two, PW4 testified that he called number 0653 649 587 which responded on the accused's mobile phone. Again, if that was the case, indeed, Sgt.Dickson (PW2) would have testified on that. Further, regardless of PW2's testimony, I find the evidence of PW4 not credible as the same hinges on hearsay and failure to field material witnesses so far as calls by number 0653 649 587 are concerned.

Regarding the retrieval of the machete, no seizure certificate was tendered to prove that the machete was retrieved from the farm owned by the accused. It is my considered opinion that the issue of retrieving the machete is unsubstantiated taking into consideration that PW4 did

not recognize the certificate and denied the appended signature as his. In that case, I will not consider his evidence so far as the retrieval of the machete is concerned.

Coming to the evidence of Sgt. Dickson (PW2), I find the same irrelevant to this case as far as mobile phone and sim cards are concerned. I hold so on the account that if the Police Officers arrested the accused with the mobile phone and one sim card for Tigo and two sim cards for Vodacom, why he did not state the relevance of the seized mobile phone and sim cards to this case? If the seized mobile phone and sim cards were relevant, why Prosecution did not field a witness to tender the same? While these questions remain unanswered, I hold that the same creates holes in the Prosecution's case. In other words, the Prosecution wanted this Court to consider the seized mobile phone and sim cards as relevant to this case based on the evidence of PW4, the Village Executive, as it did not bother to bring any forensic evidence to prove that phone number 0653 649 587 was used by the accused to extort money from the deceased and other persons.

Further, concerning the retrieval of the machete in question, the witness testified that the seizure certificate was filled on the spot. If that is the case, why did PW4 who testified to be present during the search

and was an independent witness state not to have seen the certificate before and that the appended his signature is not his? With this discrepancy in the Prosecution's evidence, I entertain the doubt regarding the retrieval of the machete.

As regards the Cautioned Statement of the accused (Exh.PE2), as a matter of practice, it is unsafe to convict a person for an offence based solely on a retracted Cautioned Statement. As a general principle for an accused person to be convicted on the retracted Cautioned Statement, there must be a shred of independent and cogent evidence to corroborate what is contained in the Statement.

The evidence adduced by the four witnesses paraded by the Prosecution does not form independent and cogent evidence that points the accused as the one who murdered Sanda Nhano. Needless to say, as I have already discussed hereinabove, the evidence of PW4 and PW2 about issues relating to calls made by number 0653 649 587 and retrieval of the machete do not form independent and cogent evidence against the accused as the murderer of Sanda Nhano. Further, the evidence of PW1 and his autopsy report do not point a finger at the accused.

I am aware that the accused person may be convicted on the retracted confession if the Court is satisfied that the Cautioned Statement contains nothing but the truth. However, before convicting an accused on the uncorroborated retracted confession, the Court is under the duty to warn itself of the danger of convicting an accused without corroborative evidence. In the celebrated case of **Tuwamoi v. Uganda** [1967] EA 84, it was stated as follows:

> '***In assessing a confession the main consideration at this stage will be, is it true?*** *And if the confession is the only evidence against an accused then the court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with the degree of certainty required in a criminal case.* ***This applies to all confessions whether they have been retracted or repudiated or admitted, but when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the***

case which the court must consider in deciding whether the confession is true.'

(Emphasis added).

When considering the circumstances of this case, I am of the considered view that the Cautioned Statement contains an untrue account of what happened on the material dates.

In his cautioned statement, the accused is recorded to state that his village leader was present when he was arrested. This assertion is contrary to the evidence of Emmanuel Petro Masondole (PW4), the Village Executive for Lwenge Village, who testified as to his role during the arrest of the accused. PW4 testified to witness the arrest of the accused and during the cross-examination, he stated that he acted beyond his powers for exercising his duties in Bugarama Village where the accused resides. With this piece of evidence, it is clear that what is stated in the Cautioned Statement so far as the presence of the leader of Bugarama Village is untrue.

Further, the Cautioned Statement of the accused contains a story of how the accused used phone calls to extort money from the deceased. In my opinion, since the statement was recorded on 10th December, 2019 the day when PW2 and PW4 stated that the accused

was found with a mobile phone with three sim cards, it was prudent for the Cautioned Statement to state vividly the phone number or numbers that were used by the accused to call the deceased. With that shortcoming, I doubt the truthfulness of the Cautioned Statement.

As a matter of practice, when an accused confessed the offence to a police officer when recording the Cautioned Statement, he is supposed to be taken to the Justice of the Peace to record his Extra-Judicial Statement. Normally, the Extra-Judicial Statement serves as a backup to the Cautioned Statement. During the Preliminary Hearing, the Prosecution indicated that it will tender an Extra-Judicial Statement of the accused.

However, for reasons known to the Prosecution, the Extra-Judicial Statement was not tendered. The absence of the Extra-Judicial Statement in a serious case like this one creates doubts in the Prosecution's case so far as the truthfulness of the Cautioned Statement is concerned. I hold so while mindful of the decision of the Court of Appeal in the case of **Ndorosi Kudekei v. Republic**, Criminal Appeal No. 318 of 2016 (Unreported), the Court of Appeal of Tanzania held that:

What was placed before the court in evidence was the cautioned statement only (exhibit Pl), whereas the whereabouts of the extra-judicial statement which was made to the Justice of peace was nowhere to be seen. With the absence of the extra judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant really confessed to have killed the deceased or not.'

With the weakness of the Prosecution's case against the accused, it is my conviction that the accused's evidence however weak cannot sustain a conviction against him. I am aware that however weak the defence is, the same cannot be used as a ladder by the Prosecution to attain a conviction if the latter's evidence is in muddles. In the case of **Kiroiyan Ole Suyan v. Republic**, Criminal Appeal No. 114 of 1994, the Court of Appeal stated:

'the weakness of the defence did not substitute for the burden cast on the prosecution to prove the charge beyond reasonable doubt.'

In the upshot, it is my considered view that the Prosecution has failed to prove beyond reasonable doubt that the accused is responsible for the murder of Sanda Nhano. Given that I hereby acquit Mawazo Anthony @Wazo from the offence of murder. I forthwith order his immediate release from prison unless he is held for other lawful causes. It is ordered.

Right To Appeal Explained.

DATED at **GEITA** this 28th April, 2023.

KS KAMANA

JUDGE