

**IN THE HIGH COURT OF TANZANIA  
(IN THE SUB-REGISTRY OF MWANZA)**

**AT GEITA**

**(ORIGINAL JURISDICTION)**

**CRIMINAL SESSIONS CASE NO. 164 OF 2021**

**REPUBLIC**

**VERSUS**

**THOMAS S/O SAMWEL @ KAHINDI**

**JUDGMENT**

*Date of Last Order: 28/03/2023*

*Date of Judgment: 28/04/2023*

**Kamana, J:**

Around 2000hrs on the 4th day of June, 2021, Bugumba Kahindi met her death. She was preparing supper at her home at Wavu Village in Nyangwh'ale Village when unknown persons armed with machetes stormed her compound. The invaders without a word assailed her body with machetes and left the scene untouched. Bugumba Kahindi did not live to tell the pain she suffered as she immediately kicked the bucket.

What followed thereafter was the arrest of Thomas Samwel, a nephew to the deceased. He was accused of ending brutally the life of

his aunt Bugumba Kahindi. The Prosecution alleged that the accused and his aunt had a feud over a farm dispute. It is out of that dispute, the Prosecution believed that the accused decided to kill, in cold blood, his father's sister.

When the Information as to the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [RE.2019] was read over to the accused, he pleaded not guilty. Given that, the full trial was held to prove the guiltiness or otherwise of the accused.

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. Liberatus Lwabuhanga, learned Counsel.

In a bid to prove its case, the Prosecution paraded four witnesses. These were Det.Cpl. Denis (PW1), Det.Cpl. Yusuph (PW2), Dr. Godfrey Isaya Sombe (PW3) and Det.Sgt. Daniel (PW4). Further, the Prosecution tendered exhibits that were admitted. The exhibits were the Post Mortem Report (Exh.PE1), the Sketchy Map of the scene of the crime (EXh.PE2) and the Cautioned Statement of the accused (Exh.PE3). The Defence had two witnesses: the accused (DW1) and his wife Solile Deus (DW2). He did not have exhibits. Having heard the Prosecution's

witnesses and gone through the admitted exhibits, this Court found the accused with a case to answer.

As part of the preliminaries, I think it is vital to, albeit, briefly visit some of the guiding principles through which I will navigate in the determination of this case. Firstly, it is a cardinal 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) where 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**, Criminal Appeal No. 351 of 2009 (Unreported).

Secondly, it is trite law that the Court is duty bound to evaluate the evidence adduced by both Prosecution and Defence and arrive at its conclusion as to whether the former has proved beyond a reasonable doubt or otherwise all ingredients of the offence with which the accused is charged. In the case at hand, the Prosecution is under the obligation to prove beyond reasonable doubt the following:

- (a) That there is a person who is dead.
- (b) That the death of that person is unnatural.
- (c) That the death of the person was premeditated in the sense that there was malice aforethought attributed to the accused.
- (d) That 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).

Starting with the issue of whether there was a person who died, the Prosecution's evidence as adduced by its witnesses shows that Bugumba Kahindi died on 4<sup>th</sup> June, 2021. The Post Mortem Report (Exh.PE1) which was not disputed by the Defence states that the autopsy was performed on the body of an adult female of forty years. One Sabina Kisandu, the deceased's daughter, identified the deceased body. The contents of the Report are corroborated by the evidence of Dr. Sombe (PW3) who performed the autopsy, Det.Cpl. Yusuph (PW2) and Det.Cpl. Denis (PW1). Both witnesses testified to have seen the body of the late Bugumba Kahindi lying facing upward lifelessly. They further evidenced to have found the deceased's body in the backyard of her house. This evidence is supported by the Sketchy Map (Exh.PE2). The Defence did not dispute the fact as to the death of the late Bugumba Kahindi. So far as the death of the deceased is concerned, I find that the witnesses are credible. In that case, it is my holding that the Prosecution has successfully proved the first ingredient beyond a reasonable doubt.

As to whether the death of Bugumba Kahindi was unnatural, the contents of the Post Mortem Report (Exh.PE1) state that the cause of her death was a haemorrhagic shock. The shock according to the Report

was caused by severe blood loss following multiple cut wounds. The Post Mortem Report is supported by the evidence of Dr. Sombe (PW3) who performed the autopsy, Det.Cpl. Yusuph (PW2) and Det.Cpl. Denis (PW1). These witnesses were eloquent in describing how they found the deceased's body with wounds on her neck, upper chest, back and right arm. This fact was also not disputed by the Defence. Again, I find no reason to fault the Prosecution's witnesses so far as the cause of death is concerned. I believe the Prosecution has proved the cause of death to be unnatural to the hilt.

Coming to the third ingredient as to whether there was malice aforethought before the murder of Bugumba Kahindi, I wish to reproduce the contents of section 200 of the Penal Code, Cap. 16 as follows:

*'Malice aforethought shall be deemed to be established by evidence proving any one or 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.'*

The then East African Court of Appeal had the opportunity to consider 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.'*

According to the Post Mortem Report (Exh.P1), the deceased's body had cut wounds on her neck which extended to her chest and back and wounds on his right arm. The Report further describes the wounds on the right arm to be of 4x6 cm and 3x5 cm also her pharynx was cut.

This fact is also supported by the evidence of Dr. Sombe (PW3) who performed the autopsy, Det.Cpl. Yusuph (PW2) and Det.Cpl. Denis (PW1). The witnesses testified to having seen the wounds. In my opinion, whoever the assailant was, by inflicting blows of a sharp object on sensitive parts of the deceased's body, he or she intended to cause death or grievous harm to the deceased.

In this regard, I do consider that the assailant used a sharp object to inflict more than one blows on the deceased's neck, chest, back and arm. Further, I am mindful of the extent of injuries as evidenced in the Post Mortem Report and the accounts of the three witnesses. The extent of the injuries proves that the assailant applied excessive force in inflicting blows. The Defence did not adduce any evidence to challenge the contents of the Post Mortem Report. In that case, it is my holding

that the assailant had malice aforethought to kill the deceased when inflicting the blows. In other words, the Prosecution has proved beyond reasonable doubt the third ingredient.

As to whether there is credible and cogent evidence that the accused is a perpetrator of the alleged killing, it is worth noting that the Prosecution did not field an eye witness. Det.Cpl. Denis and Det.Cpl. Yusuph who went to the scene of the crime testified that there are persons who witnessed the killing and informed them that the perpetrator of such killing was the accused. They specifically mentioned Sabina Kisandu, the deceased's daughter, as the one who witnessed the killing. They went on to testify that the death of Bugumba Kahindi was hastened by a feud between the deceased and the accused over farms owned by the accused's grandmother one Mwanalubinza which were used by the deceased for her benefit to the exclusion of other clan members including the accused.

Without much ado, I will give no value to the evidence of the two police officers. The evidence is purely hearsay. It is a cardinal principle of law that hearsay evidence is of no value before the Court or should be given little weight. This position was enunciated in numerous cases

including the case of **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 (Unreported) 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 (Unreported).

Another piece of evidence that the Prosecution advanced in a bid to prove its case is the Cautioned Statement of the accused (Exh.PE3). It is worth noting that the Statement was retracted by the accused on the ground that the same was made involuntarily. However, after trial within trial, the Statement was admitted.

Briefly, in the said Statement, the accused is recorded by Det.Sgt. Daniel (PW4) to state that he is the one responsible for the killing of Bugumba Kahindi, his aunt. According to the Statement, the accused confessed to kill his aunt in the company of other persons namely Robert Kahindi (his uncle), Frank Wilson (his brother), James Amos and Frank James. The accused narrated how they went to the deceased's house armed with machetes whereby he and Frank Wilson walked

through the farms and the rest used a motorcycle ridden by Robert Kahindi. The accused told PW4 how he threw down the deceased by leg-kicking her before inflicting blows. It was the statement of the accused that the assault was executed while the deceased was with Sabina Kisandu and Mwanalubinza who ran away. The contents of the statement were supported by the evidence of PW4.

At this juncture, I hasten to hold that the Prosecution has considerably failed to prove beyond reasonable doubt that the accused is the assailant who killed Bugumba Kahindi. I take that position for the following reasons:

One, 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 Bugumba Kahindi. As a matter of fact, the evidence from Dr. Sembo (PW3) and the Post Mortem Report he prepared have nothing useful to connect the accused with the

offence with which he was charged. Further, the evidence of Det.Cpl. Denis (PW1) and Det.Cpl. Yusuph (PW2) is full of hearsay when it comes to connecting the accused with the murder of Bugumba Kahindi. This is also a characteristic of the evidence of Det.Sgt. Daniel (PW4) which is an account of what he alleged to have been told by the accused.

Two, 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, it strikes my mind that the Cautioned Statement contains an untrue account of what happened on the material date. This will feature in the course of this judgment.

Three, as stated hereinabove, PW1 and PW2 testified that there were eye witnesses who saw the accused killing Bugumba Kahindi. They specifically mentioned Sabina Kisandu. However, for no apparent reason, the Prosecution did not field Sabina Kisandu as a witness. In my opinion, Sabina Kisandu, an alleged eye witness, was a key witness in this case because she was the one, according to PW1 and PW2, who saw the accused killing the deceased. I am of the knowledge that the Prosecution is at liberty to parade witnesses of its choice. However, the

failure to field a material witness by the Prosecution 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 supplied)*

**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 any justifiable reasons opted not to field Sabina

Kisandu as a witness, I draw an adverse inference against the Prosecution.

Four, all along his defence, the accused kept on denying having been arrested by *Sungusungu* for the accusations of killing his aunt. The Prosecution through PW1 and PW2 testified that they found the accused under arrest by *Sungusungu*. Further, the Cautioned Statement went on to state that the *wananzengo* under the leadership of village leader John Nzalia kept him under arrest while interrogated him and that he confessed to having killed Bugumba Kahindi. If that was a true account of what happened on the material date, why Prosecutions failed to field John Nzalia who seemed to be the first person to whom the accused confessed? Again, I draw an adverse inference against the Prosecution for its failure to parade John Nzalia, a person to whom the accused is alleged to have confessed at the first instance to commit the murder.

Five, 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 supplement to the Cautioned Statement. During the Preliminary Hearing,



the Prosecution indicated that it will tender an Extra-Judicial Statement of the accused.

However, the Extra-Judicial Statement was not tendered for reasons known to the Prosecution. 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) where the Court of Appeal of Tanzania held that:

*What was placed before the court in evidence was the cautioned statement only (exhibit P1), 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.'*

Six, despite denying squarely having a hand in murdering Bugumba Kahindi, the accused advanced the defense of alibi. He testified that on the material date and time he was at his home waiting for his supper. His evidence was corroborated by the evidence adduced by his wife Solile Deus. She testified that at the alleged time of the murder incident, she was with her husband at their home whereby she was preparing supper. These two witnesses impressed me with their consistency. They have the same story as to where they spent their day which was at their farm. They were also consistent as far as the type and color of the clothes they wore on the material date. The couple did not differ even on the type of food that the accused's wife was cooking when the news of Bugumba Kahindi's death was broken to them. Indeed, I found them to be credible witnesses.

I am aware that the accused when advancing the defence of alibi does not assume the burden of proving it. He is only required to raise doubts in the Prosecution's case which in effect is required to discredit the alibi with credible evidence. During cross-examination of DW1 and DW2, the Prosecution failed to shake the witnesses so far as the defence of alibi is concerned. With that kind of Defence's evidence plus the failure of the Prosecution to parade and tender key witnesses and an

Extra-Judicial Statement respectively, it is my considered view that the accused raised a tangible doubt in the Prosecution's case.

For the foregoing reasons, it is my conviction that the Prosecution has failed to prove the offence of murder against the accused beyond a reasonable doubt. Thomas Samwel @ Kahindi is hereby acquitted of the offence of murder. I further order his immediate release from prison unless he is held for other lawful cause. It is so ordered.

Right To Appeal Explained.

**DATED** at **GEITA** this 28<sup>th</sup> day of April, 2023.



**KS KAMANA**

**JUDGE**