

**IN THE HIGH COURT OF TANZANIA**  
**AT SUMBAWANGA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL SESSION CASE NO. 30 OF 2018**  
**REPUBLIC**  
**VERSUS**

**SENI LISESI..... ACCUSED**

**JUDGEMENT**

**19<sup>th</sup> April - 14<sup>th</sup> May 2021**

**NDUNGURU, J**

Accused person, Seni s/o Lisesi (henceforth the accused person) stands charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 RE 2019 (henceforth the Penal Code). It is alleged that on 04<sup>th</sup> day of December, 2016 at Mwadui village within Sumbawanga District and Rukwa Region, did murder one Lisesi s/o Magadula (henceforth the deceased).

He was initially arraigned before this court before Hon. Mashauri, J, however before the hearing of the trial, Hon. Mashauri got transfer to Mwanza High Court Registry, hence the matter was re-assigned to me for trial.

When the information of murder was read over and properly explained to the accused person, he pleaded not guilty to the offence, and thus plea of not guilty was entered, hence full trial.

During the trial of this case, Mr. Njooloyota Mwashubila, learned senior state attorney represented the republic; whereas, the accused person was represented by Ms. Neema Charles, the learned advocate. I also sat with three court assessors namely; Godfrey Mwiga, Patrick Wanyama and Grace Ndolezi.

In their effort to prove the case against the accused person, the prosecution paraded a total of four (4) witnesses namely; Mwalu Lisesi, who testified as prosecution witness No. 1 (PW1), Magembe Kwilasi as PW2, ASP Thomas Kilakoi as PW3 and Rosta Mofuga testified as PW4. The prosecution also tendered Post-mortem report as exhibit P.1, sketch map as exhibit P.2, cautioned statement as exhibit P.3 and extra judicial statement as exhibit P.4.

Upon the closure of prosecution case, defence case opened after it was found that the accused person had a case to answer. In disproving the prosecution allegation levelled against him, accused person testified as DW1. He neither called a witness to testify on his favour nor tendered exhibit.

The evidence for the prosecution is as follows; PW1, Mwalu Lisesi, a peasant, resident of Ilanga village testified that on 04<sup>th</sup> December 2016 at night there where she was living with her father came some

people who had a strong light torch, they went at the house of his father. His father started shouting. She escaped and going to the river as she knew there was a danger. She got hidden there until almost 00:00 hrs when her relatives started looking for her phoning her. Her relatives asked where she was and she said was hidden. They told her to come back but said she was afraid. They followed her and went altogether back home where she found her father already dead and her mother being unconscious. People who were gathered there carried her mother and rushed to the hospital. PW1 said the police officers came next day and arrested Seni who was also living at the same compound but different house.

When cross examined by Ms. Neema Charles, PW1 said in 2016 she was living at Mwadui at Muze and on the 04<sup>th</sup> day of December 2016 at night there came some people who killed her father, however she did not identify any one of them.

When asked questions for clarification by the 1<sup>st</sup> assessor Geoffrey Mwiga, PW1 replied that seni is her brother they lived together with her father.

PW2, Magembe Kwilasi, a resident of Mwadui village, Mtowisa Division testified that on 04<sup>th</sup> of December 2016 at night hours almost

around 20:00 hrs he received a phone from the relatives of the deceased Lisesi Magadula. He was informed that Lisesi and his wife were invaded and injured with a panga. He went to the area of scene where he met cloud of people but found Lisesi was already dead and his wife was unconscious. He said people who were there took the wife of the deceased to the hospital. He saw people astonished of the event and they called Seni and started interrogating him with regard to the event. When further interrogated Seni said the guys are from Mpanda and thereafter admitted to have communication with them. Seni was told to phone those guys however, he (PW2) could not hear anything from the call. He asserted that upon asked, Seni agreed to have conspired with those guys. Seni told them that he has been humiliated. He reported the event to the Police who came around 1:00 hrs pm. The police arrested Seni and took him to the police station. PW2 said he know Seni, however it has been a long time he failed to identify him in dock.

When cross examined by Ms. Neema Chararles, PW2 replied that in 2016 he was acting Village Executive Officer of Mwadui village. He added that he was not present when the event happened. He said he recorded his statement to the police and he does not know who was involved in the killing of the deceased.

When re-examined by Mr. Mwashubila, PW2 replied that when the accused was interrogated by the people he was there hearing what was said by the accused.

On his part, PW3, ASP Thomas Kilakoi, police officer currently working at Ruangwa District as District Criminal Investigation Officer said in 2016, he was acting OC- CID of Sumbawanga District. He asserted that on 05<sup>th</sup> of December 2016 in the morning he received a report from Muze police post, that someone had been killed at Mwadui village. He then prepared police officers and a medical officer and they went to the area of scene.

At the scene they found the dead body outside the house, the dead body of male person and upon his investigation he found the dead body had a cut wound at the shoulder, head and on the neck. He said there was a lot of blood at the scene and upon entered the house he also found blood on the bed. He informed the court that through his observation it appeared that the deceased was attacked while on the bed and when trying to escape he got fallen outside the house near the door. He was informed by Militia men (sungusungu) that they had kept the accused under arrest suspecting him to have been involved in the crime. Thereafter, he asked the son of the deceased one Seni who

admitted to have been involved in the killing of his father and attacking of his mother and he was with his fellow two persons. He took the accused one Seni to the police station. They also passed through Muze Health centre where the wife of the deceased was attending treatment. He was told by the wife of the deceased that she was injured by the guys who attacked them, however she could not identify them. They arrived at Sumbawanga Police Station at around 4: 00 pm where he recorded the accused cautioned statement. He started recording the same at 04:30 pm. PW3 also tendered the accused cautioned statement which was admitted as exhibit P3 without any objection.

When cross examined by Ms Neema Charles, PW3, stated that he found the accused who was in a good condition under the arrest of the sungusungu. He added that the accused freely confessed to him and on interrogation the accused was free and the situation was calm. He finally said from Mwadui to Sumbawanga is almost 100 km and they left at Mwadui at 2:00 pm.

When re-examined by Mr. Mwashubila PW3 said that sungusungu were not there when he recorded cautioned statement as he left them at Mwadui village.

PW4, Rosta Mofuga, a Legal Assistant of High Court Judges at Musoma High Court Registry testified that on 07<sup>th</sup> of December 2016 he was at Sumbawanga Urban Primary Court where he was working as Primary Court Magistrate as he was Resident Magistrate Grade II. He told the court that on 07<sup>th</sup> of December 2016 in the morning hrs he was at his duty station and at noon time at around 12: 00 pm there came Police Officer DC Shadrack with the accused person who wanted him to record extra judicial statement. He said the accused was placed at the place where other accused were and he told the police officer to bring the accused in his office. The accused was brought and he took the Chief Justice Directives on how to record extra judicial statement. Before he recorded the statement, he introduced himself to the accused person and his position and the accused person introduced himself to be Seni Lisesi, then he was told by the police who accompanied the accused that the accused is charged with murder case. He then removed the police outside the office compound far from where the office is so as could not see and hear conversation which was taking place in the office.

After the police had left, he asked the accused different questions in Kiswahili, he responded successfully and he then inspected the accused body. He found the accused body had a healed wound on the

knees of both legs. As regard the healed wounds the accused said he was beaten by sungusungu at his home village. Having satisfied on his health condition and his general understanding as well his willingness to offer his statement, he asked him if he had any statement he wished to offer, he replied he has. He then started recording the accused statement he was offering to him. Thereafter, having recorded his statement he read before the accused the whole statement and the accused agreed the statement to be correct, the accused stamped by thumb and he also signed and hand over the accused to the police who brought him. PW4 tendered extra judicial statement which was admitted as exhibit P4 without any objection.

When cross examined by Ms. Neema Charles PW4 he stated that he knows the guidelines of Chief Justice on recording extra judicial statement. He added that the accused was willing to offer his statement without any force or promise. He said he was not aware and necessary for him as regard the wound of the accused as to whether were fresh or new.

The court having found that, the prosecution has sufficiently established a case against the accused person to require him to make his defence, the accused person was called to defend himself and he



elected to testify under oath. He testified as DW1. He neither called witness to testify in his favour nor tender exhibit. The summary of his evidence is as follows;

DW1, Seni Lisesi, a peasant, resident of Mwadui village, Mtowisa Division, Sumbawanga District testified that he knows the deceased one Lisesi Magadula. He was his father who is died and that on 05<sup>th</sup> of December 2016 he was at home. He remembered that on that date at night they were invaded by unknown people. He said it was night hours he did not manage to identify them. He narrated that those people entered in the house of his father. As he was with his wife in his house, he opened the door he was lightened the torch by the people whom he did not know as they told him if got out, he would be killed. He entered his house and when the shouts stopped, he got out and found his father at the house compound lying dead. He awakened the neighbours as it was almost 22:00hrs (night).

DW1 said when he came back with neighbours, he found his father was cut with pangas and was already dead. He stayed there till morning and at around 10:00 hrs he was arrested by sungusungu for being suspected in killing of his deceased father. The sungusungu took him to the forest where they severely beaten him while forcing him to

admit to have killed his father. He stated that he lost conscious and when regained his senses he was told by sungusungu to admit the killing otherwise they would kill him. To save his life he pleased them by admitting to have killed, however he said truly he did not commit the crime. He told them that he invited the bandits, however he said it was not true.

The police came and took him to Sumbawanga Police Station; however, he forgot the date. He added that he stayed at the police station for two days before he was taken to investigation room to record his statement where he denied to have known anything as far as the event is concerned. DW1 said that the police officer decided to write on his own story and he was recorded by a police one Thom who also took him from Mwadui to Sumbawanga Police station. He also said he does not know Likuba Mahila and Masanja. DW1 said police Thom did not read the statement to him as he was forced to sign by beating.

As regards the justice of peace, he agreed to have made extra judicial statement in which he admitted to have committed offence. That he admitted simply because he was remembering the beatings inflicted upon him by sungusungu and at the police. He prayed for the court to believe him that he did not commit the charged offence. He said that

the evidence of PW4 be disregarded because he went there with full of threat from police and same time remembering the beatings inflicted by sungusungu.

When cross examined by Ms. Irene Mwabeza DW1 replied that Police Thom took the statement from Sungusungu. He added that if not beaten by sungusungu he would not have confessed. He said the justice of peace did not introduce as justice of peace and he thought was a sungusungu, but he recorded the statement in the office and there were three of them, himself, police who sent him there and the justice of peace. He was threatened by the police who sent him there that if he does not admit he will see what will happen to him when back to the police. He denied to have known gachu jilala nor kulwa mahila and he never invited people to kill his father. He is as well does not know why his father was killed. He also denied to have known Magembe as he came to know him at the court.

When re-examined by Ms. Neema Charles DW1 told that he offered statement to Sungusungu only to save his life from beatings, but it is not true that he killed his father.

When defence case was closed, both the state attorney and the learned advocate for the republic and accused person respectively were

given audience to address the court on final submissions. They all opted not to file. They left the matter to the court. After thoroughly going through prosecution and the defence case I summed up to court assessors who thereafter gave their respective opinions. In their considered opinion, one gentleman assessor opined that the accused person be found guilty of the offence facing him thus be convicted while remaining two gentleman assessor and lady assessor both opined that the accused be found not guilty of the offence facing him and thus be acquitted.

The main issue before this court is whether or not the accused did cause the death of the late Lisesi s/o Magadula and if the answer is in affirmative then whether he did so with malice afore thought.

In the instant case, it's not in dispute that as per exhibit P.I the deceased, Lisesi Magadula met his untimely death on the 04<sup>th</sup> of December 2016, as a result of being assaulted by unknown persons. The issue is who assaulted him leading to his death. According to the totality of the prosecution testimony, none of the witnesses testified to have seen the accused person assaulting the deceased. The accused is only connected with the death of the deceased by his statements he confessed before Sungusungu, Police and Justice of the Peace.

In the situation like of this case, where no one saw the accused person assaulting the deceased with a panga, three issues must be taken into consideration before making a decision; that is firstly, evidence tendered against the accused person, two; law relating to confession and thirdly; the malice afore thought.

As regards the evidence against the accused person, it is the principle of law that for the court to find the accused person guilty of the offence of murder the available evidence must link the accused person with the said death. That position was clearly stated by the Court of Appeal in the case of **Mohamed Said Matula versus Republic**[1995] TLR 3 where the Court held 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 shift away from the prosecution and no duty is cast on the appellant to establish his innocence"*

In the present case, a total of four prosecution witnesses were summoned and paraded to substantiate that the accused person killed the deceased. Neither of the witnesses testified to have seen the accused person assaulting (attacking) the deceased resulted to his

death. However, there are statements, that is cautioned statement and extra judicial statement admitted in this case as exhibit P.3 and P.4 which were read before the court by PW3 and PW4 respectively. In the statements, the accused person confessed in the involvement in the killing of the deceased one Lisesi Magadula.

Since the available evidence hinges on the statements offered by the accused person, the issue to be resolved is whether the confession (statements) led by the prosecution proved the case against the accused person on the standard required by law in criminal cases.

There is no dispute regarding the death of the deceased as evidenced by exhibit P.I, a post mortem report (the report) and the scene of crime as evidenced by exhibit P.2 which were tendered during preliminary hearing. The report shows that the death occurred as a result of severe haemorrhage due to extensive multiple cut wound on the left jaw, left shoulder, stomach, right side of the chest and the neck. The sketch map of the scene of crime displays the scene of crime.

I now begin with the issue of confession. The law is very settled that a court of law may ground conviction based on confession containing nothing but the truth of what transpired. The law relating to

confession is provided by the provision of **section 27 of the law of Evidence Act[Cap 6 RE 2019]** which provides that;

1. *"A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.*
2. *The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.*
3. *A confession shall be held to be involuntary if the court believes that it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the police force or any other person in authority"*

The above provision under section 27 of the Evidence Act have got judicial interpretation and there are number of decisions. The decisions of the court state that the validity of confession is that it must be voluntarily made by an accused person. In the historical case of **TUWAMOI VERSUS UGANDA [1967] E.A 84**. The Court of Appeal for East Africa had an opportunity to address on the main important part of confession;

*“The main essential for validity of a confession is that it is voluntary”*

The details as to the importance of voluntariness was discussed in the High Court case of **Josephat Somisha Maziku versus Republic [1992]TLR 227**, where the Court decided the following;

1. *“While it is trite law that the condition precedent for the admissibility of a confession is its voluntariness, a confession is not automatically inadmissible simply because it resulted from threats or promise, it is inadmissible only if the inducement or threat was of such a nature as was likely to cause an untrue admission of guilty;*
2. *Where you have threats and a confession far apart without a causal connection, and no chance of such threats inducing confession, such confession should be taken to be free of inducement, voluntary and admissible;*  
  
*And*
3. *It is principle of evidence that where a confession is by reason of threat, involuntarily made, and is*



*therefore inadmissible, a subsequent voluntary confession by the same maker is admissible, if the effect of the original torture, or threat, has before such subsequent confession, been dissipated and no longer the motive force behind such subsequent confession.*

The above holding also is emanated from the provision of **section 29 of the Evidence Act [Supra]** which reads as that;

*"No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilty to be made"*

Also, the see the case of **Hemed Abdallah versus Republic [1995] TLR 172, Athuman Hussein versus Republic [1988] TLR 246** discussing the above practice.

The question I ask myself is whether the available confession evidence implicates the accused person with the offence of murder. This

is because the law is very clear that confession which is voluntary made and proved is admissible in evidence. In some cases, trial court may ground conviction solely on confession without corroboration if it considers and accepts what transpired was nothing but the truth and was made voluntarily. See the case of **Shija Luyeko versus Republic [2004] TLR 254.**

In the present case, the statements made by the accused person were not protested/ objected from its recording both to the police officer and to the justice of peace during preliminary inquiry and preliminary hearing. It is was when the accused was testifying, he appeared to protest cautioned statement that it was a result of his beatings and torture allegedly executed by sungusungu during his arrest at his home village of Mwadui and at the police during investigation and at interrogation office at Sumbawanga Police Station.

He further stated that the beatings inflicted upon him by sungusungu at bush where he was sent after his arrest made him to confess to have admitted the killing of the deceased unwillingly before the police officer one Thom and later to justice of peace. The accused appeared before the justice of the peace on 07<sup>th</sup> of December 2016 to record the statement almost two days had passed from the day he was

interrogated at the police office. The justice of peace who recorded extra judicial statement inspected the accused and found his body to have some healed wounds which the accused told the justice of peace that such healed wound was a result of beatings by sungusungu at his home village at Mwadui. He also said to have been threatened by a police DC Shedrack who accompanied him to the justice of peace so as to admit the killing.

It is worthy to note that, when the accused was testifying in examination in chief in this court, on 04<sup>th</sup> of April 2021 he did not inform this court as to whether or not he underwent any treatment in the hospital as regards his wound or tender any documentary medical treatment as regard his allegation. The accused person first appeared for committal proceedings in P.1 No. 33 of 2016 before Hon. A.B Mwanjokolo [District Resident Magistrate] and then before Hon. E. Y. Wilson [District Resident Magistrate] between December 2016 and June 2018, but said nothing to his allegation. Even where he was asked by the committal court on 19<sup>th</sup> of June 2018 if he has anything to say, he opted to say nothing.

The same trend happened during the preliminary hearing in this court before Hon. Judge D.E Mrango on 05<sup>th</sup> of October 2018, he

remained silent. The accused informed this court for the first time of the beatings and threats during the hearing of this matter at the defence stage. If that was a strong allegation of him, he could have informed his learned advocate to object the statements as early as possible.

I also find that the details as regard the killing of the deceased in both the cautioned statement and in the extra judicial statement relate and frankly speaking cannot be narrated by any other person. The narrations speak of the reasons for the killing, plan to execute the killing, names of bandits involved and the place of killing. As it was observed in the case **William Mwakatobe versus Republic, Criminal Appeal No. 65 of 1995**, the Court held that;

*"Confession was so detailed, elaborate and thorough that no any other person would have known such personal details but the appellant"*

In this case, as I found hereinabove, confession as made by the accused containing nothing but the truth of what transpired before the event and during the event which may be relied by this court to determine its admissibility and as well conviction.

This being a criminal case, as pointed above, the burden of proof is generally on the prosecution and the standard is beyond reasonable

doubt. See **Mohamed Matula versus Republic [supra]** also **Twaha s/o Ali and 5 Others versus republic, Criminal Appeal No. 78 of 2004**, unreported.

In the present case, neither of the witnesses paraded to testify before this court saw the accused killing the deceased. However, what I have discussed above reveals that the prosecution side has successfully proved its case against the accused beyond reasonable. The cautioned statement and the extra judicial statement of the accused person were admitted in evidence without any objection from Ms. Neema Charles, who was the defence counsel and the same were cross examined.

In my strong opinion, the cautioned statement and the extra judicial statement recorded by the accused are admissible in evidence as were voluntarily made and this court considered and accepted its truthfulness, thus warrant conviction without corroboration as per the case of **Shija Luyeko versus Republic [supra]**.

The remaining main issue to be resolved by this court is whether the accused killed the deceased with malice aforethought. The law regulating malice aforethought is found under **section 200 of the Penal Code, Cap 16 RE 2019** to mean;

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 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 by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit an offence.*

It is cardinal principle of law in murder cases, that conviction cannot stand unless the prosecution has successfully established both the overt act (actus reus) and malice aforethought (mens rea).

The Court of Appeal decision of **Enock Kipela vs. Republic, Criminal Appeal No. 150 of 1994**, unreported, provides useful

information when it comes to the question of ascertaining as to whether the killing committed by the accused was done with malice aforethought or not. It was observed that;

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

- (i) The type and size of the weapon which was used in the attack leading to the death of the deceased;*
- (ii) The amount of force which was used by the attacker in assaulting the deceased;*
- (iii) The part or parts of the body of the deceased where the blow/s of the attacker were directed at or inflicted;*
- (iv) The number of blows which were made by the attacker although one blow may be enough depending on the nature and circumstances of each particular case;*
- (v) The kind of injuries inflicted on the deceased's body;*

- (vi) *The utterances made by the attacker if any during, before or after the attack;*
- (vii) *The conduct of the attacker before or after the incident of attack”*

When I put a test to the above factors into our case regarding the available circumstances at hand, I find that on available evidence as established by the prosecution side sufficiently established that the killing of the deceased was made with the use of a panga which is a lethal weapon. The confession in the cautioned statement and extra judicial statement reveals that the accused hired bandits to kill the deceased by using pangas, and the same happened where the post-mortem examination report reveals that, the body of the deceased was found with multiple cut wounds on various parts of her body, which is to the left jaw, left shoulder, to the stomach, the right side of the chest and the neck.

The conclusion I get from foregoing cuts is that several cuts were inflicted by the accused on the body of the deceased, great force was used by the accused in assaulting the deceased, and the cuts were focused on the delicate parts of the body of the deceased.



To combine all the events, the facts and the evidence of the prosecution which clearly point the accused actually that he killed the deceased by cutting him, I am of the strong opinion that the element of malice aforethought, *mens rea* has been established to the satisfaction of this court.

Finally, I shake hands with my esteemed gentleman assessor Geoffrey Mwiga who entered a verdict of guilty and depart from my esteemed gentleman assessor Patrick Wanyama and lady assessor Grace Ndolezi who entered a verdict of not guilty and proceeded to find that the offence of murder against the accused person has sufficiently been proved according to the requirement of the law. Therefore, I find the accused person guilty of the offence of murder contrary to **section 196 of the Penal Code**, and I hereby convict him for the offence of Murder as per section 196 of the Penal Code Cap 16 Vol. 1 of the Laws.



**D.B.NDUNGURU**

**JUDGE**

**14.05.2021**

## SENTENCE

There is only one punishment for the offence of Murder once it is proved. My hands are tied by the law and I have to pronounce the sentence. I sentence you Seni s/o Lisesi Suffer death as provided under section 197 of the Penal Code Cap 16.

I further direct that you shall suffer death by hanging as provided by Section 26(1) of the Penal Code Cap 16 R.E 2019.

It is so ordered.



  
**D.B.NDUNGURU**  
**JUDGE**  
**14.05.2021**

Right of Appeal explained.