

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA - SUB REGISTRY
AT MBEYA
CRIMINAL SESSION CASE NO. 77 OF 2022
REPUBLIC
VERSUS
SHUKRANI S/O PITSON KAMWELA

JUDGMENT

Date: 11 June 2024 & 20 June 2024

SINDA, J.:

In this matter, **Shukrani Pitson Kamwela**, is charged for the offence of murder contrary to section 196 and 197 of Penal Code, Cap. 16 R.E 2022. As per the particulars of the charge and prosecution evidence, he is accused of murdering one Subira Posita Kibona, his wife.

It is undisputed that the victim died unnaturally. The evidence presented by the prosecution revealed that the deceased died of a wound and was also burnt.

The remaining important question is whether the accused committed the offence he stands charged with. In proving its case, the prosecution called

four witnesses and one exhibit (**PE1**). Its case started with one Eva Mackson Kaponge (**PW1**) the mother of the deceased. In linking the accused with the alleged murder, she stated that, the accused married the deceased in 2021. The deceased and the accused used to stay at the house of the accused father. On 13 January 2022 at night the deceased father-in-law went to PW1 house and informed her that the deceased was not at home. PW1 communicated with various relatives who said they did not see the deceased. On the next day, PW1 informed the village chairman about the disappearance of the deceased. Later on, PW1 was informed that the accused went to the ten-cell leader and confessed that he killed his wife Subira at Chikulungu mountain. They went to the scene of crime together with people from the village office. They found the body of the deceased injured with a sharp object on the back and was burnt. They buried the body there because it was decomposed.

On cross examination she stated that she was informed by the hamlet chair person that the accused killed the deceased. The accused confessed to the leaders of the village that he murdered deceased. They found the deceased body in tunnel in the mountain.

PW2 was one **Musa Mjobige Haonge**, he testified that previously he was a ten cell leader. On 13 January 2022, at 8 p.m he received

information from the accused that his wife had disappeared since morning. He told him to check again tomorrow maybe she was at her parents house. On 15 January 2022, the hamlet chairperson called a meeting. They discussed the information that Subira had disappeared. After the meeting around 8:00pm, the accused went to PW2 home and confessed that he killed his wife by stabbing her with a knife and burnt her body with fire in a mountain tunnel of Nasashukuruni. PW2, decided to send the accused to hamlet chairperson. Later, they went to the accused parents and told the accused to repeat what he said to PW2. The accused confessed in front of his parents that he killed the deceased at the mountain. Then, they decided to take the accused to the village office for safety. On 16 January 2022 they went to that mountain, and found the deceased with wounds on her back and her body was burnt with fire. On cross examination he said that the body of deceased was found at Nashukuruni tunnel.

PW3 was one **Ostin Laston Mdolo**, he testified that he lives at Ilanga village, Illeje District. He stated that he was a hamlet chairperson. On 13 January 2022 at 8:30pm he was informed by PW2 that the accused wife was missing. They took some effort to investigate on her disappearance but in vain. On 15 January 2022 around 8:45pm PW2 went to his home

with information that the accused confessed to him that he killed the deceased. They went to accused parents and the accused also confessed that he killed the deceased with a knife. When they arrived at the mountain they noticed that the deceased body was burnt with fire. They detained the accused at the village office. On 16 January 2022 they called the people of Ulanga village and went to mountain. They found the deceased body in a tunnel stabbed with a sharp object on the neck and at the back. The body was also burned with fire and decomposed. The deceased body was buried there because the body was decomposed. He further stated that they recognised the deceased body because of the accused words together with the piece of clothes she wore.

On cross examination he said that he didn't see the remained clothes but heard from the parent. On 15 January 2022 they slept with the accused at the village office. He has no evidence to prove that the accused went to him and PW2 to confess. He said that he gave his statement at the police station. In that statement he said that the accused told him that he killed his wife but he doesn't remember the place.

The last prosecution witness was one was one **G.5969 CPL Grayson (PW4)**, he testified that he is a police officer at Ileje police station. On 16 January at 2 p.m he was at home. He received a call from OC-CID at

Ileje that at Mlale ward, Ilanga village there was a murder. He went to the police station and found his fellow policeman. They found a doctor and went to the scene of crime together with the OC-CID and other investigator. They went to the scene of crime and found the deceased body in a tunnel. The body was burnt and decomposed. The body was examined by a doctor and was identified by her relative. They found that the body was stabbed with a sharp object at the ribs and neck. At the scene of the crime, he drew a sketch map which was tendered and admitted in court as exhibit PE1. He further stated that he was informed that the accused confessed to village leadership that the accused killed his wife. He stated that he met the accused while at the police station.

On cross examination, he stated that the deceased mother identified the deceased body through her clothes which the deceased wore.

Following a ruling on prima facie case, the accused was invited to enter his defence. He testified as DW1.

In his testimony, he testified that he lives at Ilanga village. On 13 January 2022 at 8pm, he was coming from the market heading to his home he met with three people that he did not know. They told him that he is very proud because of his motorcycle. They told him, he will see what they will do to him. He went home. On 14 January 2022 at around 8:00am he went

to report the incident at the police station. They told him to wait because their boss was not there. Later on, they told him to sleep at the police station for his safety. On 15 January 2022, the police officer told him that he had murdered a person. he accused denied, he stayed there until 20 January 2022 when he was sent to court for killing the deceased.

On cross examination he stated that the deceased was not his wife. He never married. He knows that PW2 was ten cell leaders. He doesn't know PW1 and PW3, he never confessed to PW3 that he killed deceased, he has no conflict with PW2.

In final submission the defence contended that the evidence adduced by the prosecution based on hearsay and was not collaborated by their witnesses. The defence added that no one of the prosecution witnesses saw the accused with the deceased and the evidence of PW4 failed to connect the accused with the offence. The defence further stated the prosecution failed to prove the case beyond reasonable doubts.

In final submission the prosecution submitted that this court be guided by the principles of oral confession of the accused person and credibility of the witnesses to find the accused responsible for the death of the deceased. On oral confession they relied on the cases of the **Director of Public Prosecutions vs Nuru Mohamed Gulamrasul** (1988) T.L.R

and **Chamuriho Kirenge @ Chamuriho Julias vs. The Republic**, Criminal Appeal No. 597 of 2017.

On the issued of credibility of witnesses, the defence referred to the cases of **Seleman Dago @ Swalehe vs. The Republic**, Criminal Appeal No. 59 of 2022 and **Mathias Bundala vs. The Republic**, Criminal Appeal no. 62 of 2004 to support their argument.

Considering the evidence on record, it is clear that the prosecution presented circumstantial evidence in proving the offence against the accused. There was no eye witness who witnessed the murder of the deceased one **Subira Kibona**. This is in consideration of the evidence of PW1, PW2 and PW3, who testified that the accused confessed to PW2 and PW3 on killing the deceased.

The Court of Appeal in the case of **Ndalahwa Shilanga and Buswelu Busaru vs. Republic** (Criminal Appeal No. 247 of 2008) stated the conditions that have to be met for circumstantial evidence to be considered by the court in finding the accused liable of the offence charged as hereunder:

- i. The circumstance from which an inference of guilty is sought to be drawn must be cogently and firmly established:

- ii. Those circumstances must be a definite tendency unerringly pointing towards the guilt of the accused:
- iii. The circumstances taken cumulatively, should form a chain so, complete that there is no escape from conclusion that within all human... the crime was committed by the accused and not anyone else.

In the case of **Zakaria Jackson Magayo vs. The Republic** (Criminal Appeal No. 411 of 2018), the Court further stated that the facts must be so connected to lead to no other conclusion than the guilt of the accused person. The Court revisited its previous decision in the case of **Hamida Mussa vs. Republic** (1993) TLR 123 in which it held:

"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"

The Court further cited the decision in **Republic vs. Kipkering Arap Koske & Another** (1949) 16 E.A.CA 135 in which the Court of Appeal for Eastern Africa quoting with approval an expert from a book by **Wills on Circumstantial Evidence, 6th Edition, at page 311**, stated:

"In order to justify the inference of guilt, the inculpatory facts, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

See also: **Mashaka Juma @ Ntatula vs. The Republic** (Criminal Appeal No. 140 of 2022): **Gabriel Simon Mnyele vs. The Republic** (Criminal Appeal No. 437 of 2007) and **Ecksevia Silasi & Another vs. The Republic**, Criminal Appeal No. 93 of 2011 (CAT at Mtwara, unreported), in which the Court insisted that circumstantial evidence must irresistibly point to the guilt of the accused person.

I will proceed to deliberate as to whether the circumstantial evidence presented suffices to hold the accused accountable. As stated earlier, the evidence presented by the prosecution against the accused is highly circumstantial. I find the circumstantial evidence not pointing to the accused directly as required under the law as discussed earlier in this judgement.

It is a settled position of law that when a charge of murder is preferred against an accused person, the onus is always on the prosecution to prove not only the death of the deceased but also the link between the alleged death and the accused person. The prosecution must prove the case beyond reasonable doubt.

In case of **Mohamed Said Mutula vs. Republic [1995]** 3 it was 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."

The issue of determination is whether the prosecution side proved their case beyond reasonable doubt that the accused killed the deceased.

Going through evidence adduced by the prosecution, I find that there was no eye witness who witnessed the murder of the deceased one Subira Kibona. The only evidence on record which link the accused person with this offence are evidence from PW2 and PW3. Their evidence was based on oral confession of the accused person which led to discovery of the deceased body.

The term confession is defined by the law under section 3(1) (a), (b), (c) and (d) of the Evidence Act, Cap. 6 R.E 2019 (the **Evidence Act**) to mean words or conducts or combination of both or a statement containing an admission or affirmative declaration of all or substantial ingredients of the offence with which its maker is charged with and/or from which an inference may reasonably be drawn that its maker has committed an offence. Confession can be in written form before the police officer or justice of peace or orally made before any reliable witness.

In the case of **Posolo Wilson @ Mwalyengo v. Republic, Criminal Appeal No. 613 of 2015 (unreported)** the court gave guidance as to when oral confession to be relied upon. The court stated as follows;

*"Oral confession made by a suspect before or **in the presence of a reliable witnesses**, be they civilian or not, may be sufficient by itself to found conviction against the suspects."*

Also, in **John Peter Shayo and Two Others vs. R.** (1998) TLR 198 it was held that: 16

*"As a general rule, oral confessions of guilty are admissible **though they are to be received with great caution...."***

Therefore, the question is whether PW2 and PW3 are reliable witnesses. Going through the evidence adduced by PW2 and PW3, I find that their

evidence was inconsistent. PW2 stated that accused person confessed to him that he killed the deceased by stabbing her with a knife and later burnt the body in a tunnel at Nashikurungu Mountain. PW3 stated that the accused confessed that he killed his wife at Nashikurungu with a knife. PW3 further stated that upon arrival at the scene of crime they discovered that the body was also burnt with fire. From this evidence I get doubt on the fact of the accused to burn the deceased body with fire. It is unclear whether the accused confessed that he burnt the deceased body prior to going to the scene of crime or they knew that after they arrived at the scene of crime and see the deceased body.

Also, PW3 during cross examination stated that he gave statement at police station that the accused stated that he killed the deceased but he doesn't remember the place that he left the body. PW3 stated that PW2 was the one who stated that the accused said he killed the deceased at Nashikurungu. In that regard, I wonder were PW3 got information which he testified in court that accused told them that he killed his wife at Nashikurungu. I find therefore that PW2 and PW3 were not reliable witnesses. The evidence adduced by PW2 and PW3 was an oral confession made by accused to them and was supposed to resemble.

Furthermore, there was no evidence which show that the accused directed them to the place where he left the deceased body and that was the same place where they found the deceased body. As per the evidence on record the accused didn't even go to the scene of crime for purposes of directing people to the place where he left the deceased body.

If the evidence of PW2 and PW3 contains truth, I had expected the accused to led them to the crime scene. The accused was available as it was stated that on the night of 16 January 2022, he slept at the village office.

It was also evidence from prosecution that the deceased body found at Nashikurungu was burnt and decomposed. PW2 and PW3 stated that they knew it was the body of Subira Kibona because of the confession of the accused. It was stated that the deceased body was identified by her mother through her clothes. However, the deceased mother PW1 during hearing never said anything regarding the identification of the deceased body or clothes that she wore. It is not clear to this court that the body which was burnt and decomposed was that of Subira.

In case of **Katabe Kachochoba vs. Republic** [1986] T.L.R 170, the Court had this to say in an almost similar scenario, at page 172: -

"It may well be that the heart and kidney were human remains, as found by the judge. But that evidence is not conclusive and better and more conclusive evidence in that respect was available and for reasons which are not clear to us, was not produced. We are not prepared to accept a layman's view that the kidney and heart and part of a skull were human remains in the circumstances. And naturally we cannot therefore conclude that those remains were without doubt those of Ali Malela who had been killed and burnt."

In our case, it was testified that the body of the deceased was found burnt and decomposed that's why they buried it at the place of incident. In line with the above case in my opinion even in this case there was a need of prosecution to prove that the remains found at Nashikurungu was human remain. In the case of **Tuwamoi vs. Uganda** the Court of appeal stated that

"The present rule then as applied in East Africa in regard to a retracted confession is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in absence of corroboration in some material particular but that the court

might do so if it is fully satisfied in the circumstances of the case that the confession is true."

Considering the doubts that have emerged in this case and in line of the above authorities, it is unsafe to rely on the alleged oral confession of the accused person alone to convict the accused while the same was retracted by the accused person. From the evidence of PW2 and PW3 regarding oral confession of the accused it shows that they were inconsistent.

In the circumstances, the prosecution has failed to prove its case beyond reasonable doubt. I therefore find the accused person **Shukrani s/o Pitson Kamwela** not guilty for offence of murder he stands charged with under section 196 and 197 of the Penal Code, Cap 16, R. E. 2002 and consequently I acquit him from the same charge.

Right to appeal explained.

Dated at Mbeya on this 20 day of June 2024.



A. A. Sinda

A. A. SINDA
JUDGE