

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MOSHI SUB-REGISTRY)
AT MOSHI
CRIMINAL SESSIONS CASE NO. 77 of 2023
REPUBLIC
VERSUS
KAROLI AUGUSTINO PUKA
JUDGEMENT

Date of Last Order: 12.02.2024
Date of Judgment: 08.04.2024

MONGELLA, J.

In the case at hand, **Karoli Augustino Puka**, is charged for the offence of **murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E. 2019**. As per the particulars of the charge and prosecution evidence, he is accused of murdering one **Constatine Leiya Puka**, his paternal uncle. The offence is alleged to be committed on 11.02.2022 at around 22hours. The accused denied the charge levelled against him shouldering the prosecution with the task of proving the case beyond reasonable doubt, as required under the law.

It is undisputed that the victim in this case, the said, Constatine Leiya Puka, died unnaturally. The evidence presented by the prosecution revealed that the deceased died of severe bleeding

from multiple cut wounds. In addition, all witnesses from the prosecution and defense testified to the unnatural death of the deceased. As such, I shall not dwell on this issue.

The remaining important question is whether the accused committed the offence he stands charged with. In proving its case, the prosecution paraded five (5) witnesses and two (2) exhibits. Its case started with one, **Augusti Anselim Puka (PW1)**, a relative to the accused and the deceased. In linking the accused with the alleged murder, he stated that, on the material date of 10.02.2022, the accused passed by his home at around 22:47 hours and told him that he was going to warn the deceased and that, if he (PW1) comes to intervene, he shall finish him as well. That, the accused further told him that he was going to warn the deceased by canning him with sticks. That, the accused had previously canned the deceased with sticks for coffee seedlings which the accused had uprooted from the deceased's farm and planted in his own farm.

PW1 further claimed to have seen the accused holding a machete that night and heading to the deceased's house. That, in the morning, at around 06:30hours, that is, on 11.02.2024, while on the way taking his children to school, he found the old man lying on the road in a pool of blood, cut with machetes. That, the machete was left on the deceased's head. He therefore went to report to the village chairman who called the police. Though PW1 did not witness the accused killing the deceased, he was convinced that

the accused was the culprit considering the testimony he adduced.

On cross examination, he gave contradictory testimony as to his relationship with the accused. On one hand, he said the two were not in good relationship and on the other hand, he said they had no any problem. When asked as to the actions he took upon seeing the accused heading to the deceased's home with a machete, he said that he had no worries as he never thought that the accused would harm anyone. When asked about hearing any alarm, he replied that, though the distance from his house to that of the deceased is not so far, that is, 25 meters, he did not hear any noises as he was asleep. He denied there being any quarrel between him and the deceased as well. When asked as to the marks identifying the machete, he said that he did not remember and could not tell if it was the same machete that he saw the accused holding and found at the crime scene.

PW2 was one **Isack Augusti Puka**, PW1's son aged 9 years. After promising the court to tell the truth and not lies, he testified as to the character and relationship between the accused and the deceased. Very briefly, he told the court that on 10.02.2024, when heading to school in the morning, he saw the accused canning the deceased with sticks. On cross-examination, when asked about the relationship between the accused's family and his father (PW1), he said that they were not in good terms as his father told him not to visit their home as they were witches. He denied

being taken to school by his father on the date the offence is alleged to have been committed.

The accused was arrested by **PW3**, one **E7713 SGT Hassan** at 05hours in the morning, at his home in Uru-Shimbwe area within Moshi municipality. He testified that they found the accused hiding in the roof following information they got from an informer. That, one CPL Mchunguzi climbed into the roof and found the accused sleeping there. He took him down whereby **PW3** received him, handcuffed him and later took him to Majengo police station. However, before he took him to the police station, he said, he questioned the accused as to why he was hiding in the roof. The accused replied that he hid in the roof as villagers were searching for him wanting to kill him because he had killed his uncle.

The prosecution further banked on the accused's cautioned statement (exhibit P1) recorded by **PW4** one, **E8231 SGT VITALIS**. He testified to have recorded the statement on 12.02.2022 at 07hours. Explaining how he conducted the whole recording process, he said that after fetching him from the lockup, he took him to the office of one, Inspector Mixon. The said officer let the room free for them to conduct the interrogations. He said that before interrogating the accused, he informed him of the manner in which he shall be interrogated, that is, by questions and answers whereby he shall freely give his answers without influence from anyone. That, he warned him that the statement he shall give shall be used in court against him and further informed him of his right

to have a relative, friend or lawyer while giving his statement or being alone. That, the accused opted to give the statement alone.

In relation to the commission of the offence, **PW4** stated that the accused, in his statement, confessed into committing the offence he stands charged with. That, he told him that he killed his uncle, one Colman Augustino Puka because his uncle went to his farm and uprooted his coffee seedlings without his permission and uttered to him unpleasant words when he inquired about that. That, the reply from his uncle made him angry leading him to commit the offence whereby he used a machete as a weapon. PW4 continued saying that the accused told him that he cut the deceased with the machete only once on the head and after committing the act, he went back to his home to rest and the next morning he went to his farm to continue with his farm activities. That, the accused further told him that, while he was at the farm, he heard a crowd of people looking for him for killing his uncle. He got scared and decided to escape from the farm whereby he went back home to hide in the roof. That, he stayed in the roof till night when the police officers arrived and got him down and took him to Majengo Police Station.

The last prosecution witness was one, **WP 5909 DC Martha (PW5)**. This is a police officer from the CID department stationed at Majengo police station in Moshi. She was among the investigation team in the offence involved in this case. She testified that after

being assigned the case file to conduct investigation, she gathered evidence in corroboration with fellow police officers. Personally, she was involved in supervising the postmortem examination of the deceased's body which was done on 14.02.2022 at 13hours. The postmortem report (PMR) was handed to her by the medical officer who conducted the examination at KCMC Hospital. She tendered the PMR which was admitted in court as "exhibit P2." The exhibit showed that the deceased died of severe hemorrhage due to multiple wounds, that is, about eleven (11) cut wounds on the right side of the face. The right eye was damaged and the cut led to bone fractures on the right side of the face. It also revealed another wound on the stomach of about 8 by 2 centimeters. Apart from presenting the contents of the PMR, **PW5** on cross examination stated that she as well witnessed the 11 wounds on the deceased's body.

Following a ruling on *prima facie* case, the accused was invited to enter his defence. He testified as DW1 and called another witness, her sister.

In his testimony, he claimed the case to have been fabricated against him. He denied going to PW1's house and telling him that he was going to warn the deceased. He complained that PW1 lied against him following a conflict in their family which has lasted for about 20 years involving farms and witch craft accusations. He continued disowning the confession statement tendered by **PW4** saying that the same was not his, it belongs to the police. He said

that the police brought the statement by severe threats and forced him to sign. That, he was beaten and his finger pressed on the ink and then on paper. When shown "exhibit P1" he admitted the same bearing his hand writing on the verification clause, however he defended that the police brought a piece of paper already written and told him to copy the words contained therein on another piece of paper and thereafter forced him to sign. He repeated that the police took his hand, pressed it on the ink and then on the paper/words they had forced him to write.

Further defending against the testimony of PW1, he said that PW1 had already announced that he was going to get people to come and kill him. That, he announced the same to the people of Uru-Shimbwe and did that following the conflict between them on farms and witchcraft accusations. That, he as well told people that he (accused) had committed murder and told those people to search for him and kill him, something which led him to hide in the roof. In what can be interpreted as denying being taken down the roof by the police, as presented in the prosecution evidence, he said that his young brother came and told him to get down as the police were around.

On cross examination, he changed the story whereby he denied being beaten by the police. However, he claimed to have been severely tortured and threatened. He said that he was hanged upside down with ropes and water poured on him until he lost strength.

DW2, one, **Faustina Faustine Puka**, first testified as to the relationship among members of their clan. She said the relationship was not good for there being conflicts on farms and witchcraft accusations. That, due to the conflicts, they even do not visit each other at their homes. Testifying on the event, she said that the day the accused was arrested, she was at home whereby there were many people surrounding their home waiting for him to get out of the house so that they kill him. She thus called the police who arrived and found him hiding in the roof. That, one of the police officers went to get him from the roof after assuring him that he would be in safe hands.

DW2 was convinced that the case against the accused was made up due to the conflicts in the family/clan. She added that the deceased used to trade in local brew famously known as "gongo." That, the rumors in the street are that he failed to reach an understanding with his fellow businessmen/partners on the money/proceeds in their business. That, the misunderstanding led them to threaten each other with each of them threatening to deal with the other and thereafter, the murder incident occurred.

Talking about the distance from the accused's house to that of PW1's, she said that it is about 1-1½ kilometers. From PW1's house to that of the deceased, she said it is near, about 30 meters whereby one can hear an alarm being raised as food can as well be smelled from those houses. She added that the distance is too short as one can see a person walking around the houses.

Considering the evidence on record, I can confidently say that the prosecution presented two main kinds of evidence in proving the offence against the accused. **First** is circumstantial evidence. This is in consideration of the testimony of PW1 and PW2 who testified as to the conflict between the accused and the deceased. PW1 stated that the accused passed by his home telling him that he was going to the deceased's home to warn him for uprooting his coffee seedlings while holding a machete. PW2 also testified as to the accused's character of canning the deceased. The Court of Appeal in the case of **Ndalahwa Shilanga and Buswelu Busaru vs. Republic** (Criminal Appeal No. 247 of 2008) [2011] TZCA159 (15 November 2011) pointed out 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 circumstance 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 one else.

In the case of **Zakaria Jackson Magayo vs. The Republic** (Criminal Appeal No. 411 of 2018) [2021] TZCA 207 (19 May 2021) 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 **R. vs. Kipkering Arap Koske & Another** (1949) 16 E.A.C.A 135 in which the Court of Appeal for Eastern Africa quoting with approval an excerpt 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) [2022] TZCA 506 (15 August 2022); **Gabriel Simon Mnyele vs. Republic** (Criminal Appeal No. 437 of 2007) [2010] TZCA 97 (22nd December 2010), cited by the defence counsel, Mr. Emmanuel Anthony, in his submission; 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.

Before stating my finding as to whether the circumstantial evidence presented suffices to hold the accused accountable, I wish to deliberate on the **second** piece of evidence presented by the prosecution. This is with respect to the cautioned statement allegedly made by the accused before PW4, that is, “exhibit P1.” It should be noted that the defence side objected the admission of the cautioned statement on two main reasons being: **first**, contravention of **Section 57 (3) of the Criminal Procedure Act, Cap 20 R.E. 2022**, which requires the recording police officer to certify if he has read to the accused the statement after recording the same. The defence also supported its stance with the case of **Chamuriho Kirenge @ Chamuriho Julius vs. The Republic** (Criminal Appeal No. 597 of 2017) [2022] TZCA 98 (7 March 2022). For ease of reference, I wish to reproduce the contents of **Section 57 (3) of the Criminal Procedure Act**, as hereunder:

- “(3) A police officer who makes a record of an interview with a person in accordance with subsection (2) shall write, or cause to be written, at the end of the record a form of certificate in accordance with a prescribed form and shall then, unless the person is unable to read-
- (a) Show the record to the person and ask him-

- (i) To read the record and make any alteration or correction to it he wishes to make and add to it any further statement that he wishes to make;
 - (ii) To sign the certificate set out at the end of the record; and
 - (iii) If the record extends over more than one page, to initial each page that is not signed by him; and
- (b) If the person refuses, fails or appears to fail to comply with that request, certify on the record under his hand what he has done and in respect of what matters the person refused, failed or appeared to fail to comply with the request.

The court's ruling in this issue was reserved to this point of writing judgement. I have gone through "exhibit P1." At page 4 of the exhibit, it is shown that the accused read and found the statement to be correct. He as well, as argued by Mr. Makule, learned state attorney for the prosecution, that the accused verified as to the correctness of his statement. The recording officer, as well, certified in accordance with the requirement under Section 57 of the Criminal Procedure Act. The case of **Chamuriho** (supra) referred to by the defence counsel in support of the objection is found to be distinguished. The case discussed the application of **Section 57 (4) of the Criminal Procedure Act**, which is not the subject of the objection by the defence as it directs on situations where the accused does not know how to read and write. As such, this limb of objection is found to be unmerited and is overruled.

The second objection was based on voluntariness in issuing the cautioned statement. Though the statement was admitted in

evidence by the court after trial within trial been conducted, the court, in finding the accused liable or not for the offence charged, is still obliged to reconsider the statement in accordance with the legal dictates. It is a settled position that a retracted/repudiated confession can be acted upon by the court where it is corroborated by another independent evidence. I am alive, however, on the exceptional position whereby courts have relied on uncorroborated repudiated/retracted confessions of accused persons whereby they believed in the truth of the evidence contained therein. In the celebrated case of **Tuwamoi vs. Uganda** (1967) EA 84, the Court provided the warning and consideration to be taken by the court in dealing with an uncorroborated retracted/repudiated confession of an accused person. It held:

“A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a court will act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary for law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.”

In the case of **Kashindye Meli vs. Republic** [2002] TLR 374, the Court of Appeal held:

“... it is now settled law that although it is dangerous to act upon a repudiated or retracted confession

unless such confession is corroborated, the court may still act upon such a confession if it is satisfied that the confession could not but be true.”

Further, in the case of **Hemed Abdallah vs. Republic** [1995] TLR 172 the position was settled to the effect that:

“Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances is satisfied that the confession must but be true.”

See also: **Dickson Elia Nsamba Shapatwa & Another vs. The Republic** (Criminal Appeal No. 92 of 2007) [2008] TZCA 17 (30 May 2008); and **Yustas Katoma vs. The Republic** (Criminal Appeal No. 242 of 2006) [2008] TZCA 38 (14 July 2008).

To this point, the nagging question is whether it is safe to rely on the accused's repudiated/retracted confession (exhibit P1). I find it not on the following grounds: **one**, in the cautioned statement, the accused appears to confess into killing a person named “Colman s/o Leiya Puka. This name is different from the deceased named in the charge.

Two, the statement is uncorroborated by independent evidence from the prosecution. Like I 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. PW1 testified into seeing the accused heading to the deceased's home while holding a machete after telling him that he was going to warn the deceased about uprooting his coffee seedlings by canning him. PW2 testified to have seen the accused canning the deceased on one morning when going to school.

These pieces of evidence, in my considered view, do not corroborate the confession statement purportedly connecting the accused to the murder incident. It was the prosecution case that a machete was found on the deceased's head at the crime scene. In the premises, one would expect PW1 to have described the machete as being the one he claimed to have seen the accused holding when supposedly heading to the deceased's home. However, this was not the case. The police as well, never took any finger print samples to match with those of the accused to prove that he was the one who committed the offence. The police either did not give any explanation as to why the finger print samples were not taken.

Three, in the cautioned statement, and as testified by PW4, the accused allegedly confessed into cutting the deceased once on his head. The PMR, on the other hand, revealed that the deceased was cut eleven times on the head, had a bone fracture on the right part of the head, was wounded on the stomach and the right eye was damaged. This was also testified by PW5 who claimed to have eye witnessed the deceased's body during postmortem

examination. The contents of the PMR materially contradict with those in the cautioned statement.

In the circumstances, I find it unsafe to rely on the objected cautioned statement to hold the accused liable. The prosecution is thus hereby found to have failed to prove the charge against the accused beyond reasonable doubt. In the premises, I find the accused person **KAROLI AUGUSTINO PUKA, NOT GUILTY** of the offence of murder he stands charged with under **section 196 and 197 of the Penal Code, Cap 16, R. E. 2019** and consequently **acquit** him from the same charge.

Dated and delivered at Moshi on this 08th day of April 2024.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA