

**IN THE HIGH COURT OF TANZANIA**

**(MWANZA REGISTRY)**

**AT GEITA**

**CRIMINAL SESSION NO. 183 OF 2016**

**THE REPUBLIC**

**VERSUS**

**PIUS S/O MAKEJA**

**JUDGMENT**

*Date of Last Order: 29/11/2021*

*Date of Judgment: 6/12/2021*

**M. MNYUKWA, J.**

PIUS S/O MAKEJA, herein the accused person, stands charged with the offense of murder contrary to section 196 of the Penal Code, Cap. 16 [RE: 2002], now [RE: 2019]. The trial was partly heard by my learned sister Mgeyekwa J, whereby, after the defence case was marked closed, this court *suo moto* upon observation of the accused conduct on the dock being seems not to be a sane person, ordered the accused to be sent to Isanga Medical Institution for examination and observation to know his mental status. The report was vital for the court to determine the mental status of the accused from the time alleged to have committed the offence



of murder, and to the time the trial was conducted. The medical report come out and from the observation of medical expertise, the accused was sane at a time alleged to have committed the offence and during the trial before my sister Mgeyekwa, J.

Having heard from the medical experts, it becomes clear that the trial before the accused was valid, and therefore, for the reasons advanced I have to take over, I proceed from where the trial ended and I proceeded with the summing up of assessors since the counsels for both sides did not preffer to have final submissions. That being a case, I am now called upon to determine the fate of the accused person who is alleged to have killed one Mary D/O Shija and before this court, the accused is facing the charge of murder.

Briefly, the facts were that, on the fateful night of 30<sup>th</sup> May 2013, at around 20:00 hrs in Kilombero village within District and Region of Geita, the accused Pius s/o Makeja did murder one **Mary Shija** by cutting her with a bush knife. It was alleged that, the deceased was sleeping in her house with her two daughters, Agnes D/O William and Naomi D/O William, the accused opened the door and entered the deceased's house. Noticing an intruder, the deceased asked who was inside but there was no reply. One of the daughters lighted the torch on to the accused person and she



identified him. The accused left the house and he was followed by the deceased and one of her daughters. While the deceased was outside the house, the accused attacked her and cut her severely with a bush knife on her head, hand, thigh and chop off her left breast. The accused went back to the house where the other daughter was, he raped her, and then left the house for good. The scream for help was raised and the accused was named as the culprit by one of the daughters. The accused was arrested and charged with the offence of murder.

The trial was conducted with the aid of three assessors namely; Jumanne Nkaina (56 yrs), Hawa Swedi (56yrs), and Mussa Samson (54 yrs). I appreciate the counsels for their cooperation during the trial without forgetting the aid of gentlemen and lady assessors who sat with me and stated their opinion based on the facts of the case. After the summing up to the Gentlemen and Lady Assessors, they all found the accused person guilty of the offence charged.

During the trial, the prosecution was led by Mr. Kato and Ms. Winfrida, state attorneys and Mr. James Pallangyo took over to the finalization while the defence side was represented and maintained by Mr. Mwanzalima learned counsel throughout the trial.



At a trial, the prosecution paraded five witnesses namely; Lilian Joseph Katinde (PW1), E1895 D/C Said (PW2), Agnes William (PW3), Mazoya Fimbo (PW4), and Bugando Mayeka (PW5). The court also admitted 3 prosecution exhibits to include Extrajudicial statement (Exhibit P1), Caution statement of the Accused (Exhibit P2), and Post Mortem Examination Report (Exhibit P3). The defence side had only one witness, the accused Pius Makeja (DW1), and had no exhibit.

The prosecution side aligned its witness. LILIAN JOSEPH KATINDE (PW1) was the first to testify. In her testimony, She presented herself as a Primary Court Magistrate at Nyakumbu Primary Court and that on 19<sup>th</sup> June 2013, she wrote the Extrajudicial statement of the accused person. PW1 testified to have inquired from the accused of his willingness to give a statement and the accused was willing and free to give his statement. PW1 testified that she started taking the statement and among others, the accused told her that he was hired to kill the deceased for a promise of being paid Tsh. 50,000/= by his father-in-law, who they went together and he was shown the woman whom he had to kill. That after he killed her, they left the place. PW1 identified the Extrajudicial statement and tendered it before the court and it was admitted as Exhibit P1.



PW2 E1895 D/C SAID, testified that, he is a police officer working at Geita Police station. He testified that on 18<sup>th</sup> June 2013 he wrote the caution statement of the accused Pius S/O Makeja in relation to the murder of Mary D/O Shija. PW2 narrated before the court that, he informed the accused about his rights before taking the cautioned statement. PW2 further testified that he recorded the statement as per section 58 of the Criminal procedure Act Cap. 20 RE: 2002 and he used an hour to record the statement. PW2 testified before this court that the accused confessed to having murdered one Mary D/O Shija as he was promised to be paid Tshs. 50,000/= . PW2 continued to narrate that, the accused was arrested on 11<sup>th</sup> June, 2013 but he recorded his statement on 18<sup>th</sup> June, 2013 at 09:00 hrs because the accused person was taken to Rukwa region to look for his fellow and he was returned on 17<sup>th</sup> June, 2013 around 20:00 hours. That he could not record his statement at that time as it was night and there was neither power nor paper for writing the statement. PW2 tendered the accused caution statement which was admitted as Exhibit P2.

PW3, AGNES WILLIAM testified that, she was residing with her aunt the deceased, and one Naomi William. That on 30<sup>th</sup> May 2013 at night hours while sleeping with her aunt and Naomi, she woke up and told her



aunt that she heard the door opened. She lighted the torch and saw Pius Makeja, the accused person. She went on that, the accused went out and she and her aunt, the deceased followed the accused whom she lighted again and the accused went to the backyard. She further said that the torch had bright light and the accused was standing 5 meters from where she was and that she was able to identify the accused for she knew the accused before the incident for a year-long as they reside at the same village and at that fateful night the accused had no shirt and was wearing a white short. She insisted that she stood three meters away from the accused and she witnessed accused assaulting the deceased by cutting several places of her body using a bush knife.

PW3 ran headed to the backyard where Naomi was and she heard her rising an alarm and then it was silent. She then saw the accused leave the scene and Naomi told her that she was raped by the accused. She then went where her aunt was lying in the backyard and found her dead learning that the deceased had multiple cuts on her hand, head, thigh, and her left breast was cut off. PW3 resorted to asking for help from the neighbors who raised alarm and she mentioned Pius s/o Makeja, the accused as the one who murdered the deceased.



When cross-examined, PW3 testified that the incident took approximately 20 minutes. That the police arrived the next morning and she does not remember who accompanied the police and that she was the one who named the accused as the perpetrator.

MAZOYA FIMBO (PW4) testified as a doctor. He narrated that, on 31<sup>st</sup> May 2015 while he was at the hospital, he was informed by the police officer about the incidence of murder at Kilombero and he was asked to examine the body. He headed to the scene of the crime where the body was lying down. That the female body had cut wounds on the neck, backside left shoulder, and joint left side of her hand. He prepared the report in a prescribed form. PW4 tendered a post mortem report which was admitted as exhibit P3.

When cross-examined PW4 stated that, it was a female body dressed and had cut wounds. That the wounds were inflicted by a sharp object and that the cause of the death was due to severe bleeding.

PW5 one BUGANDO MAYEKA, testified that he resides in Kilombero village with his wife and children and the accused person is his nephew. He went on to testify that the accused person who is his nephew was staying with him and on 30<sup>th</sup> May 2013 at the evening hours, the accused left the house with a bush knife and PW5 didn't know where the accused



was heading to. That on the same day at night hours there was an alarm raised and he went to join the neighbors and at that time, the accused was not around. He went to the scene and found the body of the deceased lying down with cut wounds and could not find out who committed that evil act and though they have tried but could not find the killer.

PW5 went on narrating that the accused person came back to his house the next day and told PW5 that he was at places that offers labor. That on 11<sup>th</sup> June 2013 the accused was arrested in connection with the murder of the deceased Mary Shija. He went on that, when he visited the accused while in custody in the police station, and managed to talk to him, the accused admitted to have murdered the deceased and that he was hired by one Matumizi.

When cross-examined, PW5 testified that after the accused was arrested, he named him at a police station that the accused was living at his home and PW5 was arrested the next day and was locked up for three days in the police custody. PW5 testified that at the police station while in custody, the accused told him that the bush knife was hidden in the kitchen and when he went to the kitchen, he saw the bush knife but it was different from the one he left with on 11<sup>th</sup> June 2013.



The prosecution case was marked closed after the testimonies of the 5 prosecution witnesses and admission of 3 exhibits. The court was satisfied that a prima facie case has been established and therefore, the accused person was required to enter his defense.

PIUS MAKEJA, (DW1) denied the accusation. He testified that he was living with his uncle who is PW5 since 2013. That on 30<sup>th</sup> May 2013 he went to the centre and on 31<sup>st</sup> May 2013 at night hrs he was sleeping at his uncles' place. He testified that at the fateful night when the deceased was brutally murdered, he did not hear anything until the next day when he heard that one person the deceased, was cut by bush knife and died. It was his further testimony that, he did not go to the scene of the crime and he was arrested on 31<sup>st</sup> May 2013 at 14:00hrs and brought to Nyamgaza Police Station where they arrived at 15:00 hrs. He was informed that he was arrested because he was alleged to have committed the offense of murder. On the same day he was sent to Geita Police station and was informed that he killed the deceased.

He went further testifying that, the Extrajudicial statement and cautioned statement are not his for he did not record any statement and he did not kill the deceased. He went on denying PW5 testimony insisting that, it was not true that he told PW5 he killed the deceased and disputing



the Extrajudicial statement denying to have confessed to having raped at the scene after the commission of the offence of murder.

During cross-examination, DW1 testified that he is a relative of PW5 and he was staying at his place. That they were leaving peacefully and PW5 lied though they had no grudges with each other. The accused maintained that, when the alarm was raised, he did not hear so he didn't go to the scene. Testifying on the allegation that he was sent by one Matumizi Antony, he denied having been sent to murder the deceased though acknowledging to know Matumizi and his family. He also said that PW5 is a good person but his statement was untrue.

Having gone through the prosecution evidence, and defence side, it is clear that MARY D/O SHIJA is no more as it was testified by PW4 who examined her dead body and certified by Exhibit P3. It is also clear that MARY D/O SHIJA died unnatural death resulted from excessive loss of blood caused by multiple cut wounds inflicted on her body. Sad to say, the deceased multiple-cut wounds brutally were inflicted by using a sharp object, which depicts that, the assailants did it with malice aforethought which leaves no reservation that the assailant contemplated and intend to kill.



Squally, the allegation and evidence at hand being of a murder case, it is, therefore, indispensably important for the prosecution to prove malice aforethought as to the offence of murder, involves the killing of a person with malice aforethought. It is stated under Section 196 of the Penal Code, Cap.16 [RE: 2002] now, [RE: 2019] that:-

*"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder".*

From this end, the prosecution is therefore duty-bound to prove the case against the accused person on two stages; *first*, that it is the accused person who killed the deceased PIUS S/O MAKEJA, and secondly, that the accused did commit the killing with malice aforethought as provided for under Section 200 of the Penal Code, Cap. 16 [RE: 2002] now [RE: 2019]. As placed, and the most contentious issue before me and which prompted the trial of this case is *whether it is the accused persons, PIUS S/O MAKEJA who murdered the deceased MARY D/O SHIJA*

In answering this issue, it is a fundamental legal principle that the prosecution side has a burden to prove that the accused person did murder the deceased and that he did it with an evil mind. And the standard of prosecution burden to be discharged is beyond a reasonable doubt. This is to say there must be no shadow of doubts that the accused killed the deceased with evil intention, otherwise, the benefit of doubt will



benefit the accused who bears no duty to prove that he did not murder the deceased but is tasked to raise doubts. The position has severally been emphasized as was in the case of **DPP VS Ngusa Keleja @Mtangi and Another**, Criminal Appeal No. 276 of 2017 CAT, (Unreported) where the court held that: -

*"...the burden of proof in criminal cases lies squarely on the prosecution shoulder, the standard of which is beyond reasonable doubt.... The accused is merely required to raise a reasonable doubt. We must add here that the accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence"*

Again, in the case of **Paschal Yoya @Maganga vs Republic**, Criminal Appeal No. 248 of 2017(Unreported) The court had this to say

*"...it is a cardinal principle in our jurisdiction that, in cases such as one at hand, it is the prosecution that has a burden of proving its case beyond a reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not to prove his innocence"*

See also the case of **Mohamed Haruna@ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) and **Christian Kaale and Rwekiza Benard v R** [1992] TLR 302.



As deliberated above, there is no dispute that the deceased died and brutally faced her death. The prosecution is now tasked and duty bound to prove beyond doubts that the accused person PIUS S/O MAKEJA indeed killed the deceased MARY D/O SHIJA. The prosecution had five witnesses; PW1, PW2, PW3, PW4, and PW5 who testified in connection to the death of the deceased as against the accused person who gave his evidence under oath as DW1, denied the charges and has no witness.

First, the evidence of a medical doctor, PW4 who testified to have examined the body of the deceased, and without doubt or objection, his testimony established that the deceased died and the death was unnatural. Secondly, PW2, a police officer at Geita police station, testified how the accused was arrested and he wrote the accused statement which was tendered in court as exhibit P2 together with PW1 who testified to having written the Extrajudicial statement of the accused, and PW5 who is the relative to the accused testified to the extent and circumstances of involvement of the accused.

Thirdly, PW3 testified to have witnessed the accused committing the offence of murder. From among other sets of witnesses, and with all other evidence, before me, I have a testimony of an eyewitness.

From the sets of evidence in proving the case against the accused, I will start with the evidence of PW3 which, before this court, established



the issue of Identification and therefore, I am now obliged to first determine as to whether the identification of the accused person by PW3 was proper, and in doing so, I will determine the issue as to *whether the identification of the accused left no doubt or whether there was no mistake of identity.*

Before I can decide whether the evidence of visual identification is credible, I have to warn myself as to the danger of admitting the given evidence as it has been long established by different case laws that evidence of visual identification is of the weakest kind and mostly, unreliable. It is pertinent that I refer to the guidelines on visual identification as stated by the Court in its important decision in **Waziri Amani v. Republic** [1980] TLR 250, where the Court said;

*"The evidence of visual identification is of the weakest and most unreliable. It follows, therefore, that no courts should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is watertight"*

The principle was also discussed by the Court Appeal in the case of **Michael Godwin & Another V R, Criminal Appeal No. 66 of 2002** that in using this kind of evidence, the court has to make sure all possibilities of mistaken identity are eliminated by looking into conditions



that were established in the case of **Wazir Amani V R** (supra). These conditions include the time of observation, the distance where the observation was made, the conditions of which the observation occurred, whether there was good or poor lighting and whether the witness knew the accused before or not.

(see; **Shamir John v Republic**, Criminal Appeal No. 202 of 2004 CA (unreported), **Yusuph Sayi & 2 Others vs R** Criminal Appeal No. 589 of 2017 and **Mabula Makoye & Another vs Republic** Criminal Appeal No. 227 of 2017)

Aided by the above authorities, In my determination, therefore, I subject the evidence of PW3 on detailed and careful inquiry to find if PW3 properly and honestly identified the accused person.

First, PW3 established that she knows the accused person one PIUS S/O MAKEJA, for they live in one village for more than a year and the accused did not dispute the same and no grudges between them in their testimony.

Secondly, it is undisputed neither by the prosecution nor the defence that the incident of murder occurred at night and light was needed for proper identification. PW3 testified to having identified the accused after she lighted a torchlight to the accused when the accused



entered the house. PW3 further stated that after the accused went in the backyard, PW3 and deceased also followed the accused and PW3 lighted him again. PW3 maintained that the accused invaded the deceased in the backyard and assaulted her by cutting her with a bush knife to death the incident she witnessed. PW3 testified that the accused was a bare chest with white shorts and in all incidents, PW3 stood a short distance from the accused.

From the evidence of PW3, It is my observation that, first, the accused did not dispute that he is well known to PW3 before the murder incidence and that they lived in one village. Second, PW3 maintained that in a duration of 20 minutes PW3 was observing the accused and PW3 managed to identify the accused when entered the house, when they were outside before, during the assault, and after the incident and when he was leaving the scene of the crime.

Third, PW3 identification was aided by the use of Torch-light which PW3 specified it was a three-cell torch and was bright and when they were outside the house, there was bright moonlight.

Based on the principles governing visual identification, I proceed to hold that PW3 stood a chance in the identification of the accused taking into account that, PW3 testified that the act of the accused took place





approximately 20 minutes, and there was moonlight outside the house and while inside, PW3 with the aid of the torchlight was able to make proper identification and the distance where PW3 stood against the accused favoured proper identification. This could also be attributed by the factors that, PW3 knew the accused before the incident.

Vital important, and before retiring from the evidence of PW3, and rule out that indeed the accused was identified, and having in mind that apart from the evidence of identification there is also other evidence fronted by the prosecution as against the accused person. What tasked my mind is to weigh the credibility of the PW3 for the credibility of the eye witness testimony can be a very powerful tool in determining a person's guilt or innocence but it can also be devastating when false witness identification is made due to honest confusion or outright lying. This was stated in the case of **Marwa Wangiti Mwita Vs Republic, Criminal Appeal Na. 06 of 1995(unreported)** where the court said that;

*"The ability of the witness to name a suspect at the earliest opportunity is an important assurance of credibility, in the same way as unexplained delay or complete failure to do so should put prudent court to inquire"*



Again, in **Jaribu Abdalah v Republic** [2003] TLR 271, CAT, quoted with authority in the case of **Mawazo Mohamed Nyoni @ Pengo & 2 Others vs Republic**, Criminal Appeal No. 184 of 2018 held that: -

*"In a matter of identification is not enough merely to look at factor favoring accurate identification equally important is the credibility of the witness, the ability of the witness to name the offender at the earliest possible moment is reassuring though not a decisive factor"*

Siding with the wisdom stated in the above cases, PW3 is a credible witness as she was able to identify the accused at the earlier opportunity as well as naming him as the culprit after people were gathered. This gives the assurance to the court that the witness was able to identify the assailant and with the formed mind it was the accused as against any other and soon when people gathered, he named the accused. It is from this point, therefore, I proceed to hold that, PW3 is a credible witness and her evidence can the same be relied upon by this court.

The prosecution also tendered documentary evidence, including the Extrajudicial statement (exhibit P1), Caution Statement (exhibit P2), and Post Mortem Examination Report (exhibit P3). Going through the prosecution evidence, I will start with the evidence of PW1 who tendered Exhibit P1 which implicates the accused person that before the commission



of the offense of murder he freely and voluntarily confessed before PW1, a justice of peace.

PW1 testified that the accused voluntarily admitted that he murdered the deceased as he was promised to be paid Tshs. 50,000/= by Matumizi Anthony who he claimed to be his father-in-law. However, when defending himself the accused denied having admitted to killing the deceased before PW1.

This is to say, the accused retracted his confession. I am now cautious in treating this retracted confession. The law is settled that courts must be cautious when using a repudiated or retracted confession. However, the court may use the repudiated or retracted confession in convicting an accused person when it is corroborated by other evidence or it satisfies itself that the confession is true. (see **Hemed Abdallah Vs Republic** [1995] TLR 172)

In our case at hand, PW1 testified that the accused confessed before her that he killed the deceased MARY D/O SHIJA. PW1 maintained that the accused did it voluntarily. Going through Exhibit P1, though the accused person denied having confessed that he killed the deceased, the exhibit elaborates the story that happened as to the death of the deceased. Tasking my mind is where could a justice of peace get the story elaborated



and if at all PW1 could be at a position to form that story, but for whose interest.

The evidence of PW1 and what is stated on the Extrajudicial statement corroborates the evidence of PW5. It was the evidence of PW5 that on the fateful night of the murder the accused left home with a panga which after the accused confessed to have killed the deceased, he told him the bush knife was hidden in the kitchen. PW5 upon checking, he found the bush knife but different from the one the accused left home with. The story found its way on the Extrajudicial statement as the accused said he left PW5 with a bush knife but Matumizi Anthony told him that the bush knife was small and gave him his bush knife which was sharpened in both sides.

The available evidence reveals that the said bush knife was not brought before this court but looking at the similarity of the accused statement and PW5 testimony, this court is satisfied that the confession made before a justice of peace was true and therefore reliable. In the circumstance, therefore, I proceed to hold that, the Extrajudicial statement tendered by PW1 and the confession made by the accused person was indeed made and complied with the required procedures for this court to rely on. That being the case, I proceed to act upon the Extrajudicial statement and use the evidence as against the accused person.



Finally, on the last aspect of the caution statement, which was admitted as exhibit P2 when the court ruled out the objection raised over section 50(1) of the Criminal Procedure Act Cap 20 RE 2019. It is an established principle that the best evidence is where the accused person admits his guilt. However, the prosecution still has a duty to prove that the confession from an accused person was given freely and voluntarily. See the case of **Paul Maduka and 4 others v The Republic**, Criminal Appeal No. 110 of 2007(unreported). The accused repudiated the caution statement as he denied having been interviewed or written any statement. PW2 testified to have recorded the accused caution statement according to section 58 of the Criminal Procedure Act, Cap 20 R.E 2019.

Looking at the testimony of PW2, he testified to have recorded the statement and read it over to the accused, and asked him whether he wanted to alter or add anything. From this testimony together with the contents of exhibit P2, I am of the view that the caution statement has passed the test, as it was taken freely and in accordance with the law.

Being the case, that the accused has repudiated his statement but I proceed to find that, the testimony given by PW3 and PW5 collaborates what was confessed in the accused's cautioned statement. In his statement, the accused named Matumizi Anthony claims that he gave him



his bush knife In substitute with his one he had for it was smaller. Something which was also stated by PW5 that the accused told him when he visited him at the police station and was able to recover the bush knife in the kitchen.

Also, in the caution statement, the accused narrated how he reached into the deceased's residence and how he heard the deceased and PW3 waking each other saying someone entered in their house the evidence that was also testified by PW3. To add the fuel the accused in his statement narrated how he was lightened by a torch as testified by PW3 and how he went outside where there was a bright moonlight that enabled him to see the deceased person. Those statements were also testified by PW3 that the accused went outside and they followed him and she was able to identify the accused.

The statement recorded by the accused person are so detailed explaining the circumstances in which the offence was committed and it is not easy to be retrieved from any other person than the accused himself. Taking into consideration all these circumstances, I am of the view that the repudiated confession is credible as it is well corroborated by the evidence of other witnesses and therefore reliable by this court.



Now that, the prosecution has been able to prove all the aspects, that it was the accused PIUS S/O MAKEJA who killed the deceased MARY D/O SHIJA, I proceed to check if the accused had malice aforethought. First looking at the confession given by the accused himself that he was paid to kill the deceased, together with the evidence on how the deceased was injured. The post mortem report showed that the deceased died from excessive blood loss caused by multiple cut wounds. The accused cut the deceased on her vital areas such as the neck which caused her sudden death, let alone how he cut off her breast. Therefore, the cutting was so severe to show that the accused intended to end deceased life.

From what has been transpired above, this court is satisfied that the prosecution side has been able to discharge its duty and prove the case beyond reasonable doubt as required by the law. Consequently, I find the accused PIUS s/o MAKEJA guilty of the murder of one MARY D/O SHIJA and I hereby convict the accused person for murder contrary to section 196 and 197 of the Penal Code, Cap 16 RE: 2019.

DATED at GEITA this 6<sup>th</sup> day of December 2021.

  
**M. MNYUKWA.**  
**JUDGE**  
**6/12/2021**

## SENTENCE

Since PIUS MAKEJA, the accused has been convicted of murder, I hereby sentence him to death by hanging.



**M. MNYUKWA.  
JUDGE  
6/12/2021**

Right to appeal is fully explained.



**M. MNYUKWA.  
JUDGE  
6/12/2021**

Judgement delivered on 06<sup>th</sup> day of December, 2021 in the presence of all parties.



**M. MNYUKWA.  
JUDGE  
6/12/2021**