

TANZANIA / JUDGMENT

Republic v Haruna Bihama

Another Criminal Session No

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
KIGOMA CRIMINAL SESSION NO. 000032812 OF 2024 REPUBLIC
COMPLAINANT / APPELLANT / APPLICANT VERSUS HARUNA BIHAMA
RESPONDENT / DEFENDANT

JUDGMENT

KAHYOZA, J The lifeless body of Zakayo Kwigize was discovered at the bank of river Bogwe in Kidyama area within the district of Kasulu in Kigoma region, a few days after a report of his disappearance was filed at Kasulu police station by Elizabeth Vitus, PW7, the wife of the deceased. Upon immediate commencement of police investigation, the two accused persons, namely, Hanuna Bihama and Hamis Sagira @Dokta were identified in connection with the murder of the deceased who was a mobile money transactions agent for CRDB Bank, NMB bank and mobile telecommunications networks to wit, Tigo pesa, M- pesa and Airtel Money at Kwa Shayo market, Murusi street, in Kasulu township. To prove the case against the accused persons the prosecution summoned a total of fourteen (14) witnesses and tendered 22 Exhibits. Ms. Happiness Mayunga Senior State Attorney and Mr. Dickson Makongo, State Attorney, appeared on behalf of the prosecution. On the other hand, the accused persons enjoyed the legal services of Mr. Hamis Kimilomilo and Mary Milali, both learned advocates, who appeared for the first and second accused persons respectively. Testifying on how investigation led to nabbing the two accused persons, D/Cpl Suleiman, PW12, testified that an undisclosed informer gave information to the police that the deceased was seen on a motorcycle at around 21:00 hours of 14/12/2022. Based on further information received, the police started tracking the 1st accused and arrested him in the evening of 22/12/2022 after discovering that he would be arriving at Kasulu to purchase fuel for retailing business. G.6769 D/Cpl Athuman, PW3, together with fellow police officers D/Sgt John Magambo and Cpl Augustino were issued with a search warrant by the OC-CID for Kasulu. Upon their arrival at Kwa Jicho area, within Kasulu township, they found the 1st accused at a petrol station, and when they searched him, they found in his possession; Page. 1 Hon... PROJESTUS KAHYOZA a motorcycle with registration number MC 340 DMK (Exhibit PE3), a black/yellow small bag branded 'SIMBALAND' (Exhibit PE5) containing Tshs. 482,000/- (Exhibit PE4), three keys for motorcycle and one for a padlock (Exhibit PE6). Effectively, a certificate of seizure

(PE2) was filled and signed by PW3, Samson Elias, an independent witness, D/Sgt Magamba and Cpl Augustino. PW3 testified further that at the police station, the first accused was interrogated and admitted to have committed the offence in collaboration with the second accused person. According to PW3 the first accused led him and other fellow police officers to the home of the second accused at Kabulanzwili Village. In his further testimony, PW3 stated that when they arrived at Kabulanzwili, some of his colleagues surrounded the house while Insp. Fortunatus, D/Cpl Elias, D/Cpl Suleiman and Ramadhan Rashid entered the house. PW3 stated further that the second accused person tried to escape through the window but they managed to arrest him and took him to Kasulu police station. On his side, Inspector Fortunatus Francis Rugumamu, PW4, gave an account of how things unfolded after the first accused person led him together with other police officers to the second accused. According to PW4 they searched the house of the second accused after introducing themselves and informing the second accused person that he was suspected of committing murder. PW4 stated further that they searched the house and found several items including; Tsh. 830,000/- (PE 8), one motorcycle King Lion make with registration No. MC 385 CVF black in colour with red helmet (PE 9), motorcycle registration card of MC 385 CVF (PE 10), a small black portable bag containing local medicine branded 'HP' (PE 11), nine pieces of cloths, white, red and black colour (PE 12), one blue canvas (PE13), one big brown bag with local medicine (PE 14). According to PW4 when the search was complete, they filled the certificate of seizure in which he, and PW4, wrote his names and that of the witnesses, the accused and of Cpl Suleiman, the certificate of seizure was admitted as Exhibit PE15. Furthermore, PW4 mentioned that other items enlisted in the certificate of seizure were one calabash, two manyanga, (PE 16) and motorcycle registration card of MC 340 DMK (PE 17). D/Cpl Suleiman, PW12, testified that the accused persons volunteered on 25/12/2022 to take him and other police officers at the scene of crime where they killed the deceased. PW12 arrived at the crime scene with the two accused persons, D/Sgt Abdul and D/Cpl Juma. In that company were also Dismas Damiono and Nikodem Mtetema, chairpersons of Nyachijima and Murusi streets, respectively. According to PW12, the accused persons confessed before the street chair persons that they killed the deceased by hitting him with guava 'mpera' sticks and went on to show where they had hidden the three sticks (PE 19) after killing the deceased. Upon discovery of the sticks which were one foot long each, PW12 marked them with numbers, 1,2 and 3 and filled a certificate of seizure (PE 20) which was signed by all who were present at the scene, including the accused persons. Page. 2 Hon... PROJESTUS KAHYOZA In his further testimony PW12 stated that he also prepared a sketch map of the scene of crime (PE 21) which among other things shows where the sticks were hidden. The map, according to PW12 also shows where the body of the deceased was found. On his part, PW14 E. D/SSGT Abdul told the court that he interrogated the first accused and recorded his cautioned statement, exhibit PE 22. He further told the court that in that statement, the first accused mentioned the second accused person as an accomplice. It was his further testimony that both accused persons volunteered to show the place at which they killed the deceased as well as the weapons (sticks), exhibit PE 19, which were used to beat the deceased to death. At the closure of the prosecution case, the accused persons were called upon to make their defense. The first accused person, Haruna Bihama, testified as DW1. He denied any involvement in the killing of the deceased. He denied to have confessed in relation to the offence

he is facing, and that he never recorded any statement. As for some of the exhibits tendered here in court, he told the court that they belonged to him, and that he bought them by using the money he made from agricultural produce. It was his further testimony that some of the prosecution witnesses gave contradictory evidence. He also lamented that some of the suspects who also ought to have been charged were not here in court. He mentioned them as being Vedasto Elisha, whom the wife of the deceased, PW7 had suspected his involvement in the murder of the deceased. The other person was one drive (name not known) but PW2, the father of the deceased had suspected him to be involved with the murder of the deceased. On his part, the second accused person, Hamis Sagira, testified as DW2. Like the second accused person, he categorically disassociated himself with the murder of the deceased. He denied to have confessed his involvement to PW13, the street chairperson. He denied to have gone to the scene of crime for the purpose of showing the police the place where the deceased was killed, and also where the sticks used to kill the deceased were found. He also denied to have signed exhibit PE 20, a certificate of seizure that was prepared at the scene of crime, though during cross examination he admitted that it contained his names and signature. As for the items seized from his house (exhibits), he told the court that they all belonged to him including the money which he said he got the same after selling two bags of beans. Like the first accused, he also lamented as to why other suspects, including one Vedasto Elisha and one driver were not charged along with them. He concluded by telling the court that most of the prosecution witnesses told lies and were also contradicting each other. He urged the court to be acquitted as the offence against him was not proved beyond reasonable doubt. After hearing both the prosecution and the defence, I will begin by addressing the issue of the nature and cause of death as per *Masamba Musiba @Musiba vs Republic*, (Criminal Appeal no. 13 of 2019) [2021] TZCA 270, where it was stated; "...among the ingredients of establishing the offence of murder which the prosecution has to prove are that there was death and such death was occasioned by unnatural cause." Page. 3 Hon... PROJESTUS KAHYOZA I will not be detained much under this issue due to the fact that the prosecution through the testimony of PW1 and exhibit PE1 has faultlessly established the cause and indeed the nature of the deceased's death. According to PW1 the deceased person suffered severe blood loss from the wounds and due to traumatic brain injury. Exhibit PE1 corroborates PW1's testimony which points out that the deceased's death was not natural. It was a brutal death so to speak. Exhibit PE1 partly on page one, reads: "Found dead body of man...with scar on the left fore head, scar on the left jaw and skull had multiple fracture and brain protruding..." This evidence is conclusive proof that the deceased was dead at the time the body was examined by PW1. It is also proof that the deceased did not die a natural death. The next important issue to look at is who caused the death of the deceased. According to the prosecution; the two accused persons are responsible for the killing of the deceased. According to the prosecution, particularly PW12, the two accused persons who are traditional doctors told the deceased they were going to cleanse his money. PW12 stated that the accused persons ended up killing the deceased and got away with 16 million shillings that was meant to be cleansed. In his testimony PW12 believes that after murdering and taking the deceased's person 16 million shillings, the two suspects started living extravagantly contrary to their low life prior to the deceased's death. To that effect the prosecution summoned, Mpapi John, PW8, who at a time was the chairperson of Kabulanzwili

village and oversaw the buying of business huts by the first accused from Sake Mayani, Oswald Michael, one Adella and Frank Barnabas. The respective sale agreements were tendered by PW8 and admitted as exhibit PE 18. On the other hand, Samson Elias, (PW9) testified to have also sold his house for Tsh. 1,680,000/- to the first accused. In yet another contention that the first accused was involved in killing the deceased, the prosecution claims that the small black bag with yellow colour (PE 5) which was found in possession of the first accused belonged to the deceased and was used to carry money for his business. The widow of the deceased, PW7, testified that she bought that same bag for her husband. Additionally, the prosecution believes that the two accused persons being traditional doctors took advantage of the deceased by alluring him to take his money for traditional cleansing. This is the reason why exhibits such as a bag containing traditional medicines (PE11), nine pieces of clothes 'vitambaa' (PE12), a blue canvas (PE13), a brown bag containing traditional medicines (PE14) one calabash two manyangas and traditional medicines (PE16) were tendered to portray the accused were indeed traditional doctors. Page. 4

Hon... PROJESTUS KAHYOZA Before heading further, I must acknowledge a long-established principle in criminal justice on the onus of proof in criminal cases, that the accused committed the offence for which he is charged with, is always on the side of the prosecution and not on the accused person and the standard of proof is beyond reasonable doubt. Such principle has been reflected in a number of precedents from the Court of Appeal including that of Mohamed Haruna @ Mtupeni & Another v R, Criminal Appeal No. 25 of 2007 when the Court of Appeal, held that: "Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that, an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence." What I have gathered from the case at hand is that the prosecution's evidence establishing the link between the accused persons and the offence of murdering the deceased is purely circumstantial. It is pertinent to revisit the vital principles established through precedents particularly on the issue of circumstantial evidence in criminal cases. The Court of Appeal in Hosea Francis @Ngala & Another vs The Republic , Criminal Appeal No. 408 of 2015 had this to say; "This Court has always insisted that circumstantial evidence directed against an accused person must not be capable of more than one interpretation, and must irresistibly lead to an inference that it was the accused person who is responsible for the death of the deceased." Again, the Court of Appeal in Marecha Mashala v Republic, Criminal Appeal No. 447 of 2019 (17 March 2023) quoted the case of Lezjor Teper v Reginam [1952] A.C 480 in which it was stated; "It is also necessary before drawing the inference of the accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference" For the reasons stated above, the prosecution has linked the two accused persons with the murder of the deceased due to the fact that they lured the deceased that they were going to clean his money so that he could prosper in business. This is the reason, I believe, scrutiny has been made to their mode of life after the death of the deceased. In a similar manner their local leaders, neighbors and or persons they bought properties from have also been summoned to testify on the same. These include Joseph Mbwebwe (PW5), Mpapi John (PW8), Samson Elias (PW9), Oswald Michael (PW10) and Nicodemus Mtetema. As it can be seen, the entire testimonies of the above witnesses constitute circumstantial evidence. The law on circumstantial

evidence is clear and unambiguous as I have pointed out earlier. For a conviction to be grounded on Page. 5 Hon... PROJESTUS KAHYOZA circumstantial evidence, such evidence must be incapable of any other explanation other than irresistibly pointing to the guilty of the accused person. It may be that the circumstantial evidence on record has not wholly met the test, however, we also cannot eliminate the possibility that the acts and life style of the accused persons reveal that the accused persons were all of the sudden living a life incompatible with their known means of income. This becomes more relevant by looking at the fact that the first accused person bought a lot of things within a life span of almost less than a week immediately after the death of the deceased. It is for this reason that I am inclined to link this sudden wealth with the death of the deceased, who it is said he was robbed Tshs.16 million. The above approach is fortified by the existence of the cautioned statement of the first accused person, exhibit PE

22. In this statement the first accused person gives a clear account of what transpired before, during and after the death of the deceased. He explains on how they planned to lure the deceased on the pretense of cleansing his money so that it could multiply. He also explains on how they ended up killing the deceased after he refused to leave the money at the river as part of the cleansing ceremony. He also explains on how they appropriated the money amongst themselves each pocketing Tshs.8 million. It is also recorded in that statement that the first accused person used the money to buy four business huts (vibanda), exhibit PE 18 and a motorcycle, exhibit PE 3. I am acutely aware that the first accused person retracted his cautioned statement. The law regarding retracted confessions has been pronounced in numerous cases by the Court of Appeal. In *Dickson Elia Nsamba Shapwata and Another vs Republic* (Criminal Appeal 92 of 2007) [2008] TZCA 17 (30 May 2008), reported at Tanzlii, the Court had this to say: - "...it is always desirable to look for corroboration in support of a confession which has been retracted/repudiated before acting on it to the detriment of the appellant. However, according to the current state of the law, a court may convict on a retracted/repudiated confession even without corroboration". [emphasis supplied]. Again, in *Abdallah Rashid Namkoka vs Republic* (Criminal Appeal No. 206 of 2016) [2018] TZCA 363 (9 May 2018), reported at Tanzlii, the Court stated: - We are also mindful of the fact that 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 circumstance is satisfied of its truth (emphasis supplied). See also *Bombo Tombola v. Republic* [1980] TLR 254. In the present matter I have carefully considered the statement and I have also warned myself on the danger of acting on a retracted statement. I have however concluded upon considering how consistent and detailed the statement is, that the retracted statement reflects nothing but the truth, that is, a true account of what transpired on the fateful day. This requires no corroboration. Page. 6 Hon... PROJESTUS KAHYOZA Over and above, the accused persons also confessed before the PW13, Nicodemus Mtetema, the street chair person; to have killed the deceased. This confession was made when the accused persons led the police officers and PW13 to a place where the deceased was killed. It is also at this place where the sticks, exhibit PE19, which the accused persons used to beat the deceased to death, were found. The law is clear that an oral confession made before a reliable witness

can base a conviction provided it is freely and voluntarily obtained. In Mohamed Manguku Vs. Republic, Criminal Appeal No 194 of 2004 (CAT-unreported) the Court had this to say: - "Oral confession would be valid as long as the suspect was a free agent when the words imputed to him were said. " But there is yet another piece of evidence that directly links the accused persons with the death or murder of the deceased. PW12 D/CPL Suleiman told the court that on 25/12/2022 both accused persons volunteered and led the PW12, other police officers and PW13 to the scene of crime. They went to show them the place at which they killed the deceased as well as the place at which the sticks used to kill the deceased were hidden. After the exercise was complete, PW12 prepared a certificate of seizure, exhibit PE 20 and a sketch map of the scene of crime, exhibit PE 21. These two exhibits were signed by the accused persons. They were never objected to when they were tendered and admitted in evidence. The implication here is that through exhibit PE 20 the accused persons admit to have killed the deceased, that is why they led the police officers to the scene of crime, and also led to the retrieval of sticks used to kill the deceased. In my view, such strong and direct evidence, complements the cautioned statement of the first accused person. On the other hand, both accused persons in their defense denied to have killed the deceased. They also denied leading the police officers to the scene of crime to show them the place where they murdered the deceased as well as the place where they had hidden the sticks used to kill the deceased. With respect, I do not think such a defense is of any assistance to the accused persons. This is because, as I said earlier, exhibit PE 20 speaks it all. The accused persons signed it to signify that they led the police officer to the scene of crime. Denying it during the defense is of no assistance at all. Equally in his defense, the first accused person denied to have mentioned the second accused person in his cautioned statement. He said that the second accused person was arrested after the police officers saw many missed calls made by the second accused in the mobile phone of the first accused person. But this explanation is in no way credible when it is weighed against the detailed plan of murder as clearly narrated in the cautioned statement of the first accused person. Probably at this juncture, I should say a word or two as regards the defense of the accused persons. I wish to start by putting it straight that it is a noble rule in criminal justice that the burden to prove the prosecution's case is always on the prosecution. It never shifts, no matter whether the defense is weak or not. See Mohamed Haruna @ Mtupeni & Another v R, Criminal Appeal No. 25 of 2007 where the Court of Appeal stated: "Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that, an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence." Page. 7 Hon... PROJESTUS KAHYOZA But in the case at hand, there are two aspects that I believe I am entitled to make comments on them. The first one relates to the second accused person. In his defense, he told the court from the outset that he was a resident of Kimobwa within Kasulu township, but that he was arrested while at Kabulanzwili village where he had gone to buy land. However, in all his testimony that followed thereafter, he maintained that he had two residences, one at Kimobwa and the other one at Kabulanzwili Village. Such an inconsistency, in my view, portrays the second accused as a person who is not telling the

truth even when on oath. The second aspect is something I consider to be somehow strange. Both accused persons lamented in their defense that two initial suspects, that is, one Vedasto Elisha and one driver whose name could not be secured, ought to have been charged along with them. Such a defense in my view incriminates both accused persons. It is a kind of admission that the accused persons committed the offence they stand charged with, but in collaboration with other suspects that have not been charged in court. All in all, and from the foregoing discussion and findings, I am satisfied that it was the accused persons who killed the deceased. This has been sufficiently established by the prosecution evidence. The last issue I shall consider is whether the killing was done with malice aforethought. The law, that is, the Penal Code clearly provides for the circumstances in which it can be concluded that the act or omission leading to death was done with malice aforethought. Section 200 of the Penal Code, CAP 16 R. E. 2022, is couched in the following words:

200. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence. For the purpose of this case only parts (a), (b) and (c) of section 200 are applicable. According to the evidence on record, specifically that of PW1, the medical doctor, and exhibit PE1, the accused persons hit the deceased with sticks in the head thus causing a fractured skull, with brain protruding. This reveals malice aforethought on the part of the accused persons. They chose to repeatedly attack the head, one of the Page. 8 Hon... PROJESTUS KAHYOZA delicate parts of the body. According to the cautioned statement of the first accused person, they hit the accused several times before he succumbed. The weapons used were tough strong sticks (exhibit PE19). No doubt the accused knew well that the results would be deadly. In *Enock Kipela vs The Republic* [1999] TZCA 7 (TANZLII), the Court enumerated circumstances from which malice aforethought can be inferred. The Court observed: - " ... Usually, an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: -
- (1) the type and size of the weapon if any used in the attack.

- (2) the amount of force applied in the assault.
- (3) the part or parts of the body the blows were directed at or inflicted on.
- (4) The number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose.
- (5) The kind of injuries inflicted.
- (6) The attackers' utterances, if any, made before, during or after the killing.
- (7) The conduct of the attacker before and after the killing. [Emphasis provided]. See also Obadia Kijalo vs Republic, Criminal Appeal No. 95 of 2001 (unreported), Moses Michael @Tail vs Republic [1994] TLR 195 and Grospery Ntagalinda @ Koro vs Republic [2016] TZCA 661 (TANZLII). It is apparent and patently clear that these acts of the accused persons do exhibit pre-meditated evil intention on their part, thus falling under the ambit of parts (a), (b) and (c) of section 200 of the penal code. It would therefore follow that the sole and inevitable conclusion is that the accused persons killed the deceased with malice aforethought. From the foregoing discussion and findings, I am satisfied beyond any shadow of doubt that it was the accused persons who brutally killed the deceased. I accordingly find them guilty of murder in terms of sections 196 and 197 of the Penal Code, CAP. 16 R. E. 2022, and I accordingly convict them forthwith. P. R. Kahyoza, Judge. 13/12/2024. Mr. Pancras Ligombi, SA: We have no previous criminal record as regards these accused persons. We however pray they be sentenced in accordance with the law. Page. 9 Hon... PROJESTUS KAHYOZA Ms. Mary Milali, Adv: Following the court's finding, we leave it for the court so that the law can take its course. SENTENCE There is only one sentence for the offence of murder which is provided under section 197 of the Penal Code, that is, death. It is in the light of that, I hereby sentence each of the accused persons, namely, Haruna Bihama and Hamis Sagira to suffer death by hanging. P. R. Kahyoza, Judge 13/12/2024 Court: Right of appeal to the Court of Appeal is duly explained. The convict will take that step within 21 days after they have been served with the record of appeal. P. R. Kahyoza, Judge 13/12/2024 Order: With regard to the exhibits tendered, I make the following orders:
 - i) Exhibits PE12, PE13, PE14, PE 16 and PE19 collectively shall be destroyed under the law applicable. ii) Exhibits PE3, PE4, PE6, PE8, PE9, PE10 and PE17 shall be dealt with depending on the order that shall be made after the prosecution applies for disposal of the same in accordance with the applicable law. P. R. Kahyoza, Judge 13/12/2024 Dated at KIGOMA this 13th of December 2024 . Page. 10 Hon... PROJESTUS KAHYOZA P. R KAHYOZA JUDGE OF THE HIGH COURT Page. 11 Hon... PROJESTUS KAHYOZA

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