IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL SESSIONS CASE NO. 9 OF 2005

THE REPUBLIC

VERSUS

YUSUPH s/o MSHAMU

DATE OF LAST ORDER – 30/4/2007
DATE OF JUDGMENT - 11/5/2007

JUDGMENT

MJEMMAS, J.

The accused person, namely Yusuph Mshamu stands charged on information to murder contrary to section 196 of the Penal Code, Chapter 16 of the Laws. It was alleged that on or about 10th June, 2004 at Likolombe village within Tandahimba District in Mtwara region the accused did murder one Mohamed Issa Mpapa.

The plea of the accused person was taken on 26/7/2005 and the accused person pleaded not guilty to the information.

Pursuant to the plea preliminary hearing under section 192 of the Criminal Procedure Act, 1985 was conducted. The following matters or issues were agreed or admitted as not in dispute and were filed under the provisions of section 192(3) of the Criminal Procedure Act, 1985:

(i) The accused person's name and residence

(ii) The Police Form (PF3) of the deceased and Post Mortem examination report, exhibits "P1: and "P2" respectively.

(iii) The dying declaration of the deceased exhibit "P3".

The Post Mortem examination report shows that the cause of death of Mohamed Issa Mpapa of Likolombe village was due to haemothorax, pneumothorax and severe haemorrhage due to stab wound around the chest and cut wound around the left and right forearms.

PW.1, Abdallah Issa told the court that he is related to the deceased because they shared the same father but different mothers. He went on to state that the deceased used to live in Simana village, Lindi Rural. That on 10th June, 2004 the deceased was in Likolombe village and he was staying with him in his house. He went on to state that

during the material night, that is on 10th June, 2004 at around 11.00 p.m. he heard someone knocking the rear (backside) door of his house. He woke up from sleep and went to open the door. He saw two people who were holding each other. They were near his door. He asked his wife called Fatu Said to bring a hurricane lamp. He then identified the two people as the deceased and the accused person – Yusuph Mshamu. The deceased was on top of the accused person. The deceased then told him "brother I am injured". PW.1 examined the deceased and found out he had injuries around the chest and in both left and right arms. The witness went to say that the accused disappeared after five minutes. The witness said that he knew the accused before and they were related in that the accused sister was married by his father. PW.1 sent one Nuru Abdallah the same night to call the Village Executive Officer. The Village Executive Officer, one Ahmad Mussa @ Sawasawa arrived at the scene of incident and after examining the deceased person he gave PW.1 a letter to take the deceased to Likolombe Dispensary. At the dispensary he was given another letter to take to Mtama Police station. The Police directed him to take the deceased to Nyangao Mission Hospital. They took the deceased to Nyangao Mission Hospital where he stayed for twelve days and died.

The witness said also that the Village Executive Officer directed village militiamen to look for the accused the same night of the incident but they did not find him until the following morning. PW.1 admitted during cross examination that he did not see the accused person stabbing the deceased with a knife but the deceased told him he was injured. He did not speak any more until when he was at the Dispensary.

PW.2 Ahmad Mussa @ Sawasawa testified that he lives in Likolombe village and at the material time he was Acting Village Executive Officer. The witness narrated how he was informed of the fate of the deceased in the nigh of 10/6/2004. The witness stated that he visited the scene of incident the same night and found him (deceased) lying on the ground unconscious. He examined him and found that he had injuries around the chest, arms and throat. He asked PW.1 as to what happened and he was told that it was the accused person – Yusuph Mshamu who injured the deceased person. He wrote a leter/note to take the deceased to Likolombe Dispensary. He also issued orders for the arrest of the suspect by Village militiamen. The witness went further to state that the militiamen did not find

the accused that night at his home and in entertainment places. They arrested the accused person the following morning at the market place. He himself did not witness the arrest as he was not at the village at that time of arrest.

PW.3 – Mahamudu Ismail testified that he lives in the village of Likolombe and he runs a pombe club selling "mnazi pombe". The witness went on to say that on 10th June, 2004 at about 2.00 p.m. the accused person visited his club. He ordered some pombe – a small bottle. Thereafter came the deceased, one Mohamed Mpapa. The deceased sat near the accused person and started to drink the accused's pombe without his consent. The accused person did not do anything but ordered another bottle of "pombe." The deceased took again the accused "pombe" and drunk it. The accused person went to complain to PW.3. PW.3 went on to say that he warned the deceased not to behave the way he did as he would break peace in the club. The deceased then ordered his "pombe" and the accused person attempted to drink it but the deceased resisted and told him that "wewe hapa huna pombe, hizi hapa za kwangu mimi mwenyewe". That the deceased drunk his pombe with another person called Nuru. PW.3 stated further that after he had finished selling his "pombe" he ordered all the

customers to leave the place. He said that was around 06.00 p.m. All customers left and no one was injured at his place.

Another witness for the prosecution side was PW.4 – E.8875 PC. Ramadhan. The witness told the court that on 14/6/2004 he was ordered by Dickson – Station Sergeant of Kitangari Police Station to go to Mtambwe Police Post to collect a suspect called Yusuph Mshamu. The witness went on to state that when he reached Mtambwe Police Post he was informed that no case file was opened in respect of the suspect Yusuph Mshamu because the complainant was still admitted at Nyangao Hospital. The witness decided to go to Nyangao Hospital to see the complainant. He saw the complainant who had bandages around the chest and two arms. He asked the complainant who injured him and he mentioned the accused Yusuph Mshamu. The witness decided to record or rather to reduce into writing the information which was given by the complainant who later died. The witness left with the complainant's (deceased) statement and the accused person. He was ordered again to take the accused person to Kitangari Primary Court where he was charged with the offence of unlawful wounding.

According to the witness the accused was denied bail and he was sent to Newala Remand Prison.

The last witness for the prosecution side was PW.5 – C.7731 D/S Joseph Manguta. PW.5 told the court that he works as a detective in the Police Investigation Department, in Mkunya, Newala District within Mtwara Region. Before going to Mkunya he was working in Newala and Tandahimba Districts. The witness testified that on 26/6/2004 he was instructed by the O-CID to investigate a case of murder involving the accused person – Yusuph Mshamu. He visited the scene of incident and met Abdallah Issa Mpapa (PW.1). He was shown the scene of incident by the said Abdallah Issa Mpapa. He was accompanied by other policemen and a medical doctor. Thereafter the witness proceeded to Nyangao Hospital where he witnessed post mortem examination of the deceased person.

PW.5 went on to state that on 29/6/2004 he collected the accused person from Newala remand prison to his office. He interviewed the accused person to find out if he understood what was going on and what he knew about the case. According to the witness the accused person confessed to have fought with the deceased person and that

DW.2 Zauda Juma testified that at the material time she was living in the family house. She said that the accused person is his young brother. The witness went on to say that on 8/7/2002 the accused person returned home at around 5.00 p.m and he did not leave the place (home). According to the witness the accused person went to sleep at around 8.00 p.m. The witness said that their house is a small one consisting of one room and small space within that is a "sebule". According to her, it was not possible for one to leave the house without the knowledge of other people in the house. She went on to say that on the material day the accused person left at 7.00 p.m. After he had left then PW.1 and PW.2 arrived at their home and asked for the accused person. She told them that he had gone to work and they asked her to take them to where he was working. They went to a bush in Ndanda and found the accused person. The Village Chairman (PW.2) put his brother (accused) under arrest because it was alleged that he had killed one Rashid Ally. That was the case for the defence side.

I have identified five crucial issues raised by the evidence in this case.

(ii) Dying declaration of the deceased person.

(iii) Confession made by the accused person to the Village Chairman (PW.2)

(iv) The defence of alibi by the accused person.

(v) Caution statement by the accused to PW.3.

I will start with the defence of alibi as raised by the accused person. The accused person stated that after the day's work and in particular after returning from the club of Shaibu Mpilaponda on 8/7/2002 at around 6.00 p.m he did not leave his house. He called his sister one Zauda Juma to support him. The said Zauda Juma gave evidence as DW.2. She was firm that after his brother, that is the accused person, had returned from his business in the evening he never left the house. I have considered this evidence or defence in detail and took into consideration that the accused person is not, in law, required to prove his innocence but rather to raise a reasonable explanation. I agree with the Gentlemen assessors that the defence of alibi by the accused person is far from the truth. It is not a defence that raises reasonable explanation on the whereabouts of the accused person on the material time. The

reasons for such conclusion are to be found in very specific questions which were asked by the prosecution side during cross examination. For instance, when the accused person was giving evidence he said that on the material day i.e 8/7/2002 his wife was not present at home. The only people who were at home were Zauda Juma (DW.2) and Sabina Juma. But when Zauda Juma (DW.2) was asked in cross examination whether his brother (accused) was married at the time she said no, he was still a bachelor. The accused person and his sister were living together in the same house how could it be that the accused said his wife was not at home and the sister (DW.2) say his brother (accused) was not married, in other words he had no wife. DW.2, Zauda Juma said in her evidence that their house is a small one and it has only one room and "sebule". During cross examination the accused person said that the house has three rooms and he had his own room. It is difficult to understand how two people living in the same house could not understand the number of rooms in the house. As if that was not enough, the accused person said that the house has two doors while his sister (DW.2) said it has one door only. With those

contradictions, it is my opinion that the witnesses were not telling the truth with regard to the defence of alibi as raised by the accused person. I therefore don't give it any weight.

Another issue I'm going to deal with is the cautioned statement made by the accused person to PW.3. I have already mentioned that the accused person denied to have made the statement in which he confessed to have assaulted the deceased person. So it has to be treated as a repudiated confession. Before I deal with it let me mention that the counsel for defence in his final submission argued that the statement by the accused person does not amount into confession because he (accused) said that he was angered by the accused person for vomiting on him. Mr. Luena, State Attorney for the Republic was of the view that the statement amounted into confession because what is important is the unlawful act committed by the accused person and not the reason for committing the act. I dealt briefly with this matter during trial within trial but since it has been raised again let me deal with it. Section 3(1) of the Tanzania Evidence Act is relevant.

Section 3(1) provides that:

> "In this Act, unless context requires otherwise – "confession" means –
>
> (a) words or conduct, or a combination or both words and conduct, from which, whether taken alone or in conjuction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence; or
>
> (b) a statement which admits in terms either an offence or substantially that the person making the statement has committed an offence; or
>
> (c) a statement containing an admission of all the ingredients of the offence with which its maker is charged; or
>
> (d) a statement containing affirmative declarations in which incriminating facts are admitted from which when taken alone or in conjunction with the other facts proved, an inference may reasonably be drawn that the person making the statement has committed an offence.

In the present case the accused was asked the following questions:

Swali: Rashid Ally ambaye sasa hivi ni marehemu ulikuwa unamfahamu?

Jibu: Ndiyo nilikuwa tunafahamiana naye tangu mwanzo wetu.

Swali: Ulikuwa na ufitina na marehemu kabla ya kifo chake?

Jibu: Hapana sikuwa na fitina yeyote na marehemu kabla ya kifo chake.

Swali: Wakati mkinywa pombe nyumbani kwa SHAIBU MPIRAPONDA ni wakina nani walikorofishana?

Jibu: Ni mimi na marehemu Rashid Ally.

Swali: Kwa nini mlikorofishana?

Jibu: Mimi nilikasirishwa na kitendo cha kunitapikia Rashidi Ally ambaye kwa sasa hivi ni marehemu

Swali: Mlipokorofishana mlipigana?

Jibu: Ndiyo tulipigana na marehemu mimi nikawa nimemuumiza kichwani nyuma upande wa kisogo.

Swali: Nani aliwaamulia?

Jibu: Tuliamuliwa na Athumani Ajabu.

Swali: Ulimuumiza na kitu gain?

Jibu: Kipande cha kuni.

I think the above information falls under section 3(1)(a) and (b) of the Evidence Act, that is it is a confession that the accused person has committed an offence. So I agree with Mr. Luena, State Attorney that what matters is the admission

by the accused person of committing an unlawful act. The accused person admitted to have hit the deceased with a piece of wood (kipande cha kuni) at the back side of his head which led to his death according to the post mortem examination report.

Coming to the repudiated confession of the accused person, the law is as stated in the case of **ALI SALEHE MSUTU V. REPUBLIC [1980] T.L.R.1** where it was held that:

> (v) a repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted. It was also held so in the case of **JACKSON MWAKATOKA & 2 OTHERS v.R [1990] TLR.17.**

In the present case there is evidence of PW.2 who was the Village Chairman at the material time. According to PW.2, the accused person confessed before him that he assaulted the deceased person. A Village Chairman is a person of authority under section 27(3) of the Evidence Act as it was held in the case of **SHIHORE SENI AND ANOTHER V. REPUBLIC [1992] TLR.330**. There was nothing to suggest that the Village Chairman (PW.2) used

threat or other prejudice. In fact he said that he handled the matter in a friendly manner. I have no reason to doubt him and I agree with the Gentlemen assessors that the accused made the statement voluntarily. In actual fact the accused person was not even arrested but advised to assist the deceased to get medical treatment. The accused person has denied to have made the confession to the Village Chairman and he alleges that he had grudges with him. However he did not raise the issue when the said Village Chairman was testifying in court, so I find that defence as an afterthought. In my view this piece of evidence is sufficient to corroborate the repudiated confession made to PW.3 per reasoning of the Court of Appeal in the case of **HATIBU GANDHI V. REPUBLIC [1996] TLR.12.**

Apart from that there is evidence of PW.1 and PW.2 who said that the deceased person mentioned the accused person as his assailant. He made the statement before PW.1 and to his wife Maimuna Jab in the same night of the incident and the following morning he told the Village Chairman the same thing. Under section 34A of the Tanzania Evidence Act, dying declaration is a good evidence

and can be used to convict an accused person. However, as a matter of practice the evidence requires corroboration. In the case of **AFRICA MWAMBOGO v. REPUBLIC [1984] TLR.240** it was held that:

> "The deceased's persistence in implicating the appellant was mere evidence of consistency and honest but not of correctness."

However, in the present case there is evidence that the conflict between the deceased person and the accused started at the club of Shaibu Mpilaponda and the assault took place near the house of Habiba @ Mama wawili. So, I cannot really say that the deceased was mistaken as to the identify of his assailant. In actual fact even the accused person himself admits in his cautioned statement that the conflict started at the house of Shaibu Mpilaponda.

I therefore hold that the deceased correctly mentioned the accused person as his assailant before his death and this piece of evidence is corroborated by the evidence of the Village Chairman that the accused confessed to have assaulted the deceased person.

The Court of Appeal of Tanzania upheld the findings of the trial Judge and held that:

> "On the totality of the evidence we are of the considered view that the third appellant's confession to the Justice of the Peace could not but be true. His denial was clearly an afterthought".

Although in the present case we are dealing with a caution statement or rather confession made to a Police Officer I think the same principle stated in the above case applies in the sense that if there was anything to be challenged with regard to the statement that should have been raised when PW.5 was giving evidence otherwise the denial of the accused person is nothing but an afterthought. Likewise in the case of **DPP vs. NURU MOHAMEDI GULLAM RASUL [1988] TLR.82** the respondent made a caution statement before a Police Officer and signed it. All proper precautions were taken to record the statement. No objection was made to the admissibility of the cautioned statement and the Police Officer who recorded it was not cross-examined as to the voluntariness or otherwise of the statement. After the prosecution case was closed, the respondent in his evidence, purported to allege that the cautioned statement

was taken from him by force or torture and was not read over to him. He repudiated it. The court observed that;

> "We do not think a repudiation in such circumstances can carry weight. If it was alleged that PW.6 should have been cross examined on that when he was testifying or an objection raised to the admissibility of the statement. Nothing of the sort was done ------ It seems to us that the so – called repudiation was an after thought and would not deserve any serious consideration".

The accused person called the Justice of the Peace as his witness (DW.2). The witness testified how the accused person was brought to him to make an extra judicial statement. The witness told the court that after following the required procedures he took the accused person's extra judicial statement. The statement was admitted by the court as exhibit "D1". The statement contained what the accused said in court and most of the details he said in his cautioned statement to PW.5. The only missing part is the one which he admitted to have stabbed the deceased with a knife. The accused person knows better why he did not disclose that information to the Justice of the Peace. All in all, as shown in the authorities quoted above, I find that the accused

person made the cautioned statement to PW.5 and he confessed to have stabbed the deceased with a knife.

In addition to the pieces of evidence discussed above there is also the Post mortem examination report which shows that the deceased body had stab wound and that the cause of death was due to haemothorax, pneumothorax and severe haemorrhage.

I therefore agree with the honourable Lady and Gentlemen assessors that it was the accused person who inflicted the fateful wounds which led to the death of the deceased person.

After holding that it was the accused person who inflicted the fateful wounds which led to the death of the deceased person the next point to consider is whether the accused person had the necessary intent, that is malice aforethought.

In the case of **ENOCK KIPELA v.R (CAT) Mbeya, Criminal Appeal No.150 of 1994 (Unreported)** the Court of appeal observed that:

> ".....usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors including the following; the type and size of the weapon; the amount of force applied; the part or parts of the body the blow or blows were directed at or inflicted on; the number of blows although one blow may be sufficient for this purpose; the kind of injuries inflicted and the attackers utterances if any, made before or during the attack."

The accused person inflicted serious wounds on the body of the deceased person around the chest and two arms as shown in the post mortem examination report. The accused person told the deceased person "sasa nataka nikuoneshe". All these factors could be sufficient to establish malice aforethought on the part of the accused person, that is he intended to cause death or grievous bodily harm per section 200(a) of the Penal Code.

However there are circumstances in this case which could negate or minimize the above factors. The accused person and the deceased were drinking liquor and the deceased person was the cause of trouble. They ended up fighting and death occurred.

In the case of **JACKSON MWAKATOKA AND 2 OTHERS v. REPUBLIC [1990] TLR.17** the appellant was convicted of murder caused during a fight. On appeal, The court of Appeal of Tanzania quashed the appellant's conviction for murder and substituted therefore conviction for manslaughter. The Court of Appeal observed that:

> "When death occurs as a result of a fight unless there are very exceptional circumstances, the person who causes death is guilty of manslaughter and not murder."

Also in the case of **MOSES MUNGASIANI LAIZER ALIAS CHICHI v. REPUBLIC [1994]** TLR.222, the appellant was convicted of murder. On appeal he argued that the trial Judge should have convicted him not of murder but of a lesser offence of manslaughter contrary to section 195 of the Penal Code because there was a fight between the deceased and the appellant.

The Court of Appeal quashed the conviction for murder and substituted it for manslaughter and remarked:

> "It has been said times without number, and we would like to reiterate, that where death is caused as a result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder."

On the basis of the foregoing I join hands with the Lady and Gentlemen assessors that the prosecution has proved the case beyond reasonable doubt against the accused person Yusuph Mshamu and I find him guilty of the lesser offence of manslaughter and convict him accordingly.

G.J.K. Mjemmas,
Judge
11/5/2007

Mr. Luena: There is no record of previous conviction.

Mr. Mlanzi: Mitigation:

Hon. Judge in awarding sentence, I request you to take into account the circumstances which led the accused person to commit the offence. As you have said in your judgment, the deceased was the one who started to cause the problem. There is evidence that it was the deceased person who took the deceased's bottle of liquor without his consent. That was a provocation. Also as PW.1 said, he saw the deceased on top of the accused person so the accused person was trying to defend himself as he said in his cautioned statement. It is true that the accused person inflicted the wounds, in sensitive parts but the deceased was

on top of him so the nearest part to reach was the chest. In additional to that the accused did not go to look out for the weapon. It is not shown that he had a weapon before. So he could have found the weapon around the scene of incident. Another thing is that the accused person has spent about two and a half (2 ½) years in custody so the court should take that into account. I also wish to refer the court to the case of **Valerial Sail v.R [1990] T.L.R.86** in respect of the grave provocation made against the accused person. Finally I wish to say that the deceased have got himself to blame for his misconduct.

That's all.

ALOCUTUS:

Hon. Judge I request you to look at my health. I am not in a good health and any prolonged sentence in custody will kill me. I'm asking for your assistance.

SENTENCE:

I have taken into account the mitigating factors as advance by the defence counsel. I have also taken into account the circumstances under which this offence was committed. In fact it was the deceased person who

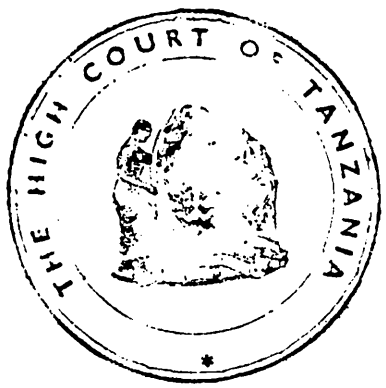
instigated the whole matter. The accused person has been in custody for more than two years now. On the basis of the

foregoing I sentence the accused person to serve three years imprisonment from today.

G.J.K. Mjemmas,
Judge
11/5/2007

Order: Right of appeal explained.

Order: Honourable assessors thanked and discharged.



G.J.K. Mjemmas,
Judge
11/5/2007