

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

(IN THE DISTRICT REGISTRY OF ARUSHA

AT MONDULI

CRIMINAL SESSION NO. 18 OF 2016

(Originating from District Court of Karatu at Karatu PI. No.
6/2014)

THE REPUBLIC

VERSUS

RUTU QAMARA @ QARESI

JUDGMENT.

Date of Last Order: 21/2/2018

Date of Judgment: 01/03/2018

BEFORE: Hon. S.C. Moshi, J

This is a murder case Rutu s/o Qamara @ Qares who herein is referred to as the accused person is charged with Murder Contrary to Section 196 of the Penal Code [Cap.16 R.E.2002].The particulars of the offence are that, accused person, RUTU S/O QAMARA @ QARES, on the 19th day of November, 2014 at

Mangisa area, Endabash village within the District of Karatu and the region of Arusha, did murder one Josephina D/O META.

The accused person pleaded not guilty to the charge. Therefore, the court called upon the prosecution to prove their case. The prosecution side had a total of seven witnesses and on the other side; the defense had one witness, the accused person himself.

The court sat with three lady assessors namely, Ellah Richard, Lucia Elisante and Sarah Massawe.

During the trial, Miss Tarsilla Gervas, State Attorney and Miss Cesilia Foka Ndaweka, State Attorney appeared for Republic whereas Mr. Priscus Massawe, advocate represented the accused person.

Brief facts of the case; the deceased met a brutal and violent death as a result of being chopped to death by an axe. The autopsy report shows that, the body had two visible cut wounds at the frontal part of the skull and the brain tissue was out. The deceased was also bleeding from the nose and the ears. According to the prosecution witnesses, the deceased and the accused person are neighbors. On the fateful date, during day time, the accused person (accused) went to deceased home. At deceased home he found PW1 and the deceased. The accused

followed the deceased who was washing clothes in one of the houses. The accused uttered some words and he looked violent. On noting that, PW1 sensed danger, she told the deceased to come out. The deceased went out, took children who were sitting with PW1 and decided to move to another house and locked the door. The accused took an axe that was in the house and followed the deceased. By then the deceased had locked the door. The accused broke the door and attacked the deceased with an axe.

The accused admitted to have killed the deceased. However, he said that he killed the deceased on self defense. According to his testimony; the killing happened at his (accused's) home and not at the deceased's home. He said that he came back home from his farm. He found the deceased in his house. The deceased had opened his bag which contained his clothes and was searching it. So he thought that she was a thief as he called her but she did not answer; instead she ran into another house. He also said that the axe which was used to kill the deceased belongs to him.

I will now briefly narrate the testimonies. For prosecution their evidence was as follows; PW.1. MARIA NADE, testified among other things that, she lives at Endabash, in Karatu District, the accused person is her neighbor.

On 19/11/2014 Rutu (accused) came at her home. She was sitting outside, at the compound. She was shocked as she saw Rutu standing behind her. She asked Rutu, why aren't you talking. Rutu answered what should he say. Rutu entered the kitchen where he found Josephine Meta (Deceased); Josephine Meta was her daughter in-law. The deceased was washing clothes. The accused told Josephine "usinisukutue" (she should not trouble him). She called Josephine, the deceased got out and came to the place where she was sitting. She was sitting there with children. The deceased took the children, she entered inside a house, when she was entering the accused said "usinifunge" (don't lock me out).

Josephine entered into the house and locked the door. She (PW.1) raised an alarm and rushed to the "Minyaa" plants which are nearby; at their shamba (farm). Rutu was shouting. He was saying, "usinifunge usinifunge". Rutu was carrying an axe. She was afraid because Rutu was carrying an axe. She left Rutu at home. She rushed to the farm to call her husband. The farm where her husband was is very close to their home. Her husband ran and got home before her. When she got home, she found the deceased (Josephine Meta) already dead. Rutu had already escaped. She didn't look at the body of Josephina as she fainted.

During cross examination by the defense counsel the witness stated among other things that, Josephine entered inside with the children. She ran to call her husband. She heard the door being broken. By then she had already met her husband who rushed to the scene. She did not go back to the scene by then as she had fainted. She didn't see the body. Her husband told her that Rutu had chopped the deceased with the axe. When she regained her conscious she found out that Josephine had already passed away. Her husband told her that Rutu run away with the axe. She saw Rutu after his arrest.

PW.2 JOHN NADE, stated among other things that, on 19/11/2014 at 3.30 p.m. he was pushing an oxen cart. He was selling water. He heard people raising an alarm. He went to the place where the alarm was raised so he could see what was happening, the alarm was from the direction of Godfrey Tluway's home. On the way he met Rutu. Rutu was holding an axe which had blood. The alarm was raised in the eastern side Rutu was running towards the west. He asked Rutu to stand, he wanted to talk to him. Rutu asked him to put the stick on the ground so they could talk; but Rutu continued to run. He ran after him. Patrice Bombo appeared in front of Rutu. He was holding a stick. He told Patrice to ask Rutu what he did. Patrice asked Rutu to

stop. Rutu refused to stop. Patrice Bombo blocked him. Rutu attacked Bombo with an axe, fortunately Bombo raised his hand to protect himself. Rutu cut Bombo with the axe in the head. By then many people had come. Rutu continued to run. They continued to chase him; fortunately Rutu fell down, he lost his grip of his hand and, the axe fell. People wanted to attack Rutu. The police had already come and they told the people that they should not beat him. After his arrest he said that it was true that he had killed the wife of Emmanuel Godfrey.

On further cross examination he said that she had neither seen Rutu smoking bhang nor quarreling.

PW.3. PATRICE BOMBO, he said that, he also ran towards the place where the alarm was being raised. He met people who were chasing Rutu. He confronted Rutu. The people asked him to block and stop him. He stopped him. Rutu was holding an axe which had blood on it. Rutu attacked him and cut him at the head. He fell down and the people helped him. Rutu ran towards a farm; the people arrested him.

During cross examination by the defense counsel he said that the accused was using bhang; and when he uses bhang he turns hostile.

When the witness was questioned by the assessor he said that the accused was a trouble maker but he did not know if the accused behaved like that after taking bhang.

PW.4. GODFREY TLUWAY, stated among other things that, Josephine Meta is wife of his son Emanuel. On 19/11/2014 he left home in the morning. He went to the funeral at Dagha Awe's home. While there, he was called by Malkiad Ero who told him that there was a person who has invaded his home so he should go home. When he got home, he saw people had already gathered and the deceased's body was lying on the ground, it was covered with a Kanga (piece of cloth). The police came there within a short time.

Upon cross examination by the defense counsel he said that the accused looked like a lunatic; he looked like a person who is smoking bhang.

PW.5. DANIEL PHILIPO SIMPA is a doctor who conducted the post mortem examination. He examined the deceased's body. The body had two visible cut wounds at the front part of the skull. Brain tissue was out of the skull, and he was bleeding from the nose and ears. His medical opinion shows that the deceased died due to bleeding to the brain tissue and fracture to the skull.

PW.6. F. 5312 SGT ELIA, he is the Officer in Command of the Station (OCS) of Endabash Police Station in Karatu District. On 19/11/2014 at about 4.00 p.m. or 3.45 p.m. he received information from the Chairman of Endabash village to the effect that a person was cut with an axe at Mangisa Hamlet. He went to that area; he was accompanied by a village Chairman. When they approached the crime scene they met people who had already arrested Rutu Qamara. The people were angry. He pleaded with them not to hurt the accused. One of the people who arrested Rutu was holding an axe. That person said that, that axe was used by the accused to cut the deceased. The person who gave him the axe was called John. The axe had blood on it. It had a wooden handle, part of the handle was wrapped with rubber [Exhibit P.2].

He arrested the accused. He went to the crime scene. He saw Josephine lying on the ground and she was already dead.

He informed the police at the District level. The deceased was taken to Endabash Health Center. He took the accused and the witnesses to police station.

He recorded the statement of some witnesses. He locked up the accused and recorded the statement of the witness who could not

come due to advanced age, TLUWAY MANIMO who is above 90 years old [Exhibit P.3].

He stated further that, he again went to crime scene with the Office in Command of the Criminal Investigation, District (OC CID) at 5.00 p.m. They inspected the scene, and drew the sketch map. The OC – CID ordered that the accused should be taken to Karatu Police Station and the body should be taken to Lutheran District Hospital.

PW.7. F. 656 D/SGT VENDELINUS, said that on 19/11/2014 at 4:00 p.m. he was at Karatu Police Station. The OC –CID directed him, burton and other Police Officers to go to Endabash to inspect the Murder. They went to the scene at 5:00 p.m. They inspected the crime scene and drew a Sketch Map of the scene [Exhibit P.4]. The crime scene is at Mangisa Hamlet. Blood was scattered all over the room where the deceased was killed. He thereafter went back to Endabash police station. The accused was already in lock-up. The deceased's body was at Endabash Health Center.

They moved the body to Karatu Lutheran Hospital. They transferred the suspect to Karatu Police Station. They got at

Karatu Police Station at 19.00 p.m. He recorded accused's caution statement [Exhibit P.5] at 19.30 p.m. to 8.30 p.m.

For defence, the accused person testifies as DW1, he among other things said that, the offence was committed at Endabash at Mangisa area. The offence was committed on 19/11/2014 at around 12.30 p.m. The incident happened at his home. He was at the farm. He returned home, he saw a person in his house. The person was searching his bag. He asked her what she was doing. Why was she searching into his bag. She did not answer. That person came out. She entered into another tin roofed house which is almost similar to the other house. He pushed the door with his hand; he entered in the house and cut her with an axe. The axe was near his bed, the bed is at his sitting room where he used to sit. The axe belonged to him.

The deceased was opening his bag. The bag contained his clothes and his grandmother's clothes. He knew that she was a thief; that is why he attacked her. He did not know the person whom he attacked with an axe. The deceased is not his neighbor.

He knew Maria Nade (PW1) by face as she used to come at their home to visit his grandmother. He does not know Maria Nade's home.

It is not true that he used to go to Maria Nade's home to ask for food.

When he met Patrice Bomboo he was along the road going to town. Patrice Bombo stopped him and started to attack him with sticks. He fell down. He was carrying his axe. He had used the axe to attack the thief. Many people came. They attacked him and beat him. He dropped the axe. His head was spinning so he could not hear anything.

He recorded a statement but the police have changed the statement. He said the house was his but they said that the house was not his. They even changed the story about the axe. He told them that it belonged to him but they recorded that it was Godfrey's. He signed on the statement but it was not the statement which was brought to court. He attacked the deceased with an axe because he thought that she was a thief.

That is the evidence from both sides. As indicated above, there is no dispute that the deceased met unnatural death; per the evidence of PW5 (the doctor) and the postmortem examination report(Exhibit P1).It is also common ground that the accused person killed the deceased. The main issue is whether the

accused killed the deceased intentionally; whether malice aforethought has been proved.

In the evidence as a whole there is no direct evidence that points at the accused person to be the killer. None of the prosecution witness had seen the accused attacking the deceased with an axe. Therefore what we have before us is accused person's admission and circumstantial evidence. It is established principle that before the court can find a conviction entirely on circumstantial evidence must find that the exculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilty; see the case of **John magulandogo V. The Republic**, Criminal Appeal NO. 18 OF 2004, Court of Appeal of Tanzania (Unreported)

There is evidence of PW1. She was at home with the deceased. She was sitting at the compound of their home while the deceased was washing clothes in one of the houses. She saw the accused coming to their home; she then saw the accused following the deceased to the house where the deceased was washing clothes. She also heard the accused uttering some words like "usinisukutue", "usinifunge" and she sensed trouble. She called the deceased to go out of the house where she was

washing clothes. The deceased escaped to another house and locked the door. The witness rushed to call her husband. It is evident that after rushing from the scene so she could seek assistance, the witness did not know what transpired thereafter because according to her evidence during cross - examination, she had fainted and regained her consciousness after the event. She even did not see the body. However, PW1's evidence establishes the fact that the deceased was last seen with the deceased. As indicated earlier, the accused does not dispute the fact that he saw the deceased.

There is evidence of Tluway S/O Manimo, whose testimony was received under section 34B (1) and (2) of the Evidence Act, Cap 6 R.E. 2002 and it was marked as Exhibit P.3. He was the first witness to get to the crime scene. He said that, he was at the grazing area, he was called by PW1 who is his daughter in law and told him that Rutu had taken an axe and he had entered Godfrey Tulway's house. He went to the scene of crime. He entered inside the house where he saw the accused holding an axe which was covered with blood and he also found the deceased already dead; and she was lying in a pool of blood holding her youngest child. He took the child. He raised an alarm for help; the accused escaped before people gathered. However

the youths pursued him and arrested him. This piece of evidence shows that the accused was found at the crime scene immediately after the offence was committed. The evidence also establishes that, the accused was holding the axe which was covered with blood.

The other incriminating piece of evidence is the evidence of Pw2 and Pw3. Their testimony shows that, the accused was seen fleeing from the crime scene with a murder weapon. He was seen with an axe which had blood on it. It was also their testimony that the accused was arrested by the people when he was fleeing away and trying to escape. Later on the police came, PW. 6 was the police who came with the village chairman, he apprehended the accused person. The accused person also did not dispute this evidence.

There is also accused person's caution statement, exhibit P.5. The accused person admitted to have killed the deceased. However, although the statement was admitted in court, I have decided to expunge it because the officer who recorded it did not show the law that allowed him to record that statement; he also did not even indicate whether he ever informed the accused of his rights before being interviewed.

It is my view that the conduct of the accused person points to him being the killer; the fact that he was last seen with the deceased person, the fact that he was found at the crime scene immediately after the offence was committed, the fact that he was escaping from the crime scene and his own admission proves that the accused did indeed kill the deceased.

The question is whether the accused person had intention to kill. The intention of the accused can be proved from the conduct of the accused and the circumstances of the case. In a similar case of Joseph **Marwa Chacha v. Republic** [1980] TLR 279 the Court of appeal held among other things that, *"in this case malice aforethought was established by the fact that the appellant made sure the coast was clear, by the nature of the attack, by the appellant's conduct immediately after the killing, by his having covered deceased's body, and by existence of motive."* The court of Appeal also held that, *"the appellant had nothing from which to defend himself and therefore did not kill on self defense."*

In the case at hand, the evidence shows that when the accused attacked the deceased; the deceased was not armed. The deceased tried to escape from him by running to another house yet the accused took an axe and pursued her, broke the door and ultimately cut the deceased to death and the accused escaped

from the scene. It is my view that the conduct of the accused indicates that the accused had intended to kill the deceased.

Also as indicated in the case of **Marwa Chacha** (supra) malice aforethought can be proved by the type of weapon used. Also in another case, case of **Tunutus/o Mnyasule v. R** [1980] TLR 204, the court held that malice aforethought can be proved by the fact that the accused stabbed the victim several times with a knife. Similarly, in our case at hand the accused cut the deceased by an axe. The autopsy shows that the body had two deep cut wounds at the frontal part of the skull.

All in all, it is my view that, the type of weapon, the fact that the deceased was not armed, the fact that the offence was committed during broad day light, the accused was able to see and follow the person whom he was attacking, the nature of the wounds which were inflicted, his attempt to escape with a bloody Murder Weapon and the accused's conduct before and after the attack points to no other explanation but to the guilt of the accused person. All the circumstances prove that the accused person had intention to kill the deceased.

The issue that arises at this stage is whether the accused person's defense can raise any reasonable doubt on the

prosecution's evidence. The accused said that he was defending himself from a thief. He said that he called out the person who was searching his bag which contained his clothes but the person did not respond; instead, that person ran to another house. That is when he followed her and attacked her with the axe. The question is whether the force used by the accused was reasonable in the circumstances. Could the person whom the accused attacked pose danger to accused person's life? The evidence shows that the offence was committed in the broad day light and the deceased was not armed. Why should the accused use a lethal weapon; the weapon which the accused was supposed to know that it could lead to death. Why cut with a knife what you can cut with a spoon? In the circumstances of this case the offence was committed during day light, the accused said he saw the person whom he thought was a thief running to another house yet he followed her; I think that the accused could not have honestly and reasonably believe that he was defending himself. The nature of weapon used and the force which was used was not necessary in the circumstances. All in all, I find that, the accused person's defense is just an afterthought and it cannot cast doubt on the prosecution's evidence.

I have taken into consideration the assessor's opinion. By virtue of law I am not bound by the assessor's opinion however their opinion helps the court to make decisions on matters of facts. Two of the lady assessors gave their opinion that the accused is guilty. One assessor gave her opinion that the accused could have been mentally unfit. I have considered her opinion. However this fact was supposed to be raised as a defense, although the issue on the mental status of the accused was asked during cross examination of the prosecution witnesses but this fact was never raised during the accused's defense nor was it raised during the plea taking. The accused is presumed sane unless otherwise proven. The duty of proving otherwise is upon the accused person who is required to prove on the balance of probabilities; see the case **Majuto Samson and the Republic**, Criminal Appeal No. 61 of 2002, Court of Appeal of Tanzania sitting at Mwanza (unreported).

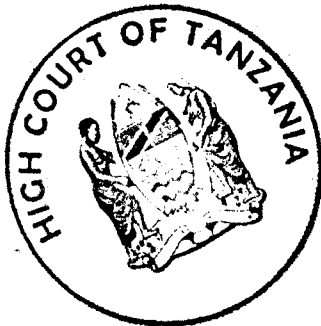
In the final analysis, basing on the aforesaid reasons I respectfully agree with the two lady assessors that the prosecution has proved the case beyond any reasonable doubt. I find the accused person guilty. Consequently, I convict him of murder c/s 196 of the Penal Code, Cap. 16 R.E. 2002.

SENTENCE.

The accused person is convicted of Murder. The only sentence for Murder is a mandatory death sentence. The court is bound to sentence the convict to suffer death by hanging; see Section 197 of the Penal Code, Cap. 16 R.E. 2002, as read together with Section 26 of the same law. The court's hands are tied. The court has no discretion in sentencing.

That said, I sentence the accused to suffer death by hanging.

Right of Appeal is Explained.




S.C.MOSHI
JUDGE
01/03/2018