

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 36 OF 2016
REPUBLIC
VERSUS
JOHN RANGE

JUDGMENT

MKASIMONGWA, J.

Before this court JOHN RANGE stands charged with Murder Contrary to Section 196 of the penal Code [Cap. 16 R.E 2002]. It is alleged that.

"JOHN RANGE, on 5th Day of December, at Ubungo NHC area within Kinondoni District, Dar es salaam Region, murdered one JUMA AYUBU"

The Accused pleaded not guilty to the charge and with a view to proving it the prosecution called six (6) witnesses to testify to the court. The witnesses are **Akwari Jacobo, Constansia Siwingwa, Michael George Milanzi, Azizi Mohamed, Dennis Wilson Chishonfwi** and **DR. Edda Vuhahula** who may, herein after, also be referred to as PW1, PW2, PW3, PW4, PW5 and PW6, respectively.

In short the prosecution's case is as that, PW2 is a clerk working with Falcon, Bus service. She resides as Ubungo. On 25/12/2012 she held a

Christmas Party at her premises and he invited several people. Among the invitees were PW1, PW4 and JUMA AYUBU (Deceased). PW1 and PW4 work with RS and MAJINJA Bus Service, respectively at Ubungo Bus Terminal. At the party there were food and soft drinks and music played. The party was over by 9.00 pm and whereas most of the invitees had left the home, PW1, PW4 and JUMA AYUBU (Deceased) remained behind assisting their host putting things in order. Then the gate was knocked by someone and when PW2 came out in response she found him to be Chacha, a neighbour and the accused person's brother. Chacha asked PW2 as to why she was playing music and PW2 responded that she did so at her premises and not his home when Chacha started rebuking her. JUMA AYUBU then came and asked Chacha "*Kwa nini unamfokea Dada*" and Chacha responded asking him "*Kwani unasemaje*" PW2 and JUMA AYUBU came inside. Thirty minutes later, PW2 came outside her house escorting PW1, PW4 and the deceased (Juma Ayubu) as they were leaving from the home. Outside the gate again they found Chacha who approached them so that he assaults PW2 when was intercepted by the deceased. The latter asked PW2 to go back inside the house which PW2 did and closed the door. As she was inside the house PW2 was not aware of what was taking place there outside.

When PW1, PW4 and the deceased were there outside Chacha said to the deceased "*Wewe ni kama nani unamuamrisha huyu kuingia ndani na kufunga gate?*" He went on holding and dragged the deceased into his premises. PW1 followed Chacha so that he takes JUMA AYUBU away and it is when Chacha raised alarm calling "John, John, John". There came John

(the accused person) from inside the house armed with a knife. PW1 and PW4 clearly saw John as there was electricity light at the place and on his arrival John said. "*Tulia, tulia, tulia*" approaching the PW1 and wanted to stab him on his stomach and the knife landed and stabbed on his right arm. From shock PW1 ran away from the scene leaving behind Juma Ayubu and PW4. According to PW4, John (the accused person) whom he knew not prior to that day stabbed JUMA Ayubu on his arm with the knife. PW4 left Chacha whom he was holding and entered into the house where there were John and Juma Ayubu. He found Juma Ayubu stabbed on his arm, shoulder and back. The accused's mother came with a chair so that she hits the deceased when the accused person said to her "*Mama acha, Mama acha*". Despite that call by the accused the mother hit the deceased by the chair. She also wanted to assault PW4 with it but PW4 successfully punched it and he fell down when Chacha came so that he stabs him with a knife which however stabbed the deceased. There was a silence and each was looking at the deceased who was severely bleeding. PW4 added that there were all signs showing that Juma Ayubu is dead. PW4 therefore ran away from the place to his home.

The prosecution's case is also to the effect that on 25/12/2012 at or 11.00 pm Michael George Millanzi (PW3), a ten call leader was at his home when there came the accused and informed that they been invaded by thief's and that in a fight ensued among the thieves they had stabbed dead one of their companions. The matter has been reported to the police and police officers were at the home and he, as the all leader, was summoned to the scene of crime. At the scene of crime PW3 met police officers who

showed to him a dead body lying in front of the house occupied by the accused's family. The body had a cut wound on the left shoulder near the neck and soaked with blood. The body was eventually taken to the police station along with the accused person and his mother. On 26/12/2012, PW5, a Police Officer stationed at Magomeni Police Station, was ordered by his superior to go to Ubungo NHC area visiting a scene of crime of a reported murder case. He came to the scene of crime at about 7.30 am – 8.00 am and found blood mark that flowed from the accused's house to the outside veranda. The area also showed something to have been drugged from inside the house to outside. He drew a sketch map plan.

PW5 again was assigned to conduct investigation in the case. In the investigation he recorded the statements of the witnesses AKWARI (PW1) and COSTANSIA (PW2). In their statements the two witnesses said that they were at the scene of crime and that there was a quarrel between them on one hand and the accused and his brother on the other hand and that it is the accused who caused the deceased's death. Again as the investigator of the case, PW5 supervised the Postmortem Examination the fact which was confirmed by Dr. EDDA VUHAHULA (PW6) the Medical Doctor at Muhimbili National Hospital where she works in the Pathology Department of the Hospital. PW6 added that on 27/12/2012 she was on duty working at the Muhimbili National Hospital Mortuary, when she was informed by PW5 who was in possession of the Post Mortem Examination Request Forms that there was a deceased body that required a Postmortem Examination be conducted upon it. With the police officer there were deceased's relatives who identified the body in the presence of

PW5 to be that of Ayubu. PW6 examined the body both externally and internally. Upon examining the body externally when was still clothed PW6 found it soaked with blood and she suspected the deceased had massively lost blood. So she examined, the deceased's eyes, nails, foot and palms and she detected that there were all signs that the deceased suffered a massive bleeding for the parts were whitish. PW6 also examined the body while was naked and found that there was stab wound under the neck. The wound was so deep into the left lung which caused severe bleeding. Again she found other small wounds caused by a sharp object. PW6 then operated the deceased's chest and internally examined the body when she found the deep cut wound extended into the lungs and that the jugular veins were cut. She then stitched and treated the body and handed it over to the relatives. PW6 prepared a Report on Post Mortem Examination which she identified in Court and tendered it as exhibit. The same was admitted and marked **Exhibit P1**. According to PW6 the deceased's death was due to hemorrhagic shock due to stab wounds.

It is from that evidence the accused person was charged with murder and upon being found to have a case to answer, the accused was called upon to make a defence. In his case he had one witness to call that is NASEMBA RANGE (DW2) who is his own mother. In defence it is shown that DW2 is a retired Civil Servant living at Ubungo National Housing Corporation area together with her children namely JOHN and CHACHA. On 25/12/2012 JOHN (the accused person) came back home at 6.45 pm and after having his dinner he proceeded to bed later at 8.45 pm. While he was sleeping the accused heard his brother one Chacha calling him from

outside. He came outside where he found three young men standing and a fellow lying down. They showed to have fought and upon asking Chacha as to what was the matter the later did not respond. The noises from outside awakened also DW2 who again came outside where she found a male person fell on the ground and other young men including Chacha. DW2 did not know the other young men. She asked the accused person to go and report the incidence to the police station. The accused then proceeded to Urafiki Police station where the matter was reported. Accompanied by police officers the accused person came back to the home where they only found the mother (DW2) and the man who was lying on ground as the other young men ran away. Upon seeing the body on the ground, according to DW2, the police officers said:- "*Ni hawa wavuta Bangi wa hapa Terminal*". The police officers asked for the presence of a ten cell leader and PW3 one MICHAEL GEORGE MILANZI was called. Upon arrival of PW3 at the scene, DW2 told the Court that the police officers searched the body which was laying in front her house and found it in possession of a Mobile phone and *marijuana* in the packet. Along with the body the police took her and John to the Police station. At the police station DW2 and the Accused person were interrogated and the accused was arrested to assist in the investigation of the case. According to the accused, he remained in the police station for two – three days before he was taken to Magomeni Police station. He added that sometime on 26/12/2012 at 10.30 he was interrogated by the police and his statement was recorded. He was eventually, on 7/1/2013 brought to the court charged with murder.

That is the whole evidence in this case. As said, the accused person is charged under Section 196 of the Penal Code [cap. 16 R.E 2002]. The offence under this Section, that is murder, is constituted of three elements which are:-

1. That a person is dead
2. That, the accused person(s) has/have killed that person.
3. That the accused person(s) killed the person with malice aforethought.

It follows therefore that in a Murder case and particularly in this case now at hand the Court must respond, from the evidence adduced, to the following questions:-

1. Whether Juma Ayubu is dead
2. Whether the Accused person one John Range killed Juma Ayubu
3. Whether John Range killed Juma Ayubu with malice aforethought.

In the trial of the case the Court had the aid of three Court Assessors namely Asha Sidadi, Togolani Mshana and Rajabu Dege. As to the verdict, the Assessors had unanimous opinion that the accused person is guilty of murder. They so opined on being satisfied that on the fateful place and time, the Accused was called outside by his brother one CHACHA. Without being told so by CHACHA the accused came outside armed with a knife with which PW4 saw him stabbing the deceased to death. I will consider the opinion of the Gentle Assessors in this judgment.

Going by the evidence adduced, I find it has been amply demonstrated that the accused person and Constansia Siwingwa (PW2) are

neighbours living at Ubungo NHC area. On the 25/12/2012 night they were all in their respective houses and that PW2 was hosting a Christmas Party to which among others, Akwari Jacob (PW1), Azizi Mohamed (PW4) and Juma Ayub (deceased) were invited and attended. Again going by the evidence, I find it is not disputed that Juma Ayub is dead. He died on 25/12/2012 night in the compound of Nasemba Range (DW2) the accused's mother in which compound lives also the accused person. One Dr. EDDA VIHAHULA (PW6) examined the deceased body as it was identified to her by Shabani Ayubu Shabani and Joseph Thomas Mzulu and in the presence of a police officer one D. 2603 D/Sgt Denis as being that of Juma Ayub. Upon examining the body, PW6 found it:-

"... with a round stab wound on the left ... cervical area penetrating to the apex of left lung and causing massive bleeding and blood in the left chest cavity. Other stab wounds were on the back ... and ... cut wounds on various parts of the body. The body was soaked with blood"

PW6 the opined that the deceased's death was due to severe hemorrhagic shock caused by stab wounds. Evidently this evidence proves the fact that Juma Ayub is dead and that he did not die a natural death. It was due to stabs inflicted upon him by fellow human beings.

As it is shown on the information of murder filed in court the accused person is alleged to have killed the deceased and the Court has to answer therefore, whether the accused person killed the deceased. The evidence adduced by both sides of the case shows that on the material night the

deceased (Juma Ayubu), Akwari Jabob (PW1) and Azizi Mohamed (PW4) quarreled with Chacha, the accused's brother as the accused was sleeping inside. This happened as Chacha wanted to assault Constansia Siwingwa (PW2) when he was intercepted by the deceased. It is not disputed that from the quarrel Chacha called the accused person. According to PW1 and PW2 the accused person came armed with a knife with which he stabbed PW1 on his hand and from the shock PW1 ran away from the scene. PW4 knew the accused person even prior to that material night and he saw the accused person stabbing Juma Ayub with the knife on his arm as he (PW4) was holding Chacha. The later pleaded to be released as there was no reason for quarrelling. PW4 left hold of that Chacha and entered into the accused's house where Juma Ayubu was drugged into by the accused. There he met Juma Ayub stabbed on his arm, shoulder and back and that the accused was possessing a knife with which he wanted to stab PW4 which eventually stabbed the deceased. The evidence of PW4 to the effect the accused did stab deceased with a knife is the direct one. I have considered the questions put against him during cross-examination. I find nothing that suggests that he was telling the lie. The evidence therefore positively responds to the issue and I find the accused person to have killed Juma Ayubu on 25/12/2012 as it as alleged by the prosecution.

Last is whether the accused person killed Juma Ayubu with malice aforethought. Section 200 of the Penal Code [cap. 16 R.E 2002] provides for circumstances which if established by evidence, malice aforethought is deemed to be established. The section reads as follows:-

"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 or to do grievous harm to any person, whether such 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 wish that it may not be caused,*
- c) An intent to commit an offence punishable with penalty which is graver than imprisonment for three years*
- d) An intention by act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence"*

This section was sometime judicially visited by the Court of Appeal of Tanzania in the case **Elias Paul v R, Criminal Appeal No. 7 of 2004** (unreported) where the Court stated that malice may also be inferred from the nature of the weapon used, the part or parts of the body where the harm is inflicted and the conduct of an accused person before or after or after killing. In the case at hand the accused used a knife stabbing the deceased on the left shoulder under the neck, back and arm. The stab on the shoulder penetrated into lung and jugular ventricle. Surely these are

vulnerable parts of a human body. As to the conduct of the accused after the killing it is shown that it is the accused person who reported of the incidence to the police and the report was not of a confessional nature. It is him who had also reported the incidence to the ten cell leader and summoned him to the same as directed by the police. Whereas the nature of the weapon used in alleged killing and the body party on which the harm was inflicted may lead the Court to infer malice, the conduct of the accused after the killing does not. I have considered again the testimony of PW4 who is recorded saying: -

"John is the accused person in this case. I was not knowing him prior to that material night. Chacha left hold of JUMA and held AKWARI. JOHN came and stood close to the deceased and stabbed him with the knife on his arm. I went and got hold of Chacha and told him "Haina haja ya ugomvi" (that is there is no need of fighting). Chacha insisted that I leave him sit on the chair and will not fight"

In evidence PW5 one Denis Wilson Chishonfwi also told the court that:-

"I recorded the statements of AKWARI and CONSTANSIA ... In their statements they narrated me that they were at the scene of crime where there was a quarrel between them and the accused and his brother"

Again in evidence the accused person and DW1 told the Court that they heard noises outside their house and that Chacha was calling the accused outside. When the accused came to the place he found the deceased fell

down and three young men standing and it showed the young men fought. These versions of testimony lead the Court to find that there was a fight to which Chacha and John (accused) on one hand and Juma Ayubu, Akwari (PW1) and Aziz Mohamed (PW4) on the other hand were parties. It can reasonably be taken therefore, that the deceased died as a result of the fight. Where death occurs as a result of a fight an accused person should be found guilty of a lesser offence of manslaughter and not murder (See **Moses Mungasiani Laizer Elias Chichi v R (1994) TLR 22**).

Based on what is discussed herein above, I will slightly differ with the Gentle Assessors that although the accused person is charged with Murder he is found guilty of Manslaughter and he is accordingly convicted of Manslaughter contrary to Section 195 of the Penal Code [Cap. 16 R.E. 2002].

Dated at Dar es Salaam this 1st of June, 2018.




E. J. Mkasimongwa

JUDGE

1/6/2018