

IN THE HIGH COURT OF TANZANIA

AT NJOMBE

ORIGINAL JURISDICTION

(IRINGA DISTRICT REGISTRY)

CRIMINAL SESSION CASE NO. 97 OF 2016

THE REPUBLIC

VERSUS

ZAWADI S/O FABIAN MLOWE

JUDGMENT

KENTE, J

The accused Zawadi Fabian Mlowe is charged with murder contrary to section 196 and 197 of the Penal Code. The information alleges that on 15th November 2015 he murdered one Imakulata Mbulingwe. This incident is said to have occurred at Limage Village in the District and Region of Njombe. He denied the charges.

The fact that Imakulata Mbulingwe who was an old lady is dead and that her death was not natural as she died in a violent manner at the time which is contemporaneous with the occurrence of this incident is not

disputed. According to the postmortem examination report which was admitted in evidence during the preliminary hearing as exhibit P1, the death of the deceased which is said to have occurred five days prior to the examination was due to asphyxia which was secondary to strangulation. The murderer or murders appear to have thereafter dumped the body of the deceased in her pit latrine from where it was subsequently exhumed on 15th November 2015.

Briefly stated the prosecution case which rested on the testimony of four witnesses was to the following effect. As stated before the deceased was an elderly lady and she was the mother of one Patricia John Mkongwa (PW1). The deceased was living at Limage Village, Njombe District. It is alleged by the prosecution witnesses particularly the deceased's daughter (PW1) and one Vitalis Simon Nchami (PW2) who was then a chairman for Mpombwi sub-village that the accused was living with the deceased and working as a shamba-boy. As regards these charges the accused was allegedly hired by the persons who had contrived the idea of killing the deceased. The said persons were however not charged along with the

accused. The accused allegedly agreed to do the assignment collaboratively with one Edimerick Mkongwa at an agreed price of Shs. 300,000/=. According to the accused in his cautioned statement which was admitted in evidence as exhibit P3, on the fateful day, the hired killers went on to accomplish the assignment and the person who had hired them made payment of Shs. 200,000/= and promised to pay the balance due on 12th November 2015.

However, two days thereafter, that is on 14th November 2015, PW1 passed at the home of her mother, the deceased as she was heading for the shamba. She told the court that told the court that found the door locked. Believing that her mother had as well gone to the shamba, PW1 moved on to work after which she returned to her mother's home. That is where she met the accused. On asking him the whereabouts of her missing mother, the accused allegedly told him she (deceased) had gone to see her daughter who lived at the place called Igominyi. On being told by PW1 that she was the very daughter of the deceased who lived at Igominyi, the accused is said to have changed and said that he could not know where

the deceased had gone. Still in doubt, PW1 asked the accused if her mother had locked the door and left with the key. The accused allegedly told him the deceased had locked the door but left behind the said key. PW1 then instructed her son one Philibert who had accompanied her to open the door whereupon it was discovered that all the maize which PW1 had stored there in reserve was nowhere to be seen. PW1 then turned to the accused and asked him if her mother had sold the said maize. The accused's nod was not hesitant. He told PW1 that the deceased had sold the whole maize and that she had thereafter left on board of certain motor-vehicle (Noah make) as she went to seek for medical treatment. Notably, prior to her death, the deceased had one of her legs distended. On being told by PW1 that there was nobody else who could have taken the deceased to hospital other than herself, the accused is said to have insisted that the deceased had told him that she was going to hospital and that she was taken her daughter. Dissatisfied with the accused's explanation, PW1 reported to the ten-cell leader who advised her to inquire from her mother's neighbours if she had informed anyone that she was

going for medical treatment. On the following day at 5 am, PW1 went to the first neighbour who told her she had no information regarding her mother's whereabouts. She then went to report to the Chairman (PW2) with whom they went back to the accused who was still at the deceased's home to inquire about the whereabouts of the deceased. At first the accused gave PW2 the same explanation that the deceased had left on board of a motor vehicle together with her daughter one Lydia. Likewise PW2 was unsatisfied with the accused's answer. He therefore reported the matter to the Village Chairman and the Village Executive Officer who hurriedly went to the scene of the crime to render their assistance.

Notably, by that time some members of the public had started gathering at the deceased's home and they were becoming extremely enraged. When the accused realized the impending danger of being attacked by the disgruntled members of the public, he pleaded with the village leadership to take him aside where he said he could tell them the truth. However, the uncontrollable villagers are said to have opposed and insisted for the accused to tell the truth in their presence. Apparently,

without conscious thought or attention, the accused then uttered the words thus “huyu marehemu Imakulata”. According to PW2, no sooner had the accused uttered the said words than the angered members of the public descended on him attacking him indiscriminately on various parts of his body. As luck would have it however, he was rescued by the said leaders who successfully convinced the annoyed “administrators of mob-justice” to stop attacking him so as to allow him to lead them to the place where he had dumped the deceased’s body. It is the evidence of PW1 and PW2 that the accused led them to the pit from where the said body was finally disinterred. From the deceased’s home, the accused was whisked to the police station at Njombe where he was interviewed and he made a statement to a Police officer one Godlisten Kundaeli Ndosa (PW4) confessing to have murdered the deceased. Notably, the said statement was admitted in evidence without any objection from the defence counsel as exhibit P3. The accused was also taken to the Justice of the Peace one Bonasius Mwalongo (PW3) to whom he made an extra-judicial statement

(Exhibit P2) confessing in the same way to have been involved in the deceased's murder.

In his defence, the appellant gave evidence on affirmation and did not call any witness. His defence version was to the effect that on the 17th November, 2015 he was at Yakobi Village, and that he did not know the deceased. To that end, he fronted an alibi meaning that at the time the offence was committed he was in a different place from Limage Village and therefore he could have committed the offence charged. However, he told the court that he heard that the deceased was murdered and that he thought those who murdered her were Longinus Mbuligwe, Edimerick Mkongwa and Neema Hongolo. He said that he was arrested on 15th November 2015 by the members of the peoples' militia when he was on the way from Yakobi Village to Njombe Township. He claimed that he was arrested as he passed along the deceased's home. As for the reason behind his arrest, he told the court that he was accused of smoking in the public. He denied to have pointed out the pit from where the body of the deceased was finally unearthed. He said that it was PW2 who showed the

police where the said body was buried. The accused also denied to have been living with the deceased before her death. He said he was temporarily living at his aunt's home in Yakobi Village. With regard to the extra-judicial and cautioned statements which he is said to have made to PW3 and PW4, the accused in what appears to have been an afterthought denied to have made the said statements saying that he was beaten up by the police and forced to sign what he did not know. All in all, he protested his innocence and implored this court to pronounce him innocent and order for him to be set free.

The assessors who sat with me were synonymously of the view that the evidence led by the prosecution had gone to prove the accused's guilt beyond any shadow of doubt. They based their respective opinions on the following premise which they considered to have been established as true. That one, the accused was living with the deceased prior to her death; two, that he had sought to mislead PW1 and PW2 that the deceased had gone for medical treatment when the two witnesses inquired on her whereabouts; three that it is the accused who pointed out the place where

the deceased's body was dumped and eventually exhumed and, lastly, that the accused had confessed to the police and the justice of the peace as having been involved in the deceased's murder.

For my part, I think, with respect, the assessors were quite justified in their opinions as I will hereinafter demonstrate.

In determining the accused's innocence or otherwise, I have found it apposite to pose the following factual questions which call for determination in this case. The first relates to the accused's residence prior to the deceased's death. The second is with regard to the assertion that he sought to mislead PW1 and PW2 into believing that the deceased had gone for medical treatment but only to change the version and lead the worried relatives and neighbours to the place where the body of the deceased was finally recovered. The last question is whether the accused had made any confessional statement to PW3 and PW4 or anyone of them admitting to have been involved in the deceased's murder.

I will start with the first question. That is whether or not the accused was living with the deceased before her brutal murder. While the accused told the court that he was living at Yakobi Village where he had gone to see his aunt, the prosecution witnesses particularly PW1 and PW2 were emphatic that he was living with the deceased at her home. PW1 and PW2 told the court that from there he used to do some shamba works upon being paid.

With the greatest respect to the accused and Mr. Mbungani learned defence counsel, I do not agree with them on the assertion that the accused was not living with the deceased prior to her death. Apart from the accused's bare assertions that at the time which is contemporaneous with the occurrence of this incident he was living at the home of his aunt at Yakobi Village, the explanation which was conveniently reserved and belatedly raised during the defence case, there is no other evidence on record to support this. While through the testimony of PW1 and PW2 the prosecution led positive evidence which was not substantially contradicted showing that indeed the accused was living with the deceased, the accused

and his defence counsel did not substantially challenge them on that aspect. Instead they waited until the time they considered to be the most opportune moment after the prosecution had closed its case so as to raise the defence of alibi. While I am mindful to the holding by the Court of Appeal of Tanzania in the case of **Venance Nuba and Another V. the Republic, Criminal Appeal No. 425 of 2013, CAT at Tabora (unreported)** that the absence of the notice required under section 194 of the **Criminal Procedure Act (Cap 20 RE 2019)** does not give the trial court the *carte blanche* to ought-rightly reject the defence of alibi, I am of the settled view that the allegations by the accused in the present case that he was living at the home of his aunt and, by implication that he could therefore not have been at the home of the deceased to commit the charged offence, is a mere afterthought. The fact that the accused was living with the deceased was not only attested to by two prosecution witnesses to wit PW1 and PW2 but also by the accused himself in his cautioned statement to PW3. What is even more is that the accused on the other hand did not bring any witness including his aunt whom he said she

lives at Yakobi Village to support him on that aspect. Moreover, I would say that, while I hold in esteem the judicial guidance given by the highest court of this land in the above-cited case, I am of the opinion that, implicit in the right to a fair trial to which the accused person is entitled under our constitution, is the duty cast upon him to reciprocate by not taking the prosecution side by surprise. Otherwise it becomes hard for the court in the circumstances such as the ones obtaining in the present case, to further investigate the alibi defence raised so belatedly by the accused relying on his word of a mouth. As it will be noted in the present case, the accused had not travelled and gone very far from the scene of crime in which case he could have probably tendered a bus ticket as an exhibit in a bid to substantiate his defence of alibi. Neither had he been admitted to hospital as to provide as evidence a hospital discharge sheet. He only told the court that he had gone to see his aunt whom as it turned out, he could not even call as witness to support him. This, to me, is, on the face of the strong evidence led by the prosecution to prove that the accused was living with the deceased prior to her vicious murder, a defence of alibi which

however, is clearly falsified by the prosecution's strong evidence. I will not therefore accord it any evidentiary weight and consequently I find and hold that, the accused was living with the deceased before she met her violent death.

With regard to the second question as posed herein before, in view of the evidence before me, I am satisfied that the accused's past-offence conducts as attested to by PW1 and PW2 clearly demonstrates his consciousness of guilty. The telling of lies to the said witnesses that the deceased had gone for medical treatment and, on being pressed, the incriminating conduct of uttering the words "huyu marehemu Imakulata" which was followed by the pointing out of the pit from where the body of the deceased was finally exhumed, in my opinion, taken in cumulative, they amount to nothing other than an implied admission by the accused that indeed he had committed the offence with which he stands charged.

With regard to the last question which is whether or not the accused had made any confessional statement to either the police or the justice of the peace or both of them, the accused and his learned defence counsel

would like us to believe that he had not and that if he did, he made it under torture. To that end, the accused tendered a police form number 3 which was admitted in evidence as exhibit D1. This evidence was intended by the accused to show that he was tortured by the police as they pressed him to confess as having murdered the deceased.

I have given deep and anxious consideration to the accused's complaints. Even if I were to dispense with his extra-judicial statement (exhibit P2) to PW3 on the grounds that he had repudiated it as I hereby do, his cautioned statement to PW3 which was received and admitted in evidence without any objection from the defence counsel is sufficient enough to implicate him and form the basis of a conviction. Notably, in his statement to PW3, the accused is recorded to have given a graphic account as to why, how and by who, the idea to murder the deceased was contrived and finally executed. Furthermore, he told PW3 how and where the body of the deceased was dumped before he led the worried relatives and neighbours to recover the said body by way of exhumation. In my opinion, this statement which is quite explicit about the accused's

complicity in the hatching and the commission of the offence with which he is charged could not have been the result of PW3's own creation or doctoring as the accused would want us to believe.

In the sum, I would say that, the accused was the maker of exhibit P2 and the detailed information provided in that statement had the effect of fortifying and further confirming the evidence of PW1 and PW2. Upon this finding, I also find the confession by the accused to PW3 to be sufficient by itself to ground a conviction. In saying this, I am also mindful to the applicability of the principle envisaged under section 31 of the **Evidence Act** that the accused's conduct to PW1 and PW2 after the murder incident amounted to an implied confession as it led to the discovery of the body of the deceased which was the material object connected with the crime with which the accused now stands charged.

In the final event, I would say that, the answer to the grand question in this case is that, it is the accused who murdered the deceased and unorthodoxically and beastly dumped her body in the pit toilet from where it was eventually recovered. The evidence led by the prosecution side has

shown that the accused had murdered the deceased for payment as agreed. In that situation, I find and hold that, his guilt has been demonstrated beyond doubt. I therefore find him guilty of murder contrary to sections 196 of the **Penal Code** and I proceed to convict him accordingly.

A handwritten signature in black ink, appearing to read "M. Kente".

P. M. KENTE
JUDGE

07/10/2020