

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)**

AT DODOMA

SITTING AT KONDOA

CRIMINAL SESSIONS CASE NO. 16 OF 2017

THE REPUBLIC

VERSUS

NYANGE OMARI @ HALIFA KILOLI

JUDGMENT

9th October, 2020 & 22nd October, 2020

M.M. SIYANI, J;

Through an information filed by the Director of Public Prosecution on 27th January, 2017, the accused person one Nyange Omari @ Halifa Kiloli, was indicted in this court for murder which is an offense under sections 196 and 197 of the Penal Code Cap 16 RE 2002. The particulars of the offense, indicates that on 28th December, 2014 and while at Hamai village within the District of Chemba in Dodoma Region, the accused person murdered his wife one Mariam Mussa by stabbing her with a knife. During the trial, Ms Beatrice Nsana and Mr. Harry Mbogoro, the learned State Attorneys represented the Republic, and the defense side was marshaled by counsel

Mr. Sosteness Mselingwa. While the prosecution procured a total number of three witnesses, the defense had no additional witnesses apart from the accused himself.

Juma Kalate (PW1), the deceased's relative and an eye witness to the killing of Mariam Mussa, was the first prosecution's witness to appear and testify in court. His testimony indicates that around 18:30 hours on 28th December, 2014, he was at his residence at Hamai village when he heard a call for help from his sister's house which is located approximately 26 paces from his house. He accordingly rushed there to see what was happening but just as he got outside the house, he saw the accused person herein chasing his wife the now late Mariam Mussa. At a distance of five (5) paces, PW1 witnessed when the accused reached his wife, kicked her down, took a knife and stabbed her in the abdomen before fleeing.

As the accused person had a knife, PW1's attempt to chase and arrest him was in vain. He therefore returned to the scene, where Mariam's condition was so bad to the extent that she could not even walk. With the assistance of others PW1 took Mariam to Hamai healthy center and later to Kondo

District hospital where around 23^{hrs} on the same day, she passed away. According to PW1, the accused person being familiar to him and the area being not yet dark as there was still some sun's light, assisted him to recognize the accused person.

Moreover, it was PW1's testimony that shortly before stabbing his wife on the material day, the accused person visited him where among others, he was informed that he had come to take his wife who returned to his mother because they had some misunderstanding. In PW1's view, there was nothing which could suggest that the accused person, who had a knife at his back pocket, was angry or he was confused when assaulting his wife.

From Hamai, the accused person went to Kinkima village where Ijumaa Salim Isaka who testified as PW2, was a village executive officer. Around 8am on 5th January, 2015, Ijumaa Salimu Isaka, being a village executive officer was informed by one Idd Njoro that the accused person, who was suspected of murdering his wife at Hamai, was at his residence. With two local militias, PW2 rushed to the said house where they arrested the accused person and later handled him to the police officers.

The killing of Mariam having been reported to the police station, one No. D.6052 D/Sgnt Said was assigned to investigate the case. According to him, he witnessed the post mortem examination of the body of the late Mariam Mussa which was done by Dr. Saria at Kondoa District hospital on 29th December, 2014. The report on post mortem examination which was tendered and admitted as evidence without objection from the accused person, indicates that severe loss of blood due to a cut wound in deceased's abdomen, was the cause of her death. According to PW3 his investigation revealed that prior to the incident of this case, the accused person had some misunderstanding with his wife following a loss of one cattle something which led him to stab her with a knife. It was PW3 testimony that the accused person escaped from Hamai immediately after the killing incidence and therefore he was at large until the 5th January, 2015 when he was arrested by the village executive officer at Kinkima.

Through his defense testimony, the accused person contended that he married the late Mariam Mussa in 2004 and that out of that union, they were blessed with three children. According to him, on 7th December, 2014 one of his three cattle disappeared. Because he entrusted the same to his

wife, a misunderstanding between them arose and as a result of such misunderstanding, his mother in law one Mwatatu Hassan, came to Churuku where they were living and took his wife back to Hamai. After five days of waiting for her return in vain, on 12th December, 2014, the accused person decided to follow his wife to Hamai. There, he unsuccessfully persuaded her to return back to their matrimonial house at Churuku because her presence at Hamai was not blessed by him.

On 28th December, 2014 the accused person decided to search for his lost cattle in the forest. He therefore spent the whole day searching for his cattle. Later that day he decided to go again to Hamai village where ended up in a bar drinking alcohol before going to his mother in law. It was his defense that upon reaching his mother in law's house, he caught his wife having extra marital affairs with another man and his inquiry only led to him be insulted by Mariam for following her there. As the two exchanged words, the defense testimony shows, the man who was with Mariam took his knife and attempted to stab the accused person who quickly went behind his wife hence the knife which was aimed at him ended up stabbing his wife.

On seeing that, both the accused person and the man who allegedly was having love affairs with Mariam, left the area. That notwithstanding and despite insisting that he was not the one who stabbed his wife, when cross examined by Mr. Mbogoro, the learned State Attorney, as to why he never returned to his in law after witnessing the killing of his wife, the accused person asked for mercy for killing his wife after catching her in flagrante delicto having extra marital affairs with another man. He contended that he didn't return to Hamai as he heard his wife complaining that he had killed her.

Having revisited the testimonies from both the prosecution and defense side, it is the law that in murder cases, the prosecution side is duty bound to prove basically three ingredients. These are one; that there is a human being who has died an unnatural death, second; that the said death must be a result of an unlawful act by the accused person and third; that death or at least serious bodily harm was intended by the accused person when doing that unlawful act.

In considering whether the prosecution side has proved its case beyond reasonable doubts, I will start with issue on whether a human being called Mariam Mussa has died a death which was an unnatural one. The key evidence in this issue came from exhibit P1, a post mortem report which was tendered and admitted without objection from the defense side. Exhibit P1 detailed the cause of death of Mariam Mussa to be severe haemorrhage due to a large penetrated wound in the left side of her abdomen. There was also evidence from PW1 who not only knew the deceased but also witnessed the incident leading to her death. Through his defense testimony, the accused person being a husband of the late Mariam, was also at the scene. He witnessed her dying after being stabbed with a knife. Therefore, from such evidence, the fact that Mariam Mussa is dead was not contested. It was also a common ground that her death did not arise from a natural cause, rather her life was brutally cut short by a person who stabbed her in the abdomen with a knife. As such the fact that Mariam Mussa has died an unnatural death, was proved beyond reasonable doubt and I accordingly hold so.

The first question being answered as such, the remaining issues for my determination are whether Mariam Mussa was unlawfully killed by the accused person and that in doing so, he intended death to occur. To answer this question, I must admit that evidence tendered and summarized above indicates the prosecution's case has been built on evidence of identification or recognition from PW1. This is therefore a case that hinges on evidence of visual identification or recognition. An established principle of law is that such kind of evidence must be carefully examined before being relied on so as to remove all possibilities of mistaken identity. That is important because, experience shows even in recognition cases where such evidence may be more reliable than identification of a stranger, mistakes are often made. The Court of Appeal of Tanzania observed the following in similar terms in **Issa s/o Mgava @ Shuka Vs. Republic**, Criminal Appeal No. 37 of 2005:

...clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made.

In order to eliminate the possibility of mistaken identity, courts of law have developed a list of factors or guidelines to be considered when examining such evidence. The list is however, not conclusive, depending on the circumstances of each case. Important among others, are: First, the period under which the accused was under observation by the witness. Second, the distance separating the two during the said observation. Third, when identification is done at night, whether there was sufficient light to enable correct identification. Fourth, whether the witness has seen the accused before and if so, when and how often. Fifth, in the course of examining the accused, whether the witness faced any obstruction which might interrupt his concentration. Sixth, ability of the witness to name a suspect's name at the earliest opportunity; Seventh, credibility of the identifying witness and eighth, the whole evidence before the Court considered, if there was any material impediments or discrepancies affecting the correct identification of the accused by the witness. [See **Methew Stephen @ Lawrence Vs Republic**, Criminal Appeal No. 16 of 2007 Court of Appeal of Tanzania]

Having listed factors to be considered, I will now test PW1's testimony in an attempt to answer the question whether or not he properly recognized the accused person. But before I do that, I find it prudent, for easy of reference, to reproduce some extracts from his testimony on how he encountered the culprit:

On 28th December, 2014 around 18:30hrs, I was at home when a murder incident happened. I started to hear "Rwangi" a call for help. I responded by going to where the call came. The call was at my sister's house one Mwatatu Hassan. Upon reaching there which is just approximately 26 paces, I saw Nyange Omary chasing his wife one Mariam Mussa. When he reached her, he struck her down, took a knife and stabbed her in the abdomen. I was about 5 paces from them so I saw everything. Nyange Omary is also called Halifa Kiloli.... I managed to identify Nyange and Mariam because there were still some sun light and I knew both Nyange Omary and Mariam. I knew Nyange well because he married my niece for not less than five years prior to the incident of this case. I met Nyange around 18hrs on 28th December, 2014 before the

killing. He came to my house. He told me that he came to pick his wife as they had some conflict but her mother told him to go and return the next day.....Nyange was in black trousers and a green shirt.

The above piece of testimony shows PW1 met with the accused person when he visited him few minutes prior to the incident. They had conversation at his houses about a conflict he had with his wife and his efforts to have her return home. At the time when the deceased was stabbed PW1 was at a close distance of about 5 paces. The incident itself happened around 18:30hrs when the sun is setting and so normally not too dark yet. PW1 gave a description of the accused person's appearance that evening. Indeed, the fact that the accused person was at the scene, was confirmed by the accused himself through his defense when he stated the following:

I then went to my mother in law. There I found my wife with another man. I caught them red handed. My wife was seeing another man in the room. I tried to knock the door by they insulted me.... I

decided to enter inside. I found a man and my wife in the bed. The man took a knife. I stepped back. Then my wife came close to the door and we started to exchange harsh words. The man wanted to stab me. I decided to hide behind my wife and the knife which that man had, stabbed my wife in the abdomen. Having seen my wife has been stabbed and the man has escaped, I also left the area. I did not return again to my in law.

Having considered the above pieces of evidence from both the prosecution and defense side, it is obviously that the accused person was at the scene at a time when his wife was stabbed. PW1's evidence points fingers directly to the accused person that he was the one who stabbed Mariam to death in an incident which he witnessed. In my considered opinion, since PW1 and the accused person were well known to each other, the question that can be raised, is whether there was a possibility of mistaken identity in the circumstance of this case. To answer this question, I have taken into consideration the fact that, PW1 saw the accused person few minutes prior to the incident. I have also in mind that PW1 was so close to the accused person and his wife and the timing of the incident itself that happened

around 18:30 when it is not yet too dark. In my opinion, since the accused himself has admitted to have been there, then PW1's claims that he saw him at a place when the killing of Mariam took place, cannot be doubted. I believe being separated by a distance of mere 5 paces, PW1 correctly identified the accused person.

The above said, I therefore hold that the accused person was correctly identified to be the one who stabbed the late Mariam and caused her death. This conclusion finds supports from the confession by the accused person himself when cross examined by Mr. Mbogoro that he killed his wife having found him with another man.

The accused person's confession when cross examined that he killed having found his in extra marital affairs, raised a defense of provocation which in law is when a person is considered to have committed a criminal act partly because of a preceding set of events that might cause a reasonable person to lose self-control. For such a defense to stand, the provocation alleged must be capable of turning a reasonable man into a temporary insanity by anger which as a result caused the accused person

to lose self-control and so react at the heat of passion which otherwise, he would have not reacted that way when sober.

In this case, the accused person alleged to have caught his wife with another man. Such a defense however, was not raised at the commencement of the trial. If the defense based on provocation was anticipated, ordinarily, it would have been indicated at the stage of preliminary hearing. As such and in terms with the decision of the Court of Appeal of Tanzania in **Modestus Raphael Mbavumbili Vs Republic**, Criminal Appeal No. 62 of 1999, failure to raise the said defense at the earlier stage of the trial, renders the same a mere afterthought.

The above notwithstanding, I have considered the entire evidence tendered during the trial for the aim of testing the truth of the accused's defense of provocation after finding his wife having extra marital affairs. Through out his defense, the accused person denied to have killed his wife. It was only through cross examination Mr. Mbogoro, that the accused person confessed to have killed. No details of how he killed was however given. Had such a defense been anticipated, the accused person would

have been consistent that he killed but under provocation. The fact that he kept denying stabbing his wife, is therefore another indication that the question of provocation is an afterthought.

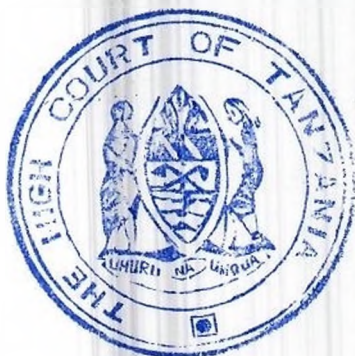
Having disposed the second issues as above, the last question for my determination is whether the killing of Mariam Mussa was actuated by malice. Malice can be inferred from the acts or omissions of the killer. Various factors such as; the type and size of the weapon used to kill, the amount of force applied to inflict the injury, where the blow or blows were directed and the conduct of the attacker before and after the killing must be considered in order to ascertain whether or not the killing was pre meditated. See **Enock Kipela Vs Republic**, Criminal Appeal No. 150 of 1994.

In the instant case, the accused person stabbed his wife in the abdomen with a knife. Exhibit P1 which was a report on post mortem examination, indicates presence of a large penetrated wound on the left side of her abdomen. A knife is a lethal weapon which can kill easily and so the accused person ought to know that stabbing his wife in the abdomen with

such a weapon could result in to death. That's why immediately after assaulting the deceased, he escaped away for almost a week before his arrest. In line with the finding of the Court of Appeal decision in **Enock Kipela Vs Republic**, I therefore hold that by using a knife to assault his wife by stabbing her in the abdomen and then escape, the accused person manifested the evil intention to cause death of the late Mariam Mussa.

In the fine and as it was for the ladies and gentleman assessors, I am therefore satisfied that the charge of murder has been proved to the required standards and on my party no reasonable doubts exists as to the guilty of the accused person. As such, I find the accused person one **Nyange Omari @ Halifa Kiloli** guilty of unlawful killing of one **Mariam Mussa** and consequently I hereby convict him for the offence of Murder as charged contrary to section 196 and 197 of the Penal Code Cap 16 RE 2002.

DATED at KOND OA this 22nd Day of October, 2020



M.M. SIYANI
JUDGE

SENTENCE

Having considered what has been submitted to me during sentencing process by counsels from both parties, it is obvious that the law in this country provides death by hanging as the only punishment for murder. Therefore, in compliance with sections 26 (1) and 197 of the Penal Code Cap 16 RE 2002, the convict one **Nyange Omari @ Halifa Kiloli**, is hereby sentenced to suffer death by hanging. It is so ordered.

DATED at KONDOA this 22nd Day of October, 2020



M.M. SIYANI
JUDGE