

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

AT TANGA

CRIMINAL SESSIONS CASE NO. 25 OF 2018

REPUBLIC

VERSUS

KHALFANI HAMADI ISSA @ YAA

JUDGMENT

MKASIMONGWA, J

Khalfani Hamadi Issa @ Yaa (Accused) stands charged with Murder Contrary to Sections 196 and 197 of the Penal Code [Cap. 16 R. E. 2002]. It is alleged that on the 18th day of April, 2015 at Mapinduzi area in Duga Ward within Tanga District the accused did Murder one Mary Lucas. He pleaded not guilty to the charge.

In order to prove the charges the prosecution called six witnesses namely; Athumani Mohamedi Mganga (PW1), F. 8603 D/C Daudi (PW2), Dr. Francis Theophil Ngowi (PW3), Mariam Shabani (PW4), Jafari Ramadhani (PW5) and A/Insp. Imani (PW6) to testify to the Court. The evidence given by the witnesses is to the effect that; sometime in 2015 the

accused person, Khalfani Hamadi Issa @ Yaa, came and rented a room in a certain house situated along Mapinduzi Street in Duga Ward. In the house also lived Mariam Shabani (PW4), a house wife, whose room was about 3-4 paces from that of the accused person. The accused had a girlfriend namely; Mary Lucas (deceased) with whom he is blessed with a child. Mary Lucas had a residence where she lived together with her relatives and that she used to visit that of the accused person where she sometime even spent her nights. According to the testimonies of Athumani Mohamedi Mganga (PW1), Mariam Shabani (PW4) and Jafari Ramadhani (PW5) the accused and Mary Lucas were, now and again, quarreling each other. PW1, the Mapinduzi Street Chairman, told the Court in evidence that in two occasions he dealt with cases which emanated from such quarrels. In all two occasions the accused was complaining against the deceased.

On 18/04/2015 in the morning Mariam Shabani (PW4) was at her home feeding her baby. She heard, from where she was sitting the accused and Mary Lucas quarreling arguing in their room. As she was used of the quarrels between the two and since she was feeding her child, PW4 paid no attention to the words the two were exchanging. Immediately thereafter, PW4 saw the accused person getting out of the room and got

outside through the rear door. He was wearing; a white "*Kanzu*" blood drenched. She was shocked and came outside tracing for him only to find the accused disappeared. PW4 raised alarm which was well responded to by a neighbour one Jafari Ramadhani (PW5), to whom, according to PW5, PW4 explained that there was a fight/argument in the accused's room and that the later has left from the home. PW5 peeped into the room from a window and could not see anything but heard a sound of a snoring person. He called one Ajali to the place and with Ajali; PW5 opened the door and entered into the room where they found Mary Lucas lying on the floor with her legs on the coach. The later was bleeding from the fresh cut wounds she sustained on the neck and ear. In the room they also saw blood on the floor. They two took Mary Lucas to the verandah and called reporting the incident to the Street Chairman one Athumani Mohamedi Mganga (PW1). The later came to the scene and he similarly, called to the Police Station reporting the event. He further, hired a Taxi with which he rushed the wounded Mary Lucas to Ngamiani Hospital via Mabawa Police Station where they were issued with a PF3. The Medical Officer on duty there at Ngamiani Hospital advised, however, that the patient be taken to Tanga Region Referral Hospital (Bombo Hospital). As they were waiting for an

Ambulance to rush them to Bombo Hospital, Mary Lucas passed away. Her body was eventually taken to Bombo Hospital Mortuary where later on 20/04/2015 a Post Mortem Examination was conducted by one Dr. Francis Theophil Ngowi (PW3), with a view to establishing the cause of death. According to PW3, a Medical Officer working at Bombo Hospital (Tanga Region Referral Hospital), on 20/4/2015 he was at his work place when he was called to the mortuary so that he conducts an autopsy to the deceased body. In the mortuary he was shown a deceased body which was identified to him by Lucas Exavery and Athumani Mganga as being that of Mary Lucas. He carried out the Post Mortem Examination it in the presence of a Police officer one F. 8603 D/C Daudi (PW2). Upon examining the body, PW3 found the same with multiple sharp deep cut wounds around the left side of the neck. Going by the nature of the injuries the deceased had sustained, PW3 was of the view that the death was due to Hemorrhagic shock resulted from the multiple deep cut wounds. He eventually prepared a Post Mortem Examination Report which he identified in Court and then tendered it to be exhibit. The Report was so admitted and marked **Exhibit P3.**

On receiving a report that there was a certain lady who had been cut wounded by her lover which event took place at Mapinduzi area, Duga on 18/4/2015, the Police acted on the report in which case later at 9:30am one F. 8603 D/C Daudi (PW2), a Police Officer stationed at Chumbageni Police Station within Tanga District, went to the scene of crime accompanied by D/C Maiga, D/Cpl. Juma, D/Cpl. Issa and WP. Nikupale, fellow Police Officers stationed at the Station. At the scene the Police Officers did not find the victim as she had already been taken to Hospital for treatment. They therefore, proceeded to the hospital where they met with the Mapinduzi Street Chairman one, Athumani Mohamed Mganga (PW1). With the Chairman and the fellow Police Officers, PW2 came back to the scene of crime where they entered into the suspect's room. In the room they found blood on the floor where again there was a blood stained machete left beside the bed which they collected as exhibit. They also saw blood stains on the bed as well as the wall. For investigation purposes, the Police Officers took with them the suspect's photographs found there in the room. PW2 then drew a sketch map of the scene of crime which he identified and eventually tendered to the Court for it to be exhibit. The same was so admitted and marked **Exhibit P1**. According to PW2, the

machete collected from the scene of crime was taken to the Police Station where he kept it after he had duly registered the same in the Exhibits Register and labeled it by its registration number which is No. 41 of 2015. Sometime later, he properly wrapped it in papers for the same to be taken to the Chemist for the laboratory analysis. PW2 identified and tendered the machete to the Court for the same to be exhibit. The Machete was admitted as such and marked **Exhibit P2**. Later on 18/04/2015 during night time the Police was informed of a person seen by people at Kange Maziwa area who looked to be in an attempt to escape. Upon getting the information A/Insp. Imani (PW6) and PW2 went to the place where they saw the suspect (the accused in this case). The later was wearing a white "*Kanzu*" stained by blood and a "*Barakashia*". He was possessing a beg (*Mfuko*) in which there were some clothes. He was arrested and taken to Chumbageni Police Station where, according to PW2, the suspect identified himself by the name; Khalfani Hamadi. PW6 added that, at the Police Station again, the Mapinduzi Street Chairman identified the accused person to be the one suspected of murder of Mary Lucas. The accused was accordingly charged with murder which offence he faces in Court.

Based on the above, summarized, prosecution evidence the Court ruled that a prima facie case had sufficiently been made out against the accused person to enable him make defence. In his defence the accused sought to have a defence testimony given under oath and that he had no witnesses to call and even exhibits to tender. He testified to the effect that he came to Tanga sometime in 1991 from his home place in Kondoa, Dodoma Region. Later in 2005 the accused came and rented a room in the house belonging to one Mainda Hatibu (deceased) situated along Mapinduzi area, Tanga. He lived in the house for about ten years by 18/04/2015 cohabiting with Mary Lucas (deceased), who was his lover since when she was ten years old. With Mary Lucas, the accused is blessed with a child called Said Khalfani Hamadi who now lives with one of his young grandmothers. The accused is a sewer and sews hats (*"Kofia"*). In the room the accused and Mary Lucas were living, there were a bed, sewing machine, mortar with its pestle and a machete, among other others. On 17/04/2015 at 4:00pm, Mary Lucas left home and the accused discovered later that, a sum Tshs. 20,000/= and Kshs. 11,000/= missing from the place he kept. She came back home later at 2:00am and upon being asked by the accused, Mary Lucas said that she was at the Bar and

admitted to have taken the money. She added that she had spent it save for Kshs. 11,000/= which she promised to give back to the accused later in the morning. On 18/04/2015 in the morning, Mary Lucas denied to have taken the money and when the accused said that he was going to complain of the matter to the Street Chairman for a solution, Mary Lucas threatened saying that she was going to assault him and that she will do so throughout the week. When the accused wanted to search into the deceased's handbag, he was severely smashed with the pestle found there in the room by the deceased. He was so smashed on the face near the nose where he was wounded and started bleeding. The deceased did further seriously assault the accused on his back using the said pestle. In the course of rescuing himself from the assaults, the accused picked up a machete which was just in front of him with which he cut the deceased twice. The deceased suffered cut wounds on the chin, neck and head from which wounds she became weak and fell on the coach. The accused then came outside the room, closed the door and left from the home leaving the deceased helplessly. He went to Street 13 within Tanga City where he fetched some herbs to curb the effects of the wound he had suffered. Later at 10:00am he was informed that Police Officers came to the home and

that his wife had been taken to hospital. As he feared of being arrested by the Police; the accused could not immediately go back home. He, instead, went to Kwa-Minchi and later at 8:00pm he was arrested by Police Officers when he was along the St. Christine Secondary School area and brought to Chumbageni Police Station where he was charged. When he was under Maweni Remand Prison Custody he was taken to Bombo Hospital for treatment and eventually was referred to Muhimbili National Hospital (MNH). As such the accused person was transferred to Keko Prison in Dar es Salaam, to enable him attend treatments at Muhimbili National Hospital. At Muhimbili National Hospital, it was resolved that the accused be operated. It is when he underwent an operation on his face/nose. After three weeks of his stay in the hospital following the operation, the accused was discharged and then taken back to Maweni - Tanga Prison. At Muhimbili National Hospital, the accused was given all his Prescription Cards along with all X-Ray Pictures which were, however, a week prior to the hearing of the case, taken and destroyed by the Prison Officers, whom he referred to as "**KM**", who stormed and searched into prison cells searching for unwanted belongings. The accused concluded by denying to

have intentionally killed the deceased. He said that, he only wounded her by bad luck.

That in short is the whole evidence in this case. In the case; whereas Mr. Paul Kusekwa and Mr. Winlucky Mangowi, learned State Attorneys, appeared on behalf of the Republic, Mr. Christopher Wantora, learned Advocate, appeared for the accused. Similarly during trial of the case, the Court had the benefit of the aid of three Court Assessors namely; Ms. Mariam Mrisho Kasongo, Mr. Hassani Omari Bwana and Ms. Saumu Abeid Ally. When the trial had commenced, Ms. Mariam Mrisho Kasongo, was bereaved as one of her nearest relatives passed away in which case she was prevented from attending throughout the trial. In the premises therefore the trial proceeded in terms of Section 286 of the Criminal Procedure Act [Cap 20 R. E 2019]. The remained Assessors eventually gave their opinion as to the end results in the matter. In their opinion the Gentlemen Assessors were of unanimous view that the accused is guilty of murder as charged. He should therefore accordingly be convicted. Such Assessors opinion will well be considered in the determination of this case.

As it is pointed out earlier, the accused stands charged with Murder Contrary to Section 196 of the Penal Code [Cap. 16 R. E. 2002]. To

constitute the offence under the section there must exist three elements that is: **One:** there must be death of a person; **Two:** that the accused killed the deceased; **Three:** that the accused killed the person with malice aforethought. Therefore, determination of this case depends on the responses the evidence adduced has to the following issues.

1. Whether or not Mary Lucas is dead
2. Whether or not the accused killed Mary Lucas.
3. Whether or not the accused killed Mary Lucas with malice aforethought.

Going by the adduced evidence, I find it is not disputed that Mary Lucas is dead. This is confirmed by the accused person who, in his defence testimony, was recorded stating that he did not intentionally kill the deceased and that it was by bad luck he wounded her, which testimony suggests that he is admitting to the fact that Mary Lucas is dead. It is also not disputed that the reason for the death of Mary Lucas is as stated in the Post Mortem Examination Report. According to the Report (**Exhibit P3**), the deceased died from Hemorrhagic shock resulted from the multiple deep cut wounds she had sustained around the left side of the neck. Evidently the deceased did not die a natural death. He was killed. It is not also

disputed that the accused person was arrested suspected of murder of the deceased.

The issue next is therefore whether the accused person killed the deceased. It is unfortunate that, in this case there is no direct oral evidence given by any of the prosecution witnesses as it ought to be in terms of Section 62 (1) (a) to (d) of the Law of Evidence Act [Cap 6 R. E 2019]. As such the case is wholly based on circumstantial evidence. The principle governing circumstantial evidence was well enunciated in the case of **Ally Bakari and Pili Bakari v. R** (1992) TLR 10 where the Court of Appeal of Tanzania had the following to say:

"Where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred"

Going by the evidence on record it is not in dispute that on 18/4/2015 the accused and Mary Lucas were in their room. There is ample evidence given by Mariam Shabani (PW4) and in fact it is not disputed by the accused person that while were in the room the accused and the deceased were arguing. The accused admitted in evidence that while the

deceased and the accused were in the room he wounded the deceased using a machete. Going by the testimony of Jafari Ramadhani (PW5) when he entered into the room, the later met Mary Lucas fallen on the floor wounded. Again, there is ample evidence that from the wounds the accused admitted to have caused, the deceased suffered severe bleeding which fact caused her death. This testimony in my view exhibits not only the facts from which an inference adverse to the accused is sought to be drawn but also proves them beyond reasonable doubt which fact suffices the finding by the Court that the accused caused the deceased's death. The issue whether the accused person killed the deceased is therefore answered in the affirmative.

Last is whether the accused killed the deceased with malice aforethought. The law does not precisely define what malice aforethought is. Section 200 of the Penal Code [Cap. 20 R. E. 2002] provides for circumstances, if proved, deem malice aforethought to have been established. The section reads as follows:

"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 of or to do grievous harm to any person, whether that 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 a wish that it may not be caused;*
- (c) *an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
- (d) *an intention by the 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 discussed by the Court of Appeal in among others, the case of **Elias Paul v. R.** Criminal Appeal No. 7 of 2004, (unreported) where it stated that:

"... knowledge that an act or omission may cause death or grievous harm constitutes constructive malice. In the instant case the appellant must have known that the act of assaulting

the deceased on the three separate occasions was likely to cause the death of the deceased or cause grievous harm to him ... malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted ... The conduct of an accused person before or after the killing may also infer malice ..."

In his testimony, Dr. Francis Theophil Ngowi PW3 tendered a Report on Postmortem Examination **(Exhibit P3)**. Going by the exhibit, PW4 reported as follows:

"Dead body of Mary Lucas, who died in Ngamiani Hospital after being cut with sharp instrument found with multiple deep cut wounds around the neck on the left side. The cause of death is hemorrhagic shock due to deep cut wounds"

Definitely the accused person used a sharp object in causing the injuries on the deceased the fact which is admitted by the accused when he said in defence that he cut the deceased by a machete. From the nature of the weapon used and the parts of the body where the harm was inflicted the court infers malice. Secondly the accused person's conduct after he had caused the injuries on the deceased, that is **One:** he left the deceased in a closed room without any assistance; **Two:** he reported nowhere of the incident; **Three:** he went on hiding fearing of being

arrested by the Police, was again relevant in this respect. In his defence the accused testified to the effect that the deceased was fighting the accused and that she used a pestle seriously beating him. With a view to defending himself he cut the deceased by a machete. This piece of testimony suffered no any tribulations when the accused was subjected to cross examination by the learned counsels representing the Republic. In the case of **Ramadhani Seifu @ BAHARIA, Juma Omary @ MWENYEKITI and Tujuane Juma @ TUJU v. R**: Criminal Appeal No. 221 of 2010 (Unreported) the Court of Appeal of Tanzania expounded the objectives of cross-examination. The Court stated:

"The object of cross-examination is to contradict, impeach the accuracy, credibility and general value of the evidence given in chief, to sift the fact already stated by the witness to detect and expose discrepancies or to elicit suppressed fact which will support the case of the cross-examining party"

Going by that object of cross-examination, where a party does not cross examine on a certain material piece of evidence given in chief that evidence remains not contradicted, accurate, credible and deserves to be accorded with the general value. As such, I find and therefore hold that; the deceased was fighting the accused and that the murder of Mary Lucas

alleged in this case occurred when the deceased was fighting with the accused. A fight as well as provocation renders the killing manslaughter and not murder. This was well stated by our Superior Court; the Court of Appeal of Tanzania in the case of **Jacob Asegelile Kakune v. D. P. P:** Criminal Appeal No. 178 of 2017 (unreported) quoting from its earlier decision in the case of **Aloyce Kitosi v. R:** Criminal Appeal No. 284 of 2009 (unreported) in which the Court said:

"It has been stated by this Court that where death occurs as a result of a fight or on account of provocation, the killing is manslaughter and not murder"

On the basis of what is discussed above, I am satisfied that Mary Lucas is dead and that she was killed by the accused person one Khalfani Hamadi Issa @ Yaa and that the later killed that Mary Lucas without malice aforethought. The above findings slightly differ from the unanimous opinion of the Gentlemen Assessors who sat assisting the Court in trial of this case which was to the effect that the accused killed the deceased with malice aforethought.

In event whereas the accused is not guilty of the offence with which he is charged, that is, Murder contrary to Sections 196 and 197 of the

Penal Code [Cap 16 R. E. 2002] hence is acquitted; he is guilty and consequently convicted of Manslaughter contrary to Sections 195 and 198 of the Code.

Dated at TANGA this 1st Day of March, 2021.




E. J. Mkasimongwa

JUDGE

01/03/2021