

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL SESSIONS NO 62 OF 2020

THE REPUBLIC

VERSUS

SISKO MUGANGA.....ACCUSED

JUDGMENT

5th & 12th March, 2021

Kahyoza, J.

Mafwimbo Yebete met his demise on the on the 18th day of January, 2018 at Makojo village. **Mafwimbo Yebete's** death was unnatural. He died of excessive bleeding at around 02.00 am within the accused person's homestead. The accused person admitted to cause the death of **Mafwimbo Yebete** without malice aforethought. The prosecution held its guns that the accused killed the **Mafwimbo Yebete** with malice aforethought.

The police arraigned Sisko Muganga, the accused person with the offence of murder C/S 196 and 197 of the Penal Code [Cap. 16 RE 2019] (the Penal Code). The prosecution alleged that the accused did, on the 18th day of January, 2018 at Makojo village within Musoma District- Mara Region, murder **Mafwimbo Yebete**. The accused pleaded not guilty. He however, pleaded guilty to the offence of manslaughter.

The issue is whether the accused person caused the deceased's death with malice aforethought.

There are primary and secondary facts, which are either common ground or undisputed between the parties. The undisputed facts are; **one**, that **Mafwimbo Yebete** is dead and that he met his demise on the 18th day of January, 2018 at Makojo village within Musoma District- Mara Region.

Two, the deceased died unnatural death. The cause of the deceased's death was traumatic shock, leading to excessive bleeding as per Exh. P1 (The post mortem examination report). Post-mortem Examination Report was admitted during the preliminary hearing; **Three**, it is also not disputed that it is the accused person who injured the deceased precipitating to his untimely death. The accused person pleaded guilty to the lesser offence of manslaughter during preliminary hearing and before the hearing commenced. He also admitted in his defence to have inflicted an injury on the deceased person which resulted to his death.

Four, it is also not disputed that the deceased was found injured within the accused's homestead on the 18th January, 2018 at past midnight.

To establish that the accused killed the Mafwimbo Yebete with malice aforethought **summoned Pw1 Petro Magai** the accused person's neighbour who deposed that on the 18/1/2018 at 00.00 hours, while sleeping heard a call for help. A person, calling for help, was shouting that robbers invaded him. He identified a person calling for help as Sisko,

his neighbour. He went to Sisko's place. Sisko narrated the ordeal, that three people invaded him and he beat one of them and the rest escaped. The accused had a stick in his hands. He identified a person the accused beat as Mafimbo Yebete Nassoro. That person was unconscious. Later, **at** around 02:00 AM, **Mafwimbo Yebete** passed away.

Pw2 Mukama Mafimbo, the deceased's deposed that on the 18/1/2018 at around 03:00PM ward executive officer informed him that his father was beaten and his leg broken. The ward executive officer told him that it was Sisko Mganga who beat his father. He went to scene and found Mafimbo Yebete already dead. He did not find Sisko at that place. He found many people, neighbours and other villagers.

Pw3 Mujungu Misana Ngereja, the chairman of Makojo village was among the people who heard the call for help and responded. He notified the police who went to the scene of the crime with a doctor. The doctor examined the deceased.

The accused person, **Sekele Sisko Muganga (Dw1)** defended himself on oath confirming the prosecution's evidence that on the 18/1/2018 at 01:00PM, at night three people invaded me. He recognized the deceased. He testified that he beat Mafimbo Yebete. He beat him with a stick (fimbo). He added that two people vanished. He shouted for help. People came at that place. He deposed that among the neighbours who went to his place was **Pw1**, Abel Daru Maregesi.

During cross-examination, **Sekele Sisko Muganga (Dw1)** deposed that he was staying alone and that he did not report immediately to police

in fear of not being assisted. He waited for the situation to come down. He was emphatic that he surrendered himself to police. He added that the deceased was a habitual thief and he had other bad habits.

The defence submitting briefly that the accused person did not commit the offence as he was invaded and that he beat his assailant with a stick in self-defence. The defence advocate, Mr. Cosmas Tuthuru, submitted that the accused should be either acquitted because he was defending himself or else be convicted with a lesser offence of manslaughter if this court finds that the accused while defending himself used excessive force.

The prosecution's State Attorney, Mr. Nchanilla beseeched the Court to convict the accused person as charged because he killed the deceased with malice aforethought. The prosecution submitted that basing on the type of the weapon used and the force used inferred from the extent of injury and its impact proved that the accused had malice aforethought to kill the deceased. He added the accused disappeared after he committed the offence a conduct which was inconsistency with innocence. He referred the Court to the case of **Enock Kipela v. R.** Criminal Appeal No. 150/1994 (CAT unreported)

It is settled that malice aforethought may be proved by direct or indirect evidence. Thus, malice aforethought may be inferred from certain factors happening before, during or after the commission of the offence. In the case of **Enock Kipela v. R.** (supra) cited by the prosecution's state attorney, the Court of Appeal held that

".....usually, an attacker will not declare his intention to cause death or grievous harm. Whether or not had that intention must be ascertained from various factors, including the following:

- i. **The type and size of the weapon, if any used in the attack;***
- ii. **The amount of force applied in the assault;***
- iii. **The part or parts of body the blows were directed at or inflicted on;***
- iv. **The number of blows, although one blow may, depending upon the facts of a particular case, be sufficient for this purpose;***
- v. **The kind of injuries inflicted;***
- vi. The attacker's utterances, if any, made before, during or after the killing; and*
- vii. The conduct of the attacker before or after the killing.
(emphasis added)*

The evidence in this case is that the accused struck the deceased once with a stick causing his death. The prosecuting state attorney submitted that the accused used a weapon, which given its impact on the deceased's skull, it must have been big. The submission was not in consonant with the evidence. **Pw1 Petro Magai** deposed that he responded to the call for help and found the accused person holding a stick. He did not describe how big was the stick. I will give the benefit of doubt to the accused that it was of a normal size. The accused person gave his justification for inflicting the blow onto the deceased resulting to

his death. He stated that the deceased invaded him at awkward night hours. The prosecution's evidence supported the accused person's account.

It is the position of the law that a person commits the offence of murder when that person kills another person with malice aforethought by an unlawful act or omission. Section 196 of the Penal Code stipulates-

*"196. Any person who, **with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.**"*

It is important to find out if the accused person's act of inflicting the blow onto the deceased causing his death had any justification. The accused person and his defence advocate submitted the accused killed the deceased in self-defence. The Court of Appeal in **John Nyamhanga Bisare V. R. [1980] TLR 5** (CA) stated four factors which must exist before the in order the accused person to invoke the defence of self-defence as follows-

- i. that most likely and on balance of probabilities the accused might have been over powered by the assailant given the circumstance.
- ii. that on the face of it the assailant's weapon was more lethal than the accused's.
- iii. the accused had exhausted all the reasonable precaution and means to escape the tragedy.
- iv. that immediately after the tragedy, the accused had demonstrated a degree of remorse reasonable expected of him.

The evidence, as given by the accused person, shows that three people invaded the accused at night after midnight and before 02:00 am. They broke the entrance door. The accused got out and struck one of the invaders once and the rest vanished. Considering the above evidence, I am of the view that the accused person killed the deceased person in the cause of self-defence.

At the end of the summing-up, the first assessor, the gentleman and the lady, second assessor opined that the accused was not guilty of offence of murder or any offence as he killed the deceased in the course of defending himself. They were of the opinion that deceased person had no justification to invade the accused person at night hours. The second assessor added that the accused had no opportunity to select which part of the invader's body to hit. The third assessor opined that the accused person was guilty of the offence of manslaughter to which he pleaded guilty.

I concur with the lady and gentleman assessors that the accused is not guilty of murder or any other offence. I do not consider that the accused person used excessive force while defending himself. The force, the accused person used was reasonable in the circumstance of the case. The three persons invaded the accused person at night, broke his door and the accused person hit one of them once with a stick. I am neither convinced that the accused used excessive force nor do I share the prosecution's view that the accused person had no right to defend himself. I am of the firm view that the accused used reasonable force in the

circumstance of the case to defend himself. It is the above reasons, I differ with the third assessors.

The law is settled that a person is not at fault criminally if he used reasonable force to defend himself or his property. In case, a person used excessive force in the course death is occasioned, he will be guilty of manslaughter. See the case of **Muhumba Kamnya v. R** [1884] T.L.R. 325 and sections 18, 18A and 18C of the Penal Code. The sections stipulate that-

*"18. Subject to the provisions of section 18A, a person **is not criminally liable for an act done in the exercise of the right of self defence** or the defence of another or the defence of property in accordance with the provisions of this Code*

18A.-(1) Subject to the provisions of this Code every person has the right-

(a) to defend himself or any other person against any unlawful act or assault or violence to the body; or

(b) to defend his own property or any property in his lawful possession, custody or under his care or the property of any other person against any unlawful act of seizure or destruction or violence.

*18C.-(1) The right of self defence or the defence of another or defence of property shall extend to a person who, in exercising that right, causes death or grievous harm to another and the person so acting, **acts in good faith and with an honest belief based on reasonable grounds that his act is necessary for the preservation of his own life or limb or the life or limb of another or of property, in the circumstances** where-*

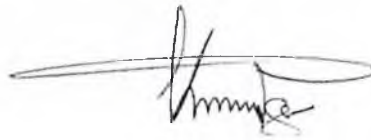
(a) the lawful act is of such a nature as may reasonably cause the apprehension that his own death or the death of another person could be the consequence of that act;

(b) the lawful act is of such a nature as may reasonably cause the apprehension that grievous harm to his own body or the body of another could be the consequence of that unlawful act;

(c) the unlawful act is with the intention of committing rape or defilement or an unnatural offence; (emphasis added)”

I, therefore, find the accused person, **Sisko Muganga, not** guilty of the offence of murder under sections 196 and 197 of the Penal Code [Cap. 16 R.E. 2019] or any other offence and acquit him accordingly.

I order his immediate release.

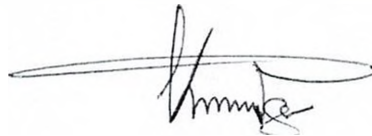


J. R. Kahyoza

JUDGE

12/03/2021

Court: Judgement delivered in the presence of Mr. Nchanilla S/A for the Republic, the accused person and the defence advocate Mr. Cosmas. The Ladies and Gentleman assessors present. Ms. Catherine present.



J. R. Kahyoza

JUDGE

12/03/2021

Court: Accused person's permanent address

Sisko Muganga C/O Kagendo Hamlet, Makojo Village Mujungu
Missana Makojo Village Chairman.

Court: Ladies and Gentleman assessors thanked and discharged.



A handwritten signature in black ink, appearing to read "J. R. Kahyoza", written over a horizontal line.

J. R. Kahyoza

JUDGE

12/03/2021