

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT TARIME

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 86 OF 2020

THE REPUBLIC

VERSUS

RAHEL W/O JOHN ISIAGA

JUDGMENT

25th February & 5th March, 2021

KISANYA, J:

In this trial, Rahel John Isiaga is indicted with an offence of murder contrary to section(s) 196 and 197 of **the Penal Code** [Cap. 16, R.E. 2019]. It is the prosecution case that, on the 22nd day of June, 2019 at Kerende Village within Tarime District in Mara Region, the said Rahel John Isiaga murdered one, Lucia d/o Kiraka. An aftermath of pouring petrol over the deceased and firing matchstick that burned substantial parts of her body, to death.

When this matter came up for preliminary hearing, the accused pleaded not guilty to the offence of murder. Her plea was to the effect that, she did not

intend to cause the deceased's death. In the result, the following memorandum of agreed matters was recorded, read over to the accused and signed by both parties:-

- 1. That the accused person is Rahel John Isiaga.*
- 2. That Lucia Kiraka is dead.*
- 3. That the deceased was the concubine of the accused's husband.*
- 4. That on 22/06/2019 the accused person found her husband with the deceased at Siwa Bar.*
- 5. That the accused had some petrol with her when she went to Siwa Bar.*
- 6. That the accused person poured the petrol over different parts of the deceased and burned her.*
- 7. That the accused person was arrested on 11/09/2019.*

Further, the report on post-mortem examination of the deceased (Exhibit **P1**) and the sketch map of the scene of crime (Exhibit **P2**) were adduced in evidence without demur from the defence. The contents of both exhibits were read over to the accused. In terms of Exhibit P1, the deceased met her demise on the 18th of July 2019 and the cause of death was due to "*severe anaemia and sephaemi due to severe 3^d degree burn.*" As to the sketch plan / map (Exhibit **P2**), it confirms that the deceased was burned at Siwa Bar.

Pursuant to section 192(4) of **the Criminal Procedure Act** [Cap. 20, R.E. 2019], any fact agreed in a memorandum of agreed matters is deemed to have been duly proved. In view of the memorandum of agreed matters and Exhibit

P1, it is apparent that: **One**, Lucia Kiraka died an unnatural death. **Two**, Lucia Kiraka's death was unlawful or not endorsed or certified by the law. **Three**, the accused at hand is the one who caused the said death. In that regard, three ingredients of murder specified under section 196 of the **Penal Code** (supra) were not disputed. What is in dispute is whether the accused person, intended to cause death or grievous bodily harm ie. Whether or not she had malice aforethought.

In order to prove its case, the prosecution called two witnesses namely, Maige Karaka Sabauri (**PW1**) and Anastazia Charles Ndalagwa (**PW2**).

The prosecution evidence can be summarized as follows: The accused was married to one John Isiaga. It appears that her husband had extra marital affairs with the deceased. On the fateful day, the accused's husband and the deceased went to Siwa Bar, located at Kerende village, Tarime District: where they met; **PW1** who happened to be the deceased's sister, and **PW2**, a bar maid, who attended them. The deceased and the accused's husband were drinking beer, while **PW1** had water to drink. As they were drinking, the accused entered through the back door. She was holding a green jug on her right hand and a matchbox on her left hand. Upon entering the bar, the accused went to the table where the deceased, accused's husband and PW1 sat. She poured a liquid, which was in the said jug (later came to be identified to be petrol) over the deceased's

head, neck and other parts of her body. Thereafter, the accused lit a matchstick and tossed it to the deceased whose clothes got in flames, eventually she was burned. The fire on the deceased was extinguished later. However, the deceased body sustained severe burns. She was taken to hospital for medical attention and met her demise on the 18th of July 2019. The accused fled after committing the offence. She was arrested on the 11th of September 2019.

In her reply testimony, the accused told the Court the events that took place before arriving at Siwa Bar. She deposed to have taken her 3 years old daughter who was suffering from convulsion to hospital and arrived home at 18:00 hours. That, since the door to the house was locked, she called her husband who informed her that he was far from the house. The accused decided to go to the booth where she used to sell charcoal. While there, she saw Lucia (the deceased) near her charcoal booth and she overheard a conversation, between Lucia and someone else through mobile phone. In her conversation, the deceased uttered:

"Leo sitafika Calfonia, naomba unifuata niko karibu na kibanda cha mke wako".

(Literally, to mean to "I wont make it to California today, please come and pick me near your wife's charcoal booth".)

After a while, the accused's husband surfaced near the accused's booth. He picked the deceased by using his motorcycle. Then, the accused called her

husband to ask the whereabouts of the keys; his reply remained to be that he was still far from the house. The accused unfolded to her husband that, she saw him being together with Lucia, her husband replied *"hao wapelelezi uliowapata kama ni wanaume nenda kawape vizuri"* (literally, to mean those investigators of yours, if they are men, then go and please them properly) and then hanged up the phone. The accused decided to go back home. After several attempts, she managed to break the door lock and went on to prepare some food. She then received a call from a woman whom she believed to be the deceased. The words uttered went as follows:

"wewe kalai bovu usiyesikia la mtu, ni mtu gani usiyeambiwa kitu ukasikia kwamba umeambiwa? Kama wewe ni mwanamke uliyekamilika rudisha shilingi 70,000/= ulizochukua kwenye sanduku lake la nguo leo."

(Literally, to mean "you, useless tray, stubborn, what kind of a person are you, that you don't understand anything that you are told to? If you find yourself to be a woman enough, return 70,000/= shillings that you took from his suitcase today")

That, when the said woman hanged up, the accused's husband called and told her:

"umesikiliza maelezo au haujasikiliza, wewe siyo kiziwi"

(To mean, "you heard the narrative or not, you are not deaf")

It was also deposed by the accused that, she received another call from the deceased who stated:-

"umeshakalili kulinda mapikipiki yanayopita kwenda California leo tumehama hatuko California. Leo tuko bar mpya"

(To mean, "you keep always monitoring those motorcycles heading to California, today we have shifted from California, and we are at a new bar")

According to the accused, she did not know the location of the said new bar. In the meantime, She received another call from the deceased's mobile phone. Upon picking the call, her husband uttered:

"Kama unajua umerudisha mzoga wako niambie nikwambie funguo zilipo lakini kama mzoga upo usiniambie."

(To mean "once you send your corpse back, then ask me for whereabouts of the keys, but if the corpse remains don't ask me)

Later on, the accused tried to call her husband, his mobile phone was answered by Lucia who told her that they were at Siwa Bar. The accused boarded a motorcycle (commonly known as "bodaboda") to Siwa Bar. Upon arrival, she made a call to her husband; he picked the call but insisted that the sick child was not his. When asked about the keys, her husband replied:

"hata hapo nje kuna banda la bata unaweza kulala hadi asubuhi."

(To mean, "even at the outdoors there is a duck's cage, you can sleep till morning)

Since the accused was at Siwa bar, she saw her husband, who was in a company of Lucia. She went inside the bar and confronted the deceased. Her husband attacked her and she was thrown outside the bar. That, the accused went in the washroom. From there, she overheard her husband requesting a room for him and Lucia. She took a jug, which was in the washroom, advanced to the parking lot and drained some petrol from a fuel tank of a motorcycle. Thereafter, she went back inside the bar and found a matchbox on the sidewall near the washroom door. She then proceeded to Lucia and John Isiaga's table and poured the petrol over the deceased body and fled. When pursued by her husband, the accused ignited the matchstick and threw its flame to the ground and the deceased's shawl caught fire. Thereafter, the accused went to her matrimonial house, took her sick child and took a refuge in her charcoal's booth before fleeing to her aunt's place. She deposed that the relationship between her husband and Lucia started way back in the year 2012.

When cross examined the accused stated that she fled out of fear for her husband, and that she did not communicate with her husband since he threatened to kill her.

During the hearing of this case, Ms. Monica Hokororo, learned State Attorney appeared for the prosecution while, Ms. Mary Samson, learned advocate entered appearance for the defence.

At the closure of the respective cases for both parties, I summed up the case to the two ladies and one gentleman assessors who sat with me throughout the trial. I directed them on matters of facts and law. These were in respect of ingredients of murder, ascertainment of malice aforethought, defence of provocation and its ingredients. When I solicited for their opinion, the three assessors unanimously inclined to the outstanding defence of provocation. To them, the killing was without malice aforethought.

Having considered the evidence as a whole, I am of the view that, this matter can be disposed of by addressing two issues namely, whether the accused had malice aforethought and whether the defence of provocation is available to the accused.

To start with the first issue, the question for consideration is whether the killing of Lucia was contemplated by the accused person. Pursuant to section 200 of the **Penal Code** (supra) malice aforethought can be established by evidence proving, among others, that the accused had an intention to cause the death of or to do grievous harm to any person or knowledge that the act or omission

causing death will probably cause the death of or grievous harm to some person. It does not matter whether that person is the person actually killed or not.

Further to that, case law has stated factors to be considered in ascertaining malice aforethought. The said factors include, the type of weapon used, the amount of force used, the kind of injuries inflicted, the conduct of the accused before and after the incident. The said factors were also stated in the case of **Enock Kipela vs Republic**, Criminal Appeal No. 150 of 1994 (unreported), as fittingly cited by Ms. Hokororo, learned State Attorney.

The defence, Ms. Samson, learned advocate was of the view that, the accused had no malice aforethought, Ms. Hokororo argued that there was sufficient evidence which proved malice aforethought on the part of the accused. The learned State Attorney premised her argument on the fact that, the accused used petrol and matchbox to burn the deceased, the petrol was poured over the deceased head and neck, the deceased sustained 3rd degree burn injury and the accused fled after committing the offence.

I agree with the learned State Attorney's argument. The following evidence implies that the accused had malice aforethought: **First**, the accused used a petrol and a match box to burn the deceased. Thus, she used explosive and dangerous substance. She had a knowledge that the same could cause to death or grievous harm. **Second**, the summary of the report on post mortem

examination (Exhibit **P1**) shows that the deceased body had severe 3rd degree burn on the head and neck. This implies that the petrol was poured on the sensitive parts of the deceased body to stand the fire. **Third**, injuries sustained by the deceased were grievous harm (severe 3rd degree burn). **Fourth**, the accused's conduct of running away immediately after the event is inconsistent with an innocent person. Therefore, the first issue whether or not the accused intended to kill or cause grievous harm to the deceased is answered in affirmative.

The accused's defence suggests that, upon entering the bar, there was a fight between her and her husband (on one side), then between her and the deceased (on the other side). However, **PW1** and **PW2** were the eye witnesses of the incident. They stated nothing about the fight. The accused was given time to cross-examine them and did not ask them anything about the fight. Failure to cross examine them on such important fact implies that the issue of fight was raised as a mere afterthought. For that reasons, I find that there was no fight for this Court to hold that the accused had no malice aforethought.

Further, in view of the evidence adduced by the defence, the accused raised the defence of provocation. That is where the second issue comes in. Is the defence of provocation available to the accused? The law is settled that where offence of murder is committed in heat of passion caused by sudden provocation, the

accused is guilty of manslaughter and not murder. This is provided for under section 201 of **the Penal Code** (supra) which reads:

When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

In light of the above provision, the defence of provocation stands if it is established that the accused caused the deceased's death at a spur of moment, in the heat of passion and before he had time to cool down. This position was also stated in **Said Kigodi @Side vs R**, Criminal Appeal No. 281 of 2009 (unreported) where the Court of Appeal held:

"We are of the firm view that the defence of provocation is available to a suspect who kills at a spur of the moment, in the heat of passion before he has time to cool down"

Now, what amount to provocation is taken care by section 202 of the **Penal Code** (supra), which reads: -

"The term "provocation" means and includes, except as hereinafter stated, any wrongful act or assault of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate case, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind

which the person charged committed upon the person by whom the act or insult is done or offered....

For the purpose of this section the expression an "ordinary person" shall mean an ordinary person of the community to which the accused belongs."

It is also pertinent to note that, provocation stands upon passing the objective test, whether an ordinary man in the community to which the accused belongs would have been provoked in the circumstances. See also **Damian Ferdinand Kiula @ Charles v. R** (1992) TLR 16.

In the present case, the accused articulated in details on the trail of events that culminated to the incident. These were in relation to the acts and words uttered by the accused's husband and the deceased. It is unfortunate that, the accused's husband (John Isiaga) though named during the preliminary hearing as one of the prosecution witnesses, he was not called to depose his evidence. I am aware that, being the accused's husband, the said John Isiaga was not a compellable witness. But that fact was to be decided upon entering the witness box. Therefore, since John Isiaga was not called, the Court draws adverse inference against the prosecution on the event that took place before the incident. Thus, having considered that **PW1** and **PW2** did not address the events that happened before the incident, the accused testimony in relation to the acts done and words uttered by her husband and the deceased goes unchallenged.

The accused's evidence as to the said trial events reveals that: **One**, the accused was coming from the hospital with a sick child. **Two**, she found the door to her house closed. **Three**, she called her husband who replied that he was far from home. **Four**, the accused did overheard the deceased seeking her husband to pick her, whereby the deceased used offensive language against her. **Five**, the accused husband picked the deceased in her presence. **Six**, when the accused called asking for keys, her husband who was with the deceased uttered words which were abusive. **Seven**, the accused's husband and the deceased called her several times and uttered words that were proved to be provocative to any reasonable person. **Eight**, it is the deceased who directed the accused to the place where they were flirting, according to **PW1** and **DW1**, the bar was located 300 meters from the accused house. **Nine**, when accused went to the bar, she overheard her husband seeking for a room for him and the deceased.

The ladies and gentleman assessors were of the opinion that the said events were provocative. They were of the view that any ordinary person within the accused's community could have been provoked in a situation which the accused went through. I agree with them that, the above stated events and the words uttered to the accused were provocative.

However, that factor is by itself not sufficient for the defence of provocation to stand. As stated earlier, it must be established that the act that causes death

was committed at a spur of the moment (and not premeditated), in the heat of passion before the accused had time to cool down.

In this case, it is crystal clear that the accused had no prior knowledge of the location of her husband and the deceased; the bar was named to her by the deceased herself; the accused realized that the said bar was just 300 meters from her house and went immediately. She even left home her sick child alone. She used three minutes to arrive to Siwa Bar. In my opinion, these factors suggest that the provocative acts/words were continuous. In such a case, the accused had no time to cool when she went to Siwa Bar. Now, what happened thereafter?

During the preliminary hearing, the fact that the accused had some petrol at the time of going to the bar was not disputed. Therefore, her defence that the jug and petrol were found at the bar cannot be considered at this stage. Also, I have held herein that, the accused defence in relation to the fight with her husband and deceased when she entered the bar is an afterthought.

Reverting the question as to what happened at the bar, it is common knowledge that the petrol cannot explode or catch on fire by itself. The accused denied to have been in possession of the matchbox when she went to the bar. On the other hand, **PW1** and **PW2** did not state to have seen the accused entering the bar's premises. They came to see her when she approached the place where the

deceased was having some drinks with the accused husband and **PW1**. Reading from the sketch map of the scene of crime (Exhibit **P2**), it is clear that Siwa bar had an entrance gate before reaching the counter where the deceased and two others seated. Since no person who testified that the accused was in possession of the matchbox when she entered the bar, then I give her a benefit of doubt that it was collected in the bar. This is so when it is considered that, **PW2** failed to give general particulars of the bar. It is my considered opinion that, the trail of events including that of pouring the petrol and igniting the matchstick found at the bar, happened at the time when the accused was under provocation. She had no time to cool down due to sequence of events.

In such a case, although the accused poured the petrol on sensitive parts of the body and used explosive substance, it is difficult to connect her acts with malice aforethought. This is due to the fact that, provocation is capable of changing a reasonable man into a temporary insane person, through anger, one might loose self-control and react at the heat of passion. See also the case of **Wilson Nyamuhanga vs R.** [1984] TLR 340 where the Court of Appeal held that:

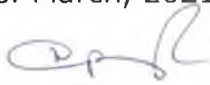
The stabbing by the appellant took place in the heat of passion generated by the fight and commotion although at one point of the fight and commotion the appellant told the deceased... Lazima ufe leo...i.e. you must die today... That statement by itself is not evidence of premeditated killing since the statement was made in course of and during the fight and commotion and not before. Appellant convicted of manslaughter."

Accordingly, I am of the considered view that the defence has managed to raise doubt that the deceased death was not planned, and that it was committed in the heat of passion caused by the acts made and words uttered by her husband and the deceased. Therefore, in terms of section 201 of the **Penal Code**, the accused is liable of manslaughter and not murder. From the foregoing, I concur with the ladies and gentleman assessors who opined that the accused is guilty of offence of manslaughter.

In the final analysis, I decline to convict Rachel w/o John Isiaga for murder, the offense which she was indicted with. In lieu thereof, I enter a substituted conviction for manslaughter contrary to sections 195 and 198 of the **Penal Code** [supra]. It is so ordered.

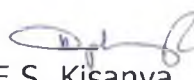
DATED at TARIME this the 5th day of March, 2021.




E.S. Kisanya
JUDGE

Court: Judgment delivered in open Court this 5th day of March, 2021 in the presence of the accused person, Ms. Monica Hokororo, learned State Attorney for the prosecution, Ms. Mary Samson, learned advocate for the accused and ladies and gentleman assessors.




E.S. Kisanya
JUDGE
05/03/2021