

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA
CRIMINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 53 OF 2019**

REPUBLIC

VERSUS

REVOCATUS s/o SUDI.....ACCUSED PERSON

JUDGMENT

Date of last order: 17/05/2021

Date of Judgment: 28/05/2021

NDUNGURU, J.

The accused person one Revocatus s/o Sudi stand charged with the offence of Murder contrary to Section 196 of the Penal Code, Cap 16 (Revised Edition 2019).

It is alleged that by the prosecution that on 25/05/2019 at Msanda – Muungano Village within Sumbawanga District, in Rukwa Region the accused person murdered one Gift s/o John Belano.

The facts presented by the prosecution, which gave rise to this trial are that; on 25/05/2019 at about 20.00 hours, the accused person went to Kijiweni area where the deceased and his relatives; Ayubu,

Zawadi and Samwel were running a barber/hair cutting saloon/shop while armed with a piece of iron bar in his trousers pocket.

That while at the place, Ayubu was accusing the accused of spreading information that he (Ayubu) had love affairs with the wife of one Florence Sumuni. The accused remained silent: he did not respond to the accusation. Having found such a situation the accused started leaving the place. As he was stepping backward at almost 10 metres, the deceased followed him saying as to why he was not responding to the accusation.

That having so urged, the accused picked out the piece of the iron bar (nondo) he had hidden in his trousers' pocket and hit the deceased on the head whereby the deceased fell down and lost consciousness. That the deceased was taken to Msanga Muungano dispensary for treatment, whereby he was referred to Sumbawanga Government Hospital for further treatment. As his health deteriorated on 29/05/2019 he was referred to Mbeya Zonal Referral hospital where on 04/06/2019 he died.

That the matter was reported to the Police Station at Laela, the accused person was arrested and arraigned for murdering Gift d/o John Belano.

When the information of murder was read to the accused person during Plea taking and Preliminary hearing, he pleaded not guilty to the information. Further on 23/04/2021 when the case came up for trial, when the charge of murder was reminded to the accused, the accused pleaded not guilty thereto.

In discharging the duty of proving the charge against the accused, the prosecution summoned five witnesses and tendered Postmortem Examination Report as exhibit ("P1"). The evidence of the prosecution and defence side can be summarized as follows:

Ayubu John Belano, testified as PW1. His testimony was to the effect that, he is living at Msanda Muungano Village. He owns a barber shop (hair cutting saloon) located at Kijiweni. That on 25/05/2019 at about 20.00 hours along with Samweli s/o John, Zawadi Kazembe and Gift John (the deceased) were at barber shop outside. While being there, there arrived Revocatus s/o Sudi; the accused. That PW1 welcomed him by asking why he (the accused) was spreading information that PW1 had love affairs with the wife of Florence. PW1 went further telling the court that, the accused did not respond. The accused started moving backward as he intended to leave the place. That the accused having moved backwards almost 10 meters, the deceased followed the accused while telling him as to why he was not

responding. PW1 said as the deceased went on following the accused, the accused threw a piece of iron bar which he had, the same hit the deceased on his head, whereby he fell down. PW1 told the court that the deceased was sent to the Dispensary where he was referred to the Regional hospital and later referred to Mbeya Zonal Referral Hospital where he on 02/06/2019 died. It was his further evidence that the accused having hit the deceased, he was also attacked by the people who were around. Thus when the deceased was sent to the Regional hospital, the accused was also taken to the hospital. When cross examined PW1 told the court that the source of dispute was the act of the accused spreading information that PW1 had love affairs with the wife of one Florence.

Samweli John testified as PW2. His testimony was that on 25/05/2019 at about 20.00 hours while at the barber shop with PW1 Zawadi Kazembe and Gift John (the deceased), there arrived the accused person. Upon his arrival PW1 asked him why he (the accused) was spreading information that PW1 was having love affairs with the wife of one Florence. PW2 went further testifying that the accused did not respond as a result he started leaving the place backwards almost 10 (ten) meters. He said the deceased followed him telling him to come close so as to settle the matter. PW2 said the accused picked a

piece of iron bar threw it from a far. The iron bar hit the deceased on the head. That the deceased fell down. The residents who were nearby attacked the accused and started beating him while Gift (the deceased) was lying down. PW2 told the court that they picked up the deceased to the Dispensary later he was referred to the Regional hospital and then to Mbeya Zonal Referral Hospital. That Gift died on 02/06/2019 while attending treatment at Mbeya Zonal Hospital.

When cross examined, PW2 told the court that the accused person being their relatives had been visiting the barber shop several times. That upon his arrival before he had said anything he (accused) was attacked by words by PW1 and the deceased. That as the accused threw the Iron bar it could have hit any of them. When re-examined PW2 told the court that the Iron bar was thrown only once. That the accused used to visit them at the barber shop several times.

PW3 one Gerald Ndenje, testified to the effect that he is a Village Executive Officer. He told the court that on 25/05/2019 at about 21.00 hours as he was at his home, there went relatives of Gift John (the deceased) telling him that they wanted introduction letter for sending Gift John to the hospital after being beaten. He said having issued the letter, there went relatives of Revocatus Sudi (accused) for the same purpose that Revocatus had been beaten by the relatives of Gift. He also

issued a letter. The witness said the next time he visited them at the Dispensary and advised them to have PF3 for further treatment. PW3 said nobody gave him clear explanation as to what happened. He told the court that later Gift was transferred to Mbeya Referral hospital for further treatment but he died while undergoing treatment. When cross examined PW3 said he was not told why Gift was beaten as the relatives were in hurry for treatment.

PW4 one H.728 D/C Rostam, told the court that he is an Investigation Officer. That on 30/05/2019 he was assigned to investigate a file on causing grievous harm. The suspect was the accused who by then was admitted at Sumbawanga Regional Hospital while the victim was Gift (deceased) who by then was receiving treatment at Mbeya Zonal Hospital. That on 02/06/2019, he was informed that the said Gift had died. PW4 told the court that in the course of his investigation he came to know it was the accused who had beaten the deceased with a piece of iron bar on 25/05/2019. That the on the very date, the deceased was with his relatives PW1, PW2 and Zawadi Kazembe. That PW1 asked the accused on the allegation that he is spreading information that PW1 is having love affairs with Florence, but the accused remained silent. The accused left the place but the deceased followed him. While at a pace of 10 (ten) meters while being followed by

deceased, the accused picked up a piece of iron bar and threw it. It hit the deceased who fell down unconsciously. When cross examined PW4 said the event was a result of throwing the words between the accused on one hand and the deceased and his relatives on the other hand.

PW5 was Dr. William John Mulla. His testimony was to the effect that he is working as Medical Doctor at Mbeya Referral Hospital. That on 04/06/2019 he conducted Postmortem Examination of one Gift s/o John Belano. That in the course of his examination it was revealed that the cause of death was due to the head injury which caused fracture of the skull and internal haemorrhage. It is this witness who tendered the Postmortem Examination Report as exhibit (Exhibit P1). Upon cross examination, PW5 told the court that the injury was caused by a blunt object. That the body was identified to him by the relatives of the deceased and reports of the hospital.

DW1 one Revocatus s/o Sudi. Testified to the effect that, he is living at Msanga – Muungano. That on 25/05/2019 at about 20.00 hours he visited his relatives Ayubu s/o John Belano, Gift s/o John Belano, Samweli Belano and Zawadi Kazembe who were at the barber shop (hair cutting saloon) located at Kijiweni area.

DW1 told the court that having arrived there, he was welcomed with words from Ayubu (PW1) alleging that he (DW1) was spreading

information that Ayubu was having love affairs with the wife of one Florence. DW1 told the court that as he saw all of his relatives were in high temper, did not respond anything, he decided to leave the place. That as he was leaving the place, Gift ran after him wanting to kick him with head. DW1 told the court that he avoided him. The act of avoiding him made him fell down on his head. That noting him to have fallen down, the relatives attacked him and started beating him up. That on 26/05/2019 he found himself at Msanga – Muungano health centre while Gift was at the next bed all attending treatment. DW1 told the court that their parents hired a vehicle and sent both of them to the Regional hospital for further treatment. That he was arrested on 28/05/2019 while attending treatment and was charged for causing grievous harm. DW1 went on testifying that on 03/06/2019 he was charged for murder, he recorded the statement on what happened and on the same date was sent to the Justice of Peace where he narrated what happened. DW1 told the court that Gift and his brothers were his relatives, they were his clan fathers. Further, he used to visit them several times and they used to assist each other in their life. That what he did was to push him down. He denied to have the iron bar. When cross examined, DW1 told the court that he was beaten by Ayubu and his relatives, not the residents.

That being the prosecution and defence evidence available, the issues for this court to determine are:

- (i) Whether the person one Gift s/o John Belano alleged to have died in actually dead, if yes
- (ii) Whether the death of Gift s/o John Belano was unnatural, if yes
- (iii) Whether it was the accused person one Revocatus s/o Sudi, who is responsible for the death of Gift s/o John Belano who is the subject of this trial. If the answer is in affirmative; then
- (iv) Whether his (accused) action was actual with malice aforethought.

The evidence available is that of PW1, PW2, PW4, PW5 and DW1 is that Gift s/o John Belano is actually dead. DW1 and PW2 are the brothers of the deceased, their evidence is that the deceased was referred to Mbeya Zonal Referral Hospital for further treatment. That was on 02/06/2019 when he was undergoing treatment. PW3 was the Village Executive Officer (VEO) of the village, whose evidence was that the Gift s/o John Belano died at Mbeya Referral Hospital where he was undergoing treatment. PW4 is the Police Officer, investigator of the case. He also told the court that on 04/06/2019 he attended postmortem examination of the dead body of Gift s/o John Belano at Mbeya Referral hospital. Likewise it is the evidence of DW1, PW5, the Medical Officer who attended postmortem examination of the body of

Gift s/o John Belano having identified to him by the relatives of the deceased. In the same footing DW1 does not deny the fact that Gift s/o John Belano is actually dead.

Further from the evidence of PW1 and PW2 that Gift s/o John Belano was kicked by the accused with a piece of iron bar on his head, and from the evidence of PW5, the Medical Officer who conducted postmortem examination and identified the cause of death being **"Fractures of left temporal and parietal bones, fracture of anterior cranial fossa"**. The same is revealed in the exhibit P1 (the Postmortem Examination Report). It therefore, indisputed that the said Gift s/o John Belano is actually dead and further that his death was not natural, that is to say the deceased encountered violent untimely death.

The evidence on record is to the effect that on 25/05/2019 at 20.00 hours while at the hair cutting kiosk, there went the accused who having exchanged words with Ayubu and the deceased, with the accused person, the accused when started leaving the place at a distance of 10 meters, the deceased was following him. Noting that the deceased was following him, the accused threw a piece of iron bar which hit at the deceased on the head and made him fall down. This is per evidence of PW1 and PW2 who were present at the scene of the crime. While the evidence of DW1 (the accused) is that while the

accused ran after him wanting to hit him with the head he pushed him as a result the deceased fell on his head. From there two versions of evidence it is indispute that it is the accused act while led to the death of the deceased; it be by hitting him with a piece of iron bar which he threw or by pushing him and made him fall on his head.

These versions are corroborated by the evidence of PW5 (the Medical Officer) who told the court that the cause of death was due to the head injury. The same position is evidence by the report (Exhibit P1). It is therefore that the accused person was the one responsible for the death of one Gift s/o John Belano who is subject in this trial.

The most vital and contentious issue for that matter is whether or not the act of the accused person was actuated with malice aforethought. For the offence of murder to stand malice aforethought must be established.

The evidence available on record is that the accused and deceased and his brothers are relatives. The accused calls the deceased and his brothers his clan fathers. Again the evidence is that the accused used to visit those relatives of his at their hair cutting kiosk now and then. That on the fateful date he visited them as he used. But he was received/attacked with the words and not welcoming greetings that he is spreading allegations that Ayubu the brother of the deceased was

having love affairs with somebody's wife. Taking into circumstances of the case it appears, such allegation was not pleasing to Ayubu and the brothers he had. That is why upon the arrival of the accused at the place there was no greeting but, the accused was welcomed with those words.

As further evidence, even when the accused decided to quit the place he was followed by the deceased who insisted him to stop leaving and respond to what he was told by Ayubu (PW1). Taking the circumstances of the case it appears, there was a quarrel between the accused and the deceased and his brothers, that is why the deceased and his brothers stood readily awaiting for the accused person to come. Once he (accused) arrived there were no greetings. The accused was attacked with words.

I am aware that malice aforethought can be inferred from the weapon used, the manner in which it was used and part of the body injured. See: **R. V. T Ocheni (1945) 12 EACA 63, Enock Kapela vs. Republic**, Criminal Appeal No. 150 of 1994 Court of Appeal of Tanzania (Unreported).

From the evidence available in this case, there is no any act of the accused which could assist the court to infer to the presence of malice aforethought or an intention to kill on the part of the accused person. I

am of the so firm view due to fact that, the evidence reveals that, the accused and the deceased are relatives, the accused used to visit the deceased at the barber kiosk several times or now and then, they used to help each other in their daily life, that when he visited them was not aware of what could happen, that he was read to avoid misunderstanding that is why he decided to leave the place. I am of the considered view that if the accused intended to kill or cause grievous harm to the accused, as he was armed, he could have directed a blow to PW1 or if he intended to the deceased could have directed the blow while they were close at the barber shop standing and not throwing the iron bar from far.

Looking at the prosecution and defence as a whole, I have not deduced any iota of evidence which could assist me to infer to the presence of motive or reasons for the accused to have decided to kill or cause grievous harm to the deceased who was his blood relative. The absence of motive leads me to a strong presumption that it was unfortunate. See **Betram Ngoji vs. Republic**, Criminal Appeal No. 5 of 1989 Court of Appeal of Tanzania (Unreported).

From the evidence at hand it is very difficult to say that the accused intended to kill or cause grievous harm to the deceased. In the premises, he should have given the benefit of doubt and find him guilt

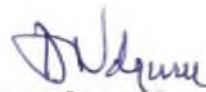
not of murder but manslaughter. In **Faustine Kunambi vs. Republic**, Criminal Appeal No. 32 of 1990 (Unreported), the Court of Appeal of Tanzania quoting with approval the case of **Joseph and anc** (1946)

13 EACA 187 had this to say:

"Where it is difficult on the evidence to say that the accused intended to kill or cause grievous harm to the accused he should be given the benefit of doubt and found guilty not of murder but of manslaughter".

See also **Hamis Mchana vs. Republic [1984] T.L.R 319** Court of Appeal of Tanzania.

Having so said and done I join hand with hon. assessors who unanimously found the accused not guilty of murder because the accused did not intend to kill the deceased. I hereby find the accused person guilty of Manslaughter Applying the provisions of Section 300 (2) of the Criminal Procedure Act, (Cap 20 Revised Edition 2019), I hereby proceed to convict the accused for the offence of Manslaughter as per Section 195 of the Penal Code, (Cap 16 Revised Edition 2019).



D. B. NDUNGURU
JUDGE
28/05/2021

Date: 28.05.2021

Coram: Hon. D. B. Ndunguru-J

For Republic: Mr. Njoloyota Mwashubila, S/A.

For Accused: Mr. Deogratius Sanga, Defence Counsel.

Accused: Present

Interpreter: Mr. Namtamwa Emmanuel English into Kiswahili and
vice versa.

Judge Legal Assistant: Shija Mdadila

Assessor 1. Patrick Wanyama

Assessor 2. Imelda Kamsweke

Assessor 3. Atupakisyee Kapange

} Present

Mr. Mwashubila, SSA:

The case is for judgment we are ready.

Mr. Deogratius Sanga, Adv:

We are ready for defence.

Court: Judgment is read to in the presence of Mr. Mwashubila, S/A

Mr. Deogratius Sanga defence counsel and the accused.

**D. B. Ndunguru
Judge
28.05.2021**

PREVIOUS CRIMINAL RECORD

Mr. Mwashubila, S/A:

My Lord, we don't have previous Criminal record, of the accused person, but the accused be sentence according to the circumstances on which the death of the deceased occurred.

MITIGATION

Mr. Deogratus Sanga Defence Counsel:

My Lord we pray for leniency sentence to the accused if, it pleases conditional discharge due to the following reasons.

First, the accused is the first offender as submitted by the learned State Attorney.

Secondly, my lord taking into account the way the offence was committed that if the deceased could not followed him death could not have happened.

My lord the accused and the deceased are relatives, the accused even in his defence shown remorse for the death of his relative whom they lived peaceful and helped each other.

Further the accused has been in remand prison for two years now he has learnt alot. I pray the court to consider him when assessing proper sentence to him.

SENTENCE

Having heard the submission of the prosecution side that the accused is the first offender but he be sentenced taking into account the circumstances in which the offence happened and what has been submitted by the defence counsel in the mitigation.

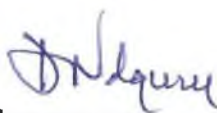
I agree with both of them that the accused person in the first offender, further the circumstance in which the offence was committed that the accused and the deceased were are blood relatives it was just a misunderstanding which occurred on the material date between them.

The remorse altitude of the accused during the trial for the death of his relative, and having considered also the fact that he has been in remand custody for two years now, I find this is one of the cases in which the court has to exercised mercy to the accused.

I hereby sentence the accused person for the offence of Manslaughter C/S 195 and 198 of the Penal Code to serve one year imprisonment in jail.

It is so ordered.




D. B. Ndunguru
Judge
28.05.2021