

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT COURT OF MUSOMA
AT TARIME
CRIMINAL SESSIONS NO. 88 OF 2020**

**THE REPUBLICPROSECUTOR
VERSUS
MUSA RANGE @ SALIMA.....ACCUSED**

JUDGMENT

5th & 12th July, 2021

Kahyoza, J.

According to the information **Musa Range @ Salima** is arraigned for intentionally killing his son, **Emmanuel s/o Musa @ Range** on the on 16th day of June, 2017 at Nyamantare village within Serengeti District in Mara Region.

Musa Range @ Salima (the accused person) is charged with the offence of Murder contrary to **Section 196 and 197 of the Penal Code, [Cap. 16 R.E. 2019]**. The prosecution alleged that on 16th day of June, 2017 at Nyamantare village within Serengeti District in Mara Region, the accused murdered one **Emmanuel s/o Musa @ Range** (the deceased). The accused person pleaded not guilty.

The evidence tendered during trial shows that **Pendo Marwa Ngige (Pw1)**, the accused person's wife, a competent but not a compellable witness, volunteered to testified against her husband that on the 16/6/2017 the accused beat the deceased. The accused person struck the deceased so much that **Pendo Marwa Ngige (Pw1)** decided to report to

her father-in-law and request him to stop the accused from beating the deceased. **Pendo Marwa Ngige (Pw1)**'s father-in-law responded by sending **Chacha Range**, her brother-in-law to escort her and find out why Musa Range was beating **Emmanuel Musa**. She went back and found **Emmanuel Musa** dead. Musa Range, the accused was busy making bricks. Musa Range told **Pendo Marwa Ngige (Pw1)** that he had committed a bad act. He killed their son, Emmanuel Musa. (*Nimefanya kitu kibaya cha kuuwa mtoto*). The evidence of **Pendo Marwa Ngige (Pw1)** was that the accused uttered the words in the presence of the accused's brother **Chacha Range**.

Musa Range told **Pendo Marwa Ngige (Pw1)** not to cry as things were okay. She disobeyed the instructions and shouted for help, calling people to come to witness the death of her child. People responded. They traced the deceased's body. **Samwel Musa**, a child of five years, was present at the time his father killed his younger brother. **Samwel Musa**, led people to the place where they recovered the deceased's body. The accused person hid the body in the bush. They took the body to the house. At the time the accused was nowhere to be seen.

The following day the police and the hamlet chairman went to the scene of the crime. The police and the doctor examined the dead body. Further, the police interrogated **Pendo Marwa Ngige (Pw1)** and allowed them to bury.

Thomas Nyahanga (PW2), the hamlet chairman of Mirengo went to the scene of the crime and interrogated **Pendo Marwa Ngige (Pw1)** who told him that the accused killed their son on 16/06/2017. He did not

find the accused at that place. He added that they buried deceased's body in the absence accused person.

G. 5805 DC Christopher (**PW3**), drew sketch map on the 17/6/2017, which he tendered it as exhibit P.2.

The evidence further, shows that Albert Kasanga (**PW4**), a clinical officer, examined the dead body on 17/06/20147. He found the body with bruises, and the clothes with blood stains. He concluded that the cause of death was the injuries to internal organs, the spleen, liver, bladder and ureters. He thereafter filled a post mortem examination report form. The report was admitted in evidence as exhibit P1 during preliminary hearing.

According to **Pendo Marwa Ngige (Pw1)** the accused re-surfaced five days after the deceased was buried. He hid during in the bush during the day, came home at night, eat food, slept, and left to hide before dawn. The police got information regarding the accused person's behavior. On the 5/9/2019 at 03.00am the police arrested the accused.

Musa Range Salima, the accused, gave his defence on oath denying to commit the offence of murder of Emmanuel Musa, his son. He deposed on the 16/6/2016 at 05:00PM he was resting or sleeping in his house while Samuel Musa and Emmanuel Musa were outside the house playing. Later, he heard Emmanuel Musa crying. He went out and found that Emmanuel Musa lying on his stomach. Emmanuel Musa was trembling and frothing. He took him inside the house and went to the centre to buy him medicine.

Musa Range Salima (Dw1) further testified that the deceased was suffering from epilepsy. At times, he said that the deceased was suffering from convulsion. He started deposed that the deceased contracted the

disease immediately after he stopped breastfeeding. He added that whenever the deceased suffered from epilepsy they took him to the deceased's grandmother who gave him local medicine. He bought medicine from the centre and on his way back, he heard the deceased's mother crying for help. He entered his house and found Emmanuel dead.

They buried the deceased's body on the 17/6/2016. After mourning his son, he resumed his daily activities. He stayed at his home place until on the 3/3/2019 at around 02:00AM when the police broke into his house, and arrested him.

The police officer ordered him to give them a firearm. On 4/3/2019 Christopher (**Pw3**) interrogated him. He tortured him and took him to various places. The police took him to court and charged him two offences; one, the charge of murder and two, the charge of unlawful possession of firearms. He added that the court acquitted him with the charge of unlawful possession of firearms.

He denied to kill his son. He testified that Emmanuel died due to epilepsy. He deposed that Magoiga Rande fabricated the case against him as he had extra-marital relationship with his wife and they had a land dispute. The dispute was over a piece of land he bought from Paulo Range but the dispute was resolved at the family level.

When cross examined by Mr. Temba, he replied he went to the centre to buy medicine for the deceased as the deceased's mother lived very far away.

To establish the offence of murder, the prosecution must prove beyond reasonable doubt all the elements of the offence of murder, which are; **one**, that the person alleged to have been killed is in fact dead; **two**,

that the alleged death was unnatural one; **three**, that the accused before the court is the one who killed the deceased; and **four**, that the killing was done with the intention of either causing death or causing serious bodily injury. That is the killing was done with malice aforethought.

Malice aforethought may be proved by evidence or inferred the amount of force the offender deploys to inflict an injury or from his conduct before and after the commission of the offence. **See the case of Mosses Michael alias Tall V R.** [1994] TLR. 195. The accused person has no duty to prove his innocence. The accused person's only duty is to cast a reasonable doubt on the prosecution's evidence.

Elements of the offence of murder may be proved by direct or circumstantial evidence. In the current case, there is no direct evidence. The prosecution relies on circumstantial evidence to prove its case. There are elements which do not need to be proved. The prosecution and the defence agreed during the preliminary hearing that **Emmanuel s/o Musa @ Range** is dead. He died on the 16th day of June, 2017. They also agreed that **Emmanuel s/o Musa @ Range's** death was not natural. The doctor described in the post-mortem examination report, Exh. P1, that the cause of death was due to internal bleeding. It is also not in dispute that **Emmanuel s/o Musa @ Range** was two and half years old boy. The post-mortem was admitted during the preliminary hearing. The summary report reads as follows-

"BRUISES AND SCARS ALL OVER THE BODY. INJURIES IN INTERNAL ORGANS."

The prosecution's duty in this case is to prove that it is the accused who killed the **Emmanuel s/o Musa @ Range** and killed him with malice aforethought.

It is clear that there was no eye witness. The prosecution seeks to rely on circumstantial evidence to prove the accused person guilty. Where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. See the Court of Appeal holding in **Walii Abdallah Kibutwa and 2 Others V. R.** Criminal Appeal No. 181 of 2006 where it sought inspiration from the Indian case of **Sharad Birdhichand Sarda v State of Maharashtra**, AIR (1984) SC 1622 in which the court stated the conditions precedent before conviction could be based on circumstantial evidence. There are:

- 1. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;*
- 2. The facts so established should be consistent only with the hypothesis of guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
- 3. The circumstances should be of a conclusive nature and tendency;*
- 4. They should exclude every possible hypothesis except the one to be proved; and*

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The prosecution evidence was that **Pendo Marwa Ngige (Pw1)** witnessed **Musa Range Salima**, beating their child **Emmanuel s/o Musa @ Range**, the deceased. **Pendo Marwa Ngige (Pw1)** is the accused's wife and the deceased's mother. The way the accused person administered the beating perturbed her. She went to complain to the accused person's father, her father in-law and request him to stop the accused from beating the deceased. She came back and found the deceased dead and his body hidden. Not only that but also the accused told her that he killed their son. She did not see the accused killing the deceased. The circumstantial evidence is that she witnesses the accused beating severely **Emmanuel s/o Musa @ Range**, the deceased and left to complain to the accused father. She came back and found **Emmanuel s/o Musa @ Range** dead. It is proved that **Emmanuel s/o Musa @ Range** died of internal bleeding and that the body has bruises and scars all over the place. I have no scintilla of doubt that the accused person beat the deceased causing internal bleeding and inflicting cuts and bruises onto his body.

In addition, the accused confessed to **Pendo Marwa Ngige (Pw1)** that he killed their son.

The accused dismissed the evidence that he beat the deceased causing his death. He deposed that the deceased was suffering from epilepsy and at times he said he was suffering from convulsion. He

convulsed or suffered from epileptic fits falling to his stomach damaging what Albert Kasanga (**PW4**), called internal organs. He rushed to buy him medicine on his way back he found him dead. He deposed that when the deceased suffered from epileptic fits they took him to the accused's mother who treated him with local herbs.

I was unable to buy the accused's story for several reasons; one, he confessed to **Pendo Marwa Ngige (Pw1)** that he killed their son. I agree with Mr. Temba, the state attorney that confession need not be in writing. The accused statement to **Pendo Marwa Ngige (Pw1)** was an oral confession. It is sufficient evidence to convict the accused with the offence of murder. He made it voluntarily. The Court of Appeal considered oral evidence in of **Mboje Mawe & three others v R.**, Criminal Appeal No. 86/2010 and stated, thus-

"This oral confession is significant in the sense that it was made before the first appellant made the cautioned statement, and also before he volunteered to make extra – judicial statement. It is also important to point out that in giving that confession this appellant was not operating under a state of fear or threat. Finally, the significance of this confession lies in the fact that he stated where the body parts were buried and eventually on arrival at his house he dug them out himself. In essence therefore, this was "a confession leading to discovery"

There is yet another case where the Court of Appeal approved oral evidence. The Court of Appeal of Tanzania in **Posolo Wilson @ Mwalyego v R** Criminal Appeal No. 613/2015 CAT (unreported) stated that-

*"It is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect (see for example the **Director of Public Prosecutions v. Nuru Mohamed Gulamrasul**, [1988] TLR 82). In **Mohamed Manguku v. Republic**, Criminal Appeal No. 194 of 2004, the Court insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him."*

Two, Pendo Marwa Ngige (Pw1) witnessed the accused beating the deceased. She decided to complain to the accused's father. I find **Pendo Marwa Ngige (Pw1)** the witness of truth. I warned her that she had a right not to give evidence against her husband. She volunteered to testify. I have no cogent reason not to trust her evidence. She told the court that she loved her husband. There is evidence that five days after they buried the deceased, the accused re-surfaced. The accused person spent nights with **Pendo Marwa Ngige (Pw1)** and hid during the day. She prepared food for him for two years (from June, 2017 when the accused committed the offence to March, 2019 when the police arrested him) without causing his arrest.

Three, there is reliable evidence from **Pendo Marwa Ngige (Pw1)** and **Thomas Nyahanga (PW2)** that the accused person did not take part in the burial ceremonies of his son, **Emmanuel s/o Musa @ Range**. He disappeared immediately after **Pendo Marwa Ngige (Pw1)** shouted for help upon receiving information that her son was dead. **Thomas Nyahanga (PW2)** deposed that they did not find that accused person at the crime scene on the day following the fateful day. I have no reason to

discredit their testimony. If the accused person was innocent why did he disappear. Not only that but also there is evidence that he hid the deceased's body in the bush. An innocent person would have no reason to hide the deceased's body.

In addition, I am unable to find the accused's evidence credible on the ground that he told the Court that they used to take the deceased to his grandmother for treatment when he suffered from epileptic fits or convulsion. Had that been true why did he buy medicine from medical store instead of taking the deceased to his grandmother for treatment?

I find the prosecution's circumstantial evidence credible and all the incriminating facts incompatible with the innocence of the accused or the guilt of any other person. Further, I find the accused person's confession to his wife, **Pendo Marwa Ngige (Pw1)** corroborated the circumstantial evidence to prove that the accused killed the deceased.

The last issue to consider is whether the prosecution established that the accused killed the deceased with malice aforethought. The state attorney submitted that the accused killed the deceased with malice aforethought because; **one**, the amount of force used. He submitted the accused used excessive force that damaged the deceased's internal organs; **two**, that the accused person's conduct before and after the death of **Emmanuel s/o Musa @ Range**, proved that he had malice aforethought. The accused person beat the deceased frequently. He did not love him. After he committed the offence, he hid the deceased body in the bush. He also disappeared after his wife cried for help.

The defence's advocate contended that the prosecution did not the accused killed the deceased with malice aforethought. She submitted that

the prosecution did not prove that the accused beat the deceased with an intention to punish or to kill him. She referred the Court to the case of **Fiddolin Haule v R.** [1992] TLR 148.

The accused person's advocate submitted that the doctor did not establish that the deceased's internal organs were damaged.

The evidence on record shows that the accused beat the deceased frequently. On the fateful day, the accused beat the deceased to the extent that the deceased's mother could not stomach. She decided to complaint to the accused person's father. The accused person's beating was more than punishing the deceased. The accused person's conduct of striking the deceased for heavily and causing his death, hiding the dead body and escaping there after depicts that he had malice aforethought.

All the ladies and gentleman assessors unanimously opined that the accused person killed the deceased with malice aforethought. I have no reason to defer with the Ladies and gentleman assessors the accused person killed the deceased with malice aforethought. I concur with ladies and gentleman assessors that the accused killed **Emmanuel s/o Musa @ Range** with malice aforethought. The accused person's conduct established his malice aforethought, the killed **Emmanuel s/o Musa @ Range**, hid the body in the bush and disappeared. The accused's conduct was inconsistent with innocence.

In addition, the accused beat **Emmanuel s/o Musa @ Range** to death, having accomplished his goal he threw away the dead body and went ahead with his activity of brick making. It was as if nothing had happened. He was not shocked with his act. To indicate that he did not care what had happened, he told **Pendo Marwa Ngige (Pw1)** not to

worry and cry as everything was under control. The accused person's conduct is incompatible with innocence. He had all intention to either cause grievous harm or kill **Emmanuel s/o Musa @ Range** for reasons known to himself.

I, therefore, find the accused person, **Musa Range Salima** guilty of the offence of murder of one **Emmanuel s/o Musa @ Range** and convict him of that offence u/s 196 and 197 of the Penal Code [Cap. 16 R.E. 2019].



J. R. Kahyoza,

JUDGE

12/7/2021

SENTENCE

The accused person has been convicted with the offence of murder, which carries a mandatory sentence of death by hanging. I, therefore, sentence the accused/convict to be hanged to death under Sections 196 & 197 of the Penal Code read together with section 322 of the Criminal Procedure Act, [Cap.20 R.E 2019].

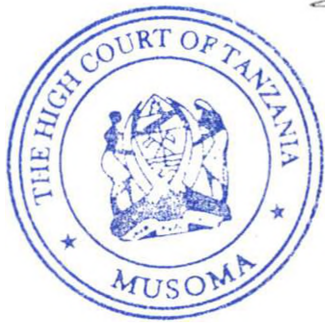


J. R. Kahyoza,

JUDGE

12/7/2021

Court: Right of appeal explained. The accused is required to lodge a notice of appeal within 30 days from today.



J. R. Kahyoza,

JUDGE

12/7/2021