

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT NGARA**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSIONS CASE NO. 6 3 OF 2018**

**THE REPUBLIC**

**VERSUS**

**SHUKURU IVAN**

**JUDGMENT**

*Date of last order: 02.11.2021*

*Date of Judgment: 05.11.2021*

*Mwenda, J.*

The accused person, Shukuru Ivan stands charged with the offence of murder contrary to **sections 196 and 197 of the Penal Code [CAP. 16 R.E. 2019]**. It is alleged in the information that, on 7<sup>th</sup> day of June 2016, during day hours, at Ruganzo village within Ngara District in Kagera Region, the accused person murdered one Ester D/O Kajwala. The accused person denied any involvement in the murder of the deceased; therefore, a plea of not guilty was accordingly entered on record.

In a bid to prove the case against the accused person, the Prosecution side under the representation of Mr. Clemence Mwakanyamale, Principal State Attorney and Amani Kilua learned State Attorney lined up a total of four (4) witnesses and tendered two exhibits which are the post-mortem examination

report as exhibit P1 and the sketch map as exhibit P2. On the other hand, the accused person enjoyed the services of Mr. Baraka John, learned Advocate who relied on the sworn testimony of just one witness, the accused person himself, with no exhibit.

The brief facts of this case are that, on 05<sup>th</sup> June 2016 the deceased one Esther Kajwala went to Joseph Mathayo (PW1)'s home and asked for food and shelter as she had nowhere to live. She was given food and Mr. Joseph Mathayo before hosting her, took her to ten cell leader seek approval. He was allowed and he took her to his son's house one Masumbuko who by that time had travelled. On the fateful day, i.e. 07<sup>th</sup> June, 2016 around morning hours, Mr. Joseph Mathayo went to his farm for farming activities. The said farm is few meters away from his home. While there at he heard sounds of beatings which forced him to run towards the direction it came from. On arrival he found Shukuru Ivan and Bizimana Ivan assaulting Ester Kajwala. He asked them why they were assaulting her and he was told that Ester Kajwala is a witch who had bewitched people at a place where she came from. It is from that assault the said Esther Kajwala sustained injuries as a result she was sent to hospital for treatment. She however passed away on the following day. Following the victim's death Shukuru Ivan was arrested and brought in this court with the charge of murder of the deceased contrary to **section 196 of the Penal Code**. It is important to note that Bizimana Ivan escaped before the victim could be send to hospital.

As stated above, the prosecution's side brought four (4) witnesses to prove its case. The first witness was Mr. Joseph Mathayo (PW1). This witness is the step father to the accused person as he is married to Cecilia W/O Mathayo, accused's mother. He testified to the effect that on 05<sup>th</sup> June 2016, while at his home, he was approached by Ester Kajwala. The said Ester Kajwala begged for food as she was hungry. She was given food and after she had eaten, she requested for a shelter as she had no place to live.

He further testified that he took her to the ten cell leader to seek approval to host her. He was allowed and he thus hosted her in his son's home, one Masumbuko who by that time had travelled. This witness testified further that on 07<sup>th</sup> June 2016 during morning hours while working in a farm near his home, he heard sounds of beatings. His curiosity drove him out of the farm and when he went at the victim's residence, he saw her being beaten and dragged away from the house she was living in. It was his step sons, the accused person and his young brother one Bizimana S/O Ivan who escaped after the incident who were beating the deceased. He further testified that the victim was injured on her head and blood was oozing therefrom. He said that he asked the victim's assailants as to why were they assaulting her and they replied that the victim was a witch who had bewitched people at a place where she came from. He testified further that later on the hamlet chairman came and Bizimana Ivan escaped. He concluded his evidence in that the victim was then taken to hospital where she passed on.

Mr. Kalist S/O Kalongo (clinical officer) who stood as PW2, testified that he performed post mortem examination and that upon examining the body of the deceased, he detected a large wound on her head and bruises all over her body; he said her stomach was also swollen due to internal bleeding. According to him the deceased's cause of death was due to internal haemorrhage. He tendered post mortem report as exhibit P1.

A police officer one G. 632 D/C Deogratus stood as PW3. He testified that on 8<sup>th</sup> June 2016 he was instructed by OC - CID for Ngara District to go to Ruganzo village to draw a sketch map of the scene of crime of murder incident Ref. IR/684/2016. The witness tendered the sketch map as exhibit P2 and the same was read out and explained before this court.

Mr. Joseph Simon (PW4), testified before this court that on 07<sup>th</sup> June 2016 at around 11:00 hrs in a companion of his village mates, was ferrying groundnuts home from a farm where they had harvested. Before they could reach home, they met Shukuru Ivan and Bizimana Ivan assaulting Ester Kajwala. He said, Shukuru was assaulting the victim using a stick while his young brother (Bizimana) was using a club. He asked the victim's assailants on the reasons for such act and they said the victim was a witch who bewitched Bizimana Ivan's Children. He beseeched them to stop but his efforts were fruitless and he proceeded with his way home. He further testified that while at his home, came a small girl who informed him that there was a woman who had fallen and injured along the road. Since he suspected the said woman would be Esther,

he rushed towards that direction screaming for help. When he reached at the scene of crime, the victim was lying bleeding from her head and the assailants were nowhere to be seen. He testified further that they mounted search for the assailants and managed to find them, later on, Bizimana Ivan escaped with his club. He further testified that, Shukuru Ivan put his farm as a collateral to secure funds to carter for the victim's transport and treatment. According to him Shukuru managed to acquire 80,000/=Tshs from one Paulo and later he secured transport to ferry the victim to the hospital. He concluded by stating that the victim was then send and admitted at Nyamiyaga hospital while the accused remained under police custody. On 08<sup>th</sup> June 2016 he heard that the victim had passed away.

When the accused (Shukuru Ivan) was called to give his evidence in defence of the case against him, he denied to have murdered Esther Kajwala. He testified that on 07<sup>th</sup> June 2016 at around 11:00 hours, while at his home, came Bizimana Ivan (his young brother) holding a club. That the said Bizimana Ivan told him that he was going to beat Esther Kajwala as she bewitched his child. Shortly Bizimana left heading towards Esther's home and he also followed him. At Esther's home he found Bizimana hitting the victim with a club. He said the victim was screaming for help and other villagers gathered for help.

He testified further that Bizimana Ivan ran away holding his club and in turn other villagers arrested him in order to help them to trace Bizimana Ivan. He further testified that the hamlet chairman came and ordered him to find money

to carter for the victim's treatment which he refused. He said he was then sent to police.

Finally, the defence and prosecution's side agreed to fine tune the registered facts and evidences to reveal the weakness and strength of the prosecution's case through final submissions. From the submissions of both parties, it is not in dispute that Esther Kajwala is dead and that her death is due to unnatural cause. What is in dispute is the accused's involvement in assaulting and killing of the deceased.

According to Mr. Baraka learned counsel for the accused, the prosecution side failed to prove the case beyond reasonable doubt that the accused is the one who assaulted Ester Kajwala and caused her death. To him the evidence produced by prosecution witnesses contradicts each other with the statement given by them at the police station. Forexample PW1 stated before the police station that it was Bizimana Ivan who assaulted the victim and not the accused. But before the court, he said it was the accused who assaulted the victim and thereby causing her death. According to Mr. Baraka learned advocate, the evidence adduced cannot be reliable on to convict the accused person as it is tainted with a lot of doubts. He cited the case of **Jeremiah Shemweta vs R. [1985] TLR** and **Haji Bakari Hassan vs Republic Criminal Appeal No. 365 of 2014** CAT at Dodoma to support his argument.

Apart from that Mr. Baraka submitted that, failure by the prosecution to tender the said club and sticks which were used in committing the offence as exhibits creates doubts as to the guilty of the accused in support thereof, he cited the case of **Yassin Abasi vs. Republic Criminal Appeal No. 282 of 2017 (unreported)**. Again, he casted doubt on failure by the prosecution's side to call material witnesses such as the village chairman and the investigator.

On the other hand, the submissions by Mr. Baraka, were protested by learned state attorneys. According to Mr. Amani learned state attorney, the prosecution side proved their case beyond reasonable doubt against the accused person. To him PW1 and PW4 were eye witnesses who testified before the court on how they witnessed the accused assaulting the victim. He further submitted that it is true that, there are contradictions on PW1's and PW4's evidence adduced in court against what they recorded before the police station but to him the said contradictions do not go to the root of the case. He cited the case of **Abdallah Rajab Wazir vs. Republic Criminal Appeal No. 116 of 2014** (unreported) Court of Appeal of Tanzania and the case of **Godluck Kyando vs. Republic Criminal Appeal No. 118 of 2003** (unreported) to support his argument. He further submitted that according to PW4, accused admitted before his village mates to have assaulted the deceased and he volunteered to pay money so as to carter for the victim's treatment and transport.

On top of that, the learned state attorney raised the issue of malice aforethought and he submitted that the accused intended to kill the deceased

as he was told to stop assaulting the victim but refused. Further he said the weapon used to assault the victim show he intended kill her. To cement his argument, he cited the case of **Enock Kipela vs. Republic Criminal Appeal No. 150 of 1994** Court of Appeal of Tanzania.

After the summing up to the Ladies and Gentleman Assessors, each one was of the opinion that the accused person was positively recognized by PW1 and PW4 beating the victim. All three ended up with a verdict of guilty against the accused person to the offence charged.

Having considered the evidence on record and the submissions by the learned counsels for republic and defense, there is no dispute that the deceased is dead and that her death was unnatural. However, the main issues for determination before the court are: one, whether or not the accused person killed the deceased and if the answer to this issue is in the affirmative, then whether or not accused person acted with malice aforethought.

It is vital to underscore that, the offence of murder according to section 196 of the Penal Code the offence of murder gives rise to four crucial ingredients of which the prosecution must prove beyond reasonable doubt so as to discharge its duty. These are: one, the fact of the death of the deceased, two, the cause of such death, three, proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and four, a proof that the said unlawful act or omission was committed with malice aforethought.



**[See the case of The Republic versus Mungei Simion Criminal Session Case No. 56 of 2020 (HCT) (unreported).]**

In discharging the aforesaid duty, the prosecution brought four (4) witnesses but the key witnesses were PW1 and PW4, who arrived at the scene of crime and eye witnessed the incident. As I have pointed herein above, at this stage, there are only two issues that call for determination by this Court that is whether or not accused killed Esther and if yes whether there was malice aforethought. Admittedly, as rightly submitted by counsel for the prosecution side the accused person was identified and recognized by PW1 and PW4 and there is no doubt to that effect. According to their testimonies, they saw the accused person and his young brother Bizimana Ivan beating the deceased who sustained injuries which led to be hospitalized and a day later passed on.

The issue of identification of accused at the scene of the crime should not detain this court due to the following reasons. Firstly, the incident took place on a broad day light i.e. at around 11:00 hours, secondly the accused was familiar to PW1 and PW4, i.e. a step son to PW1 and village mate to PW4, a village Anglican Pastor. For that matter therefore their identification was by recognition and lastly the accused himself does not dispute being at the scene of crime on the fateful day, as he stated so in his statement before the police as well as during his testimony while defending his case.

In order to accord weight to PW1's and PW4's evidence, two issues should be analyzed, one, are these witnesses credible and two if credible, are they consistent in their evidence (i.e. if there are any material contradiction to their evidence). On the issue of credibility this court without any doubt is satisfied that PW1 and PW4 are credible witnesses. I am of the said view because the accused said he had no grudges with these witnesses before and therefore I find that they had no reason to fabricate evidence against him. Also, this court assessed their demeanor when they were testifying in court and satisfied that they were telling the truth.

On the issue of contradiction, as I have stated herein above, the defense counsel attacked the evidence of the Prosecution side especially the evidence of PW1 and PW4 claiming that there is contradiction in respect of statements given before the police station against the evidence adduced in the dock.

It is a settled principle that not every discrepancy or contradiction in the prosecution's evidence will cause their case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled as it was stated in the case of **Said Ally Ismail vs. Republic, Criminal Appeal No. 249 of 2008 CAT (unreported)** and in the case of **Marmo Slaa @ Hofu and Three Others vs. Republic, Criminal Appeal No. 246 of 2011 (unreported)** as it was stated that;

***"In all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such errors in memory due to lapse of time. Minor contradictions, inconsistencies, embellishments, or improvements, on trivial matters which do not affect the case of the prosecution should not be made a ground on which the evidence can be rejected."*** [Emphasis added]

That being said therefore, I find the said contradictions as minor which do not go to the root of the case.

It is trite law that the burden of proof in criminal cases is that of the prosecution's side and the standard is beyond reasonable doubt [see the case of **Said Hemed vs. R [1987] TLR 117** and **Mohamed Matula vs. Republic [1995] TLR 3**]. In our case therefore PW1 and PW4 testified that they saw accused person and his young brother Bizimana Ivan assaulting the victim. That Bizimana was using a big club while the accused was using a small stick. Be that as it may, it is evident that accused participated in assaulting the victim.

On the basis of the foregoing observation, therefore it is my firm view that, the Prosecution side that it was the accused, Shukuru Ivan, who killed the deceased, Esther Kajwala. Thus, the first issue is affirmatively answered.

The second issue to be determined is whether the accused person killed the deceased with malice aforethought. **Section 200 of the Penal Code [CAP 16 R.E 2019]** illustrate on what amount to malice aforethought. The same provides as hereunder;

***S. 200.***

***"Malice aforethought shall be deemed to be established by evidence proving any one nor 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 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;*

See also the cases of **Florence Mwarabu vs. Republic, Criminal Appeal No. 129 of 2003**, Court of Appeal of Tanzania at Dar es Salaam (unreported) and **Mohamed Said Matula v. Republic [1995] TLR 3**.

Apart from that, the Court of Appeal of Tanzania in the case of **Enock Kipela vs. Republic, (supra)** it was held that;

*"....usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack, (2) the amount of force applied in the assault, (3) the part or parts of the body the blow were directed at or inflicted on, (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose, (5) the kind of injuries inflicted, (6) the attackers utterances, if any, made before, during or after the killing, and (7) the*

***conduct of the attacker before and after the killing.***

*"(Emphasis is mine)*

From the foregoing holding this court noted the following in the present case. With regard to the **type and the size of weapon used**, PW1 apart from testifying that, he saw accused person Bizimana beating the deceased, he did not describe a type and weapon used. PW4 on his part testified that the accused assaulted the victim using a stick while Bizimana Ivan was using a club. Since there is no evidence that there was a plan to harm the victim between accused person and Bizimana, it is then unsafe to conclude that the accused before this court intended to cause death or do grievous harm. It is also unfortunate that the said stick which is purported to be used by the accused person was not tendered as exhibit to enable this court see if by its size and type, the accused ought to have appreciated that death or grievous harm would be caused.

With regard to **amount of force applied in the assault**, this also was not attended well by the prosecution's side. PW2, a clinical officer who tendered post mortem report did not describe the amount of force that was used especially on the wound sustained by the victim on the head. It is also unfortunate to say that the post mortem examination report described the skull and its contents as well as other skeletal structures of the deceased as intact [see part 11 of exhibit P1]. Again even PW1 and PW4 did not describe the wound other than saying it was large. It is therefore unsafe to conclude that the

accused person inflicted a fatal blow on the deceased's head without proof to that effect.

With regard to the ***part(s) of the body the blow was directed at or inflicted on***, PW1, PW2 and PW3 testified that the victim was injured on her head. However as stated above, the Post mortem report is silent on that head injury. The post mortem report shows the external appearance of the deceased's body was with multiple bruises on the whole body but PW2 The Clinical Officer did not tell this court if the said bruises were capable of causing death.

On the number of blows, ***although one blow may depending upon the facts of the particular case be sufficient for that purpose***, there is no evidence from the prosecution's side on the number of blows or how fatally the said blows were inflicted on the deceased's head.

On the ***kind of injuries inflicted***, PW2 did not state the kind of injuries sustained by the victim. In the post mortem report, which was tendered as exhibit P1, PW2 observed that the victim's body had bruises on the whole body. He however did not tell us how the said bruises on the body would probably lead to internal bleeding. Even if the internal bleeding was due to multiple bruises on the whole of body, there is no evidence that they were caused by the accused while using a stick.

With regard to **attackers utterances made before, during or after the killing**, the record shows that Bizimana Ivan and accused said that the victim was a witch who bewitched people where he came from and that they wanted to send her back (where she came from) [see PW1 and PW4]. This court considered accused's utterance and concludes that, his/their aim was to send the victim back to her village and not to cause death of the victim.

On the conduct of the attacker before and after the killing, this court noted accused's conduct after the victim had been injured as that of a person who did not intent to kill the victim. He offered his farm as a collateral and secured 80,000/= Tshs which was used to carter for transport and treatment of the victim to the hospital. In essence he struggled to save the deceased's life.

From the analysis above it is evident that the factors ascertaining malice afore thought as stipulated in the case of **Enock Kipela vs. Republic (supra)** are not meet in the present case. I am of the firm view that accused person had no malice aforethought to cause death of Esther Kajwala.

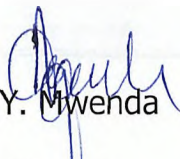
As I have stated earlier, I made a summary of evidence to honorable Gentleman and ladies assessors. Thereafter I requested them to make a verdict. Each and every one made their own verdict as stated earlier. They all opined that the prosecution evidence was sufficient to support murder. Their opinion hinged on the testimony of PW1 and PW4 who are eye witnesses. They also stressed that accused's failure to stop Bizimana Ivan (his young brother) from going and



attack the victim, also his act of following Bizimana Ivan and join him in beating the victim is a proof that he had malice aforethought. I must commend them for their concentration and daily attendance from the beginning of trial to this stage. However, with due respect with the reasons I have advanced above I differ with their opinion as the circumstances in this case shows accused person had no malice aforethought.

I therefore, find the accused person, Shukuru Ivan guilty of the offence of manslaughter contrary to **section 195 and 198 of the Penal Code [CAP 16 R.E 2019]** and therefore convict him accordingly.



  
A.Y. Mwenda  
**Judge**  
05.11.2021


### **SENTENCE**

In sentencing the accused person, I have considered the mitigating factor which are that the accused is the first offender, he has spent 5 years in remand prison and that he is a father to two children and the sole bread winner for his family. I have also considered the fact that after the incident he struggled to raise funds to carter for treatment and transport of the victim to the hospital, which shows he is remorseful.

From the foregoing reasons I thus sentence the accused Shukuru Ivan to serve a term of four (4) years in prison starting from today.

The right of appeal fully explained.



  
A.Y. Mwenda

**Judge**

05.11.2021

This order was pronounced in open court in the presence of the accused person, Shukuru Ivan, and his learned defence counsel Mr. Baraka John and in the presence of learned state attorney Mr. Clemence Mwakanyamale (PSA) and Mr. Amani Kilua (SA).



  
A.Y. Mwenda

**Judge**

05.11.2021