

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

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**CRIMINAL SESSIONS CASE NO. 19 OF 2021**

**THE REPUBLIC**

**VERSUS**

**COSTANTINE S/O STEPHANO**

**JUDGMENT**

23<sup>rd</sup> Nov & 06<sup>th</sup> Dec, 2021.

**F. H. MAHIMBALI, J.**

COSTANTINE S/O STEPHANO, the accused person in this case is charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16, R.E 2019, (the Penal Code). It is alleged by the prosecution that on 29<sup>th</sup> day of March, 2020 at Nafuba Village within Bunda District in Mara Region, the accused person murdered one Anety d/o Daudi. The accused person pleaded "*Not Guilty*" to the information of murder. However in his plea of not guilty, he kept on maintaining that he killed the deceased out of bad luck. Meaning that he didn't intend to kill his lover but he just acted on provocation and they had a family quarrel between the two.

According to the facts of the case, the deceased and accused person were lovers, living as husband and wife (without proof of a contractual marriage between them). Their cohabitation life in Sozya Island within Nafuba village Island made everyone to know them as spouses.

On the material date, the accused person is alleged to have attacked the deceased by beating her on various parts of her body including pulling her up by a dressed cloth across her neck. The reason of the said attack could not be known by anyone around. Whereas the deceased was a food vendor – cooker, accused person was a barber running a barber shop in Sozya sub village of Nafuba island in Bunda District.

The summary of the evidence is as follows; **PW1: FLORA JOHN MAANDAZI**, testified that she is a resident of Sozya village within Bunda District. She knew both the deceased Anety and the accused person, Constantine. That on 29/03/2020 around morning time (08:00hrs), while at her home, she witnessed the deceased Anety being beaten by Costantine using his fists and legs. She intervened by asking Constantine to leave his lover, Aneth. By that time, Aneth had already been wounded by iron sheet on one of her fingers (hand finger).

Costantine had then left Aneth (released her) and went back to his saloon office (barber shop). As the man returned to his barber shop, Anety had gone to report the said incidence to the Ward Office where Mgambo came and arrested Costantine at his barber shop. They took him to VEO's officer where he was detained for some time. Later on (on the same day), the said Constantine was released. By that time, Anety had returned to her business place (cooking activities – "mama lishe"). Later on at noon (the same date of 29/03/2020), she got information from some people that Anety was beaten to unconscious. She then rushed to the described scene, where she saw Anety laying down and unconscious. Many people gathered and amongst others was Anastazia. By that time, the said Anety was almost unconscious as she could not even talk. Shortly, the chairperson and Mgambo came for purposes of arresting the said Constantine. They then took Anety to the dispensary for medication. During the said medication, she noted Anety recovering a little as she could open up her eyes and moved her body from one side to another. However, when it reached 05:00 hours on 30/03/2020, her condition deteriorated her condition worsened. They then found a transport (boat) to Kibara Hospital. While at the Hospital it was noted that the said Anety had already died. She identified the said Constantine

in the accused dock (After She had gone to the accused's dock and held his shoulder). When cross examined by Mr. Makongo, she stated that in the said boat they were seven people (Herself, VEO, Aneth, Constatine, Mgambo J, canoe captain and Magreth Fabian). That while at Kibara, she remained at the shore. She came to know the death of Aneth following the call she had received from VEO.

**PW2; ANASTAZIA JOHN** her testimony is to the effect that she lives at Sozya – Nafuba in Bunda District engaged in food vendor (*mama lishe*) to fishermen. That on 29/03/2020 around 14:00 hours, she recalled the incident of Anety being killed by Costantine. She stated on that day around noon time, she and Aneth had gone to bath at the Lake Victoria - Sozya. After bathing (swimming), as they were returning home before reaching home, they passed through to Aneth's boss (Magreth) where they collected utensils. As they were returning home suddenly came Constatine to the direction they were heading, held Anety, pulled her Khanga dress up which she had dressed crossing her neck and then started beating her by using his fists and legs. The said fists were directed on the neck while leg kicks were directed to the leg zones/part of the said Anety. By that time, Constatine was not uttering anything but just kicking Anety on various part of her body without any reaction or

resistance from her. The said incidence lapsed for some time (about three minutes). Seeing this, she intervened by inquiring from Constatine as what was wrong, she then asked him to leave her. While still holding her up, the said Constatine continued kicking and fisting her, until when Anety lost conscious, it is when Constatine left her as she had fallen down. While there, came Lyato who after seeing this went to Magreth and reported the said incidence. Then Magreth came, they picked Anety (herself, Frola and others) Carrying her by using they hands holding her body. By that time, the said Constatine was arrested by people and taken to local leader. Prior to this incidence, in an earlier event, as they were heading to the lake for bath, she had witnessed Constatine chasing Anety whereby Anety escaped to her boss, Magreth and Constatine refrained. Then when they were returning from the lake, Constatine came from the back and started attacking Anety. She identified the said Constatine by touching the accused person on his shoulder while the accused was at the dock. She further stated that the said Constatine also lives at Sozya. That, When she had arrived in that village three years ago (2019), she met him there. He was a barber. She finally added that the said Constatine and Anety were lovers like husband and wife. When cross examined, she stated that the said khanga dress

which the deceased wore across her neck was yellow in colour. It was a Kichori (Mtandio) but not exactly a khanga dress. It was of tetron material. She further stated that she never heard of any other quarrel between these two save what she witnessed that day. She got news of Anety's death on 30<sup>th</sup> March 2020 from the people who escorted/sent Anety to Hospital, as she had not gone to the hospital.

**PW3 LYATO PETRO**, testified that he lives at Sozya since 2008. He is engaged in fishing activities. He recalled on 29/03/2020 around noon time (15:00 hours) while coming from fish camp (Sozya) heading to center, along the way he saw the accused person beating the deceased. He had held the deceased from the back of the neck on the dress she had tied at the back of the neck and he also witnessed the accused fisting the deceased and then beating her on her legs. Seeing this, he had to rush to Magreth (her boss) to report on the incidence.

When he returned at the scene with Magreth, the victim had already been taken to hospital. At the Hospital he saw the deceased being under treatment (water drip). In his testimony, he witnessed one blow (fist) on the neck. He pointed at the said accused person while at the accused's dock by holding his shoulder. As the deceased was taken for medication, accused person was put under arrest at the local leader's office.

**PW4: IBRAHIM ANDESHI KIYOYA**, testified that he too lives at Nafuba Bunda. Nafuba village is within Nasimo Ward. He is VEO since July 2018. On 29<sup>th</sup> March, 2020 at noon time (15:00hours) while with doctor of Nafuba dispensary, he got information that there was one woman who had been beaten. As he was heading to the scene with that doctor, he met the said victim along the way being carried. As he was with the dispensary doctor, he (the doctor) ordered to see her. Upon the preliminary examination, he ordered her to be put in one hall for medication and ventilation. The doctor then started offering medication by putting drips on her (about five drips). When it reached 18:00 hours, the victim developed some signs of awareness. The doctor recommended that she should remain there for more observation. When it reached morning of 30/03/2020 (next day), the doctor recommended that the victim to be taken to Kibara Mission Hospital. He then did harambee for raising fund for purposes of getting fuel and bill clearance of the victim for her transportation to Kibara Mission Hospital. Money was raised and the victim was eventually taken to Kibara hospital. As the accused person was also under arrest, he also ordered Mgambo to take the accused person to Kibara for him to be handed over to police. He was also one of the persons who boarded the boat to Kibara together

with the accused person. After two hours, they had reached the shore of Kibara where the victim was taken by stretcher to Hospital. While there, when the Doctor saw the victim, he shortly confirmed that she is dead. Then the deceased's body was taken to mortuary and he reported the incidence to the police. Relatives of the deceased were being traced and on 31<sup>st</sup> March, 2020 the deceased's body was examined. After the burial permit, they buried her on 31<sup>st</sup> March, 2020 at 19:00 hours. He clarified in his testimony that Sozya is an island within Nafuba village. The murder happened at Sozya island within Nafuba village. Nafuba is also an Island in Nansimo Ward. What he witnessed with the deceased; her neck was so loose the situation which is unlikely to a normal human being. He described the deceased's name is Anety.

That was all about the prosecution's case. The court then under section 293 of the CPA, made a ruling that the accused person had a case to answer. He thus made his defence as follows.

**DW1: CONSTATINE STEPHANO, in this defense testimony** stated that the deceased Anety Daudi was his lover. They had been living together for a period of three years. During their time, they had managed to get twin babies who were born in 2014. On 29/03/2020 he was at Sozya. He recalled on that day after he woke up in the morning,



he went to his office leaving his lover at home, leaving instructions that she should go later to his office for getting money for the basic needs of the day. While at his office, he could not see his wife. Surprisingly, he saw his child coming to his place of work who told him that he is hungry and that their mother was not at home. He started making follow up of the wife. He then saw her seated with one mother (PW2) who did not know her name. After he had seen her with PW2, he inquired from her as to why she had not gone to take money for the basic needs of the day, she just replied, *"he should not ask her stupid question and that he had to go his way"*. Following this unpleasant reply, he got angry and spontaneously kicked her on the leg and she fell down. It was strange to him when he heard the prosecution witnesses saying that, he had beaten her by a number of blows using his legs, fists and robbed her neck. That was not a true version according to him.

He further stated in his testimony that the said PW2 was the one who was coaching his wife that she should not only be with him (one man) but instead she should find other men as there are good opportunities from them. All this PW2 was telling his wife, he got to know from his wife (the deceased). When cross examined, he replied that these words *"I should not ask her stupid question and that I have*

*to take my way*” were abusive and provocative words. He also replied that, cutting someone with a knife on his neck and on the hand, he doesn’t know which area is more dangerous. As regards the twin children he repeated saying that they were born in 2014 with Anety.

After the closure of the defense case, counsel of both parties made their final submissions. Mr. Byamungu for the Republic submitted that with this murder case, it is undisputed fact that the accused person killed the deceased. This also suggests that it is undisputed that the deceased death is by unnatural cause. The PE1 exhibit (PMR) tells that the deceased’s death was caused by spine fracture which led to brain death. As per the testimonies of PW2 , PW3 and PW4 the evidence is clear that the accused person attacked the deceased on the back, grabbed her by the neck by a piece of cloth and further attacked her by fist and legs. As she fell unconscious on that day of 29<sup>th</sup> March, 2020, she did not regain her conscious until her demise on 30<sup>th</sup> March, 2020 (next day). The manner the deceased was attacked and eventually killed by the accused, the conduct of the accused person seemed to be barbaric from the morning of 29<sup>th</sup> March, 2020 (PW1 testimony). Conjunctively, the testimony of PW1 and PW2 suggests that the accused person had malice aforethought of murdering the deceased. The neck

areas are sensitive areas, if brutally attacked as done is life costly to the deceased. Had he not intended to cause death of the deceased, he wouldn't have attacked the deceased that much. It appears also that the efforts/force used by the accused was so high that led to the fracture of the neck spine. Normally neck spine is not easily fractured unless excessive force is used. Furthermore, the accused person didn't even offer assistance to the deceased at the scene.

He added in his submission that as per accused person defense testimony, it is just rubbish testimony. He says that he saw the deceased seated with PW2 then he attacked her by legging her down. It is strange for a seated person to be cross legged (*kukatwa mtama na kudondoka chini*). Assuming that his defense being provoked by the words uttered words is reliable, the same could not be counted as provocation to causing death of the spouse. If such words were abusive and costing life to the spouse, he was of the view that there would be perhaps few couples surviving to date as such words are common in life.

In consideration to the case of **Damian Ferdinand Kiula vs Republic** 1992 (TLR) 16, he inspired this court that the purported provocative words in relation to the ordinary man in the given community could not have reacted that way. That the said words were

provocative and uttered in the presence of PW2, but during cross examination on respect of this fact, he could not respond it squarely. He thus prays that his testimony be considered as an afterthought. His testimony is so suspicious on head and sake. In the case of **Chora Samson Kiberiti vs Republic** 516 of 2019 CAT – Musoma), discussed on how afterthought defense is unreliable.

He concluded in his submission that with this, the prosecution case be considered as proved beyond reasonable doubt via testimony of PW1, PW2 PW3 and PW4. In essence these prosecution witnesses proved credence and thus gave credible evidence in court which is nothing but incriminating against the accused person with the offence of murder – charged with, conducted by Mr. Byamungu.

In his final submission Mr. Thomas Makongo learned counsel for defense stated that in law, it is the republic's legal duty of proving the case beyond reasonable doubt. In the present case, it is the Republic's duty to establish whether the said killing was with malice aforethought or otherwise. In his assessment to the prosecution's case via their four witnesses, in totality none of them established malice aforethought as per law. When PW2 was giving his testimony in court, testified that there was only one quarrel on that day of 29/03/2020. In essence it is

the testimony of this PW2 which established the direct testimony of the accused person beating the deceased. What has been submitted by the learned state attorney that it was a continuous beating is his own version but not that of PW2. That there was excessive force used against the deceased person, it has not been established by evidence. The evidence of both sides is at one that the accused person legged "kumkata mtama" the deceased and put her down. The prosecution evidence is wanting that there was excessive force. That there was spine neck fracture by excessive force has not been legally and medically proved. Neck spine can be fractured by a bad falling and not necessarily by excessive force as submitted by his fellow learned brother whom he submitted had assumed the medical role which is not his profession. On the uttered words by the deceased that were so common by an ordinary common man, it might be to him and not everyone. Provocation depends on the originality/custom of the said person. He added that the cited case above (Damian Ferdinand Kiula) is very supportive to the position he is subscribing. Considering the fact that the accused person is the head of the family and that the deceased uttered such provocative words against the head, she being a shoulder, ought to have exhibited loyalty to the head. She being a wife/spouse erred to her

man by uttering such words. It is his submission that the accused person erred in law, equally the deceased misbehaved before her man. In his assessment to this case, PW2 is a custodian of many evils to the deceased against the accused person. In any way she could not tell much truth in court in favour of the accused person who is going against his back. With all has been testified and submitted in court, it is clear that the death of the deceased is not murder per se as charged but manslaughter as per law under section 195 of the penal code, he concluded his submission.

That was all about the case's summary of evidence and final submissions.

Legally, it is the prosecution side which is placed with a higher responsibility than that of the accused in a proof of criminal charge. This is reflected under sections 3 (2) a, 110 and 111 of the Evidence Act Cap.6 [R.E 2019], and cemented by several cases including the case of Joseph John Makune v R [1986] TLR 44 at page 49, where the Court of Appeal held that:-

*"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being*

*where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."*

The second principle is that the standard of proof in criminal cases that is required by law is proof beyond a reasonable doubt. The Court of Appeal of Tanzania in the case of **Mohamed Haruna@ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) held that:-

*"Of course in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."*

According to the law, the evidence must be so legally convincing that no reasonable person would ever question the accused's guilt. (See the cases of **Mohamed Said Matula v Republic [1995] TLR 3**, **Anatory Mutafulungwa v Republic**, Criminal Appeal No. 267 of 2010, Court of Appeal of Tanzania and **Festo Komba v Republic**, Criminal Appeal No.77 of 2015, Court of Appeal of Tanzania all unreported).

In the case of **Enock Kipela v Republic**, Criminal Appeal No. 150 of 1994 (unreported) discussed what entails malice aforethought, saying that: -

*"Usually, an attacker will not declare 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 blows 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 attacker's utterances if any; made before, during or after the killing and.*
- 7. The conduct of the attacker before and after the killing.*

Normally, in murder/homicide cases, the prosecution is duty bound to prove the following elements of the offence of murder:

- (a) That there is a person who died of an unnatural death;
- (b) That the killing was unlawful or not endorsed or certified by the law;



- (c) That the killer had malice aforethought.
- (d) That the accused person arraigned before the Court is the one who killed the deceased.

According to the evidence in record in this case, it is undisputed that the deceased died unnatural death, that the killing was unlawful and that the accused person here is responsible of the said killing. The main controversy is whether the accused person had malice aforethought when attacking the deceased.

Considering the testimony of PW2 and PW3, it is undoubted that the said beating was one sided and there was no fight between the accused and the deceased. The only defense of the accused person when beating the deceased was that he acted under provocation and thus, it is death causing without an intention, suggesting manslaughter. The prosecution is in resistance to it.

In my analysis to the evidence by prosecution, I am of the firm legal view that what the accused person did, is not manslaughter as suggested. The evidence by PW2 is of highest credence and does not suggest any quarrel between the accused person and the deceased at the material time. What is evident is the fact that the accused person violently attacked the deceased. There was no time as per evidence in

record that the deceased revenged against the accused person as a way of self defence during the said attacking. The defense testimony that the accused person was provoked by the words "*he should not ask her stupid questions and that he had to take his way*" are not founded. It is more a constructive defense by the accused person. Had it been true, it was expected for it to feature out against the testimony of PW2 by the defense side. Failure to cross examine PW2 on this important aspect is equal to making constructive evidence which the same has not shaken the prosecution case. In the case **Nyakwama s/o Ondare @ Okware**, Criminal Appeal no. 507 of 2019, while making reference to the case of **Nyerere Nyague v. The Republic**, Criminal Appeal No. 67 of 2010 (unreported), the Court relied on the decisions in **Cyprian Kibogoyo v. The Republic**, Criminal Appeal No.88 of 1992 and **Paul Yusuf Nchia v. National Executive Secretary, Chama Cha Mapinduzi** and Another, Civil Appeal No.85 2005 (both unreported)) where the Court of Appeal once again observed that:-

*"As a matter of principle; a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said".*

With this remark, I am convinced by the Republic that the accused person's defense in this case is more constructive defense as it is an afterthought in which it is unworthy of credit. As the evidence is water tight that the accused person attacked the deceased as witnessed by PW2 and PW3, there is neither provocative words in it nor any quarrel established to reduce the offence to manslaughter as wished.

In essence, I consider the facts and evidence of the case establishing the offence of murder sufficiently beyond any reasonable doubt. The accused person as per facts and evidence of the case, premeditated the killing. He first wanted to attack her while going to the lake, but accomplished it on her return from the lake having escaped the first attack. This is just in consideration of the testimony of PW2, the testimony of PW1 notwithstanding.

What constitutes malice aforethought or intention to kill is well defined by laws, literature and decided cases (see section 200 of the Penal Code and the case of **Enock Kipela** (supra) and **Ajili Ajili @ Ismail vs Republic**, Criminal Appeal no 505 of 2016). According to the Black's Law Dictionary, malice aforethought is defined as:

*"A pre-determination to commit an act without legal justification or excuse.... An intent, at the time of killing,*

*wilfully to take the life of human being, or an intent wilfully to act in callous and wanton disregard of the consequences to human life: but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed"* (see Criminal Law in Tanzania, A Case Digest, by Dr Fauz Twaib and Daudi Kinywafu at page 335).

What is stated in the Penal Code under section 200 (above), is what the cases of **Enock Kipela (supra) and Ajili Ajili @ Ismail vs Republic**, Criminal Appeal no 505 of 2016 deeply clarified on malice aforethought.

All said and considered, it is undoubted that what the accused person did as per facts and evidence of this case is nothing but murder. Accused person as per evidence of PW1 and PW2, seemed to have clearly premeditated to commit an act against the deceased without any legal justification. When all this is calculated, the manner the accused person blowed the deceased on her neck, pulled her neck up tied with a cloth across her neck by high force, entails nothing but malice aforethought against the life of the deceased. In my consideration, there is nothing of diminished responsibility by the accused person but malice aforethought.

Consequently, I hereby convict the accused person to the offence of murder as charged, contrary to the provisions of sections 196 and 197 of the penal code.

Dated at MUSOMA this 6<sup>th</sup> day of December, 2021

  
F. H. Mahimbali

JUDGE

**Sentence:** Considering the punishment for murder is only one known as per law, the accused person is hereby sentenced to suffer death by hanging pursuant to section 197 of the Penal Code, Cap 16 R.E 2019 as read together with section 322 (1) & (2) of the CPA, Cap 20 R.E 2019.



  
F. H. Mahimbali

JUDGE

06/12/2021

Right of Appeal fully explained to any aggrieved party under section 323 of the CPA, Cap 20 R.E 2019.

DATED at MUSOMA this 6<sup>th</sup> day of December, 2021.

  
F. H. Mahimbali

JUDGE

06/12/2021