

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA**

CRIMINAL SESSIONS CASE NO. 77 OF 2018

THE REPUBLIC

VERSUS

1. JUMA NKANKAA MBEDULWA

2. RUNGWA JUMA MADINDA

.....

JUDGMENT

23rdMay&28thJune,2022

MDEMU, J.:

On 12th of February, 2019 Juma Nkankaa Mbedulwa and Rungwa Juma Madinda appeared before this court for plea and plea taking on the offence of murder contrary to the provisions of sections 196 and 197 of the Penal Code, Cap.16. Both denied to have murdered one Mosi Mduhu on 4th of July, 2015 as alleged by the prosecution in the information for murder.

In the particulars of offence and the evidence of the prosecution, the 1st Accused was in the move to arrest the deceased alleging to have stolen his bicycle. On the fateful day, at local brew pub owned by one Michael Hugo Njamasi (PW2), the 1st Accused asked the then 2nd Accused to assist in arresting the deceased. In so doing, suddenly, the 1st Accused took a knife

from the deceased waist and stabbed him in the left chest. The deceased died on the spot.

The trial commenced on 23rd of May, 2022 in which Mr. Bagenda, learned State Attorney appeared for the Republic whereas Mr. Kidumage and Ms. Amina Hamis, both learned Advocates, appeared for the 1st and 2nd Accused persons respectively. At the start, the learned State Attorney informed the court that, the 2nd accused Rungwa Juma Madinda died in prison on 17th of April, 2020 as per information contained in Ref. No.102/DO/I/1V/249, Remand Prisoner 863/2020. His case thus abated under the provisions of section 284A of the Criminal Procedure Act, Cap.20.

From the outset, in both the prosecution and defence case, there is evidence that it is the Accused who stabbed the deceased using a knife. The trial therefore was mounted to establish if the killing was associated with the requisite malice aforethought. To establish this, the prosecution called four witnesses namely: Florian Joseph, Michael Hugo Njamasi, Pili Staphano and E.9204 D/Cpl. Wilson; PW1, PW2, PW3 and PW4 respectively. They also tendered in evidence a sketch plan and postmortem report exhibits P1 and P2 respectively. On the other hand, establishing want of malice aforethought, the Accused Juma Nkaka testified alone as DW1. He also

tendered his caution and extrajudicial statements as exhibits D1 and D2 respectively.

According to the prosecution case, on 4th of July, 2015 PW1 Florian Joseph, the deceased, Pili Stephano (PW3) and others were at a local brew pub owned by Mikael Hugo Njamasi (PW3) taking local brew. While there, the 1st Accused (the Accused) and the 2nd Accused one Rungwa Juma Madinda (the then 2nd Accused) also visited there. They were not armed and proceeded straight to where the deceased and PW3 were seated sipping local brew. The then 2nd Accused, famously known as "police jamii" touched the deceased signaling to the Accused to be the person they were looking for on allegation of stealing the Accused's bicycle. The deceased was armed with a knife in his waist.

It was further the prosecution case that, suddenly, as per the evidence of PW3, the Accused herein picked a knife from the waist of the deceased and stabbed him in the chest. The deceased died on the spot. As testified by PW4, E.9204 D/Cpl. Wilson and also as contained in the postmortem report (exhibit P2), the deceased body had a penetrated wound in the chest and hemorrhagic shock was registered to be the cause of death.

Given this evidence, in terms of section 293(2) of the Criminal Procedure Act, Cap. 20, the Accused person was found to have a case to

answer. This finding was arrived at without assistance of parties as they left the matter to court. Having this information, and upon being informed of his rights in terms of the provisions of section 293(2) of Cap. 20, the Accused decided to exercise his rights under section 293(2)(a) of Cap. 20. He thus testified alone on oath.

Testifying as DW1, Juma Nkaka, the Accused herein stated that for quite some time was tracing the accused because he had stolen his bicycle. He also reported the matter to Mchela Hamisi, the Hamlet chairman and to one Matonya, the Sungusungu commander. On the fateful day, he went to a local brew club with the then 2nd Accused where he met the deceased armed with a stick and a knife. The deceased started to escape thus managed to grab the said knife which was about to fall down and did use to stab the deceased.

The Accused then disappeared to Tanga. He was later arrested and confessed both before the police and justice of peace to have stabbed the deceased using a knife. The Caution and extrajudicial statements were tendered by DW1 as exhibit D1 collectively. This marked the end of both the prosecution and defence cases. Parties did not have their closing submissions.

Having a summary of both the prosecution and the defence case, it is not disputed that, the deceased is dead and died unnatural death. It is equally on record that on the 4th of July, 2015, the deceased was attacked by the Accused and the then 2nd Accused person at a local pub brew owned by PW2. Equally, during the attack, the Accused herein stabbed the deceased using a knife. What therefore is at dispute is whether or not the Accused's act was accompanied with the requisite mensrea. Before I venture to this end, in murder charges, for the accused to be proved guilty, his actions (the *actus reus*) have to be associated with the requisite malice aforethought.

Essentially, in terms of the provisions of **section 196 of the Penal Code, Cap.16**, an accused person may only be responsible for the murder of Mosi Mduhu as stand charged only if the act of stabbing the deceased using a knife was accompanied with malice aforethought as defined in the provisions of **section 200 of the Penal Code, Cap.16** as follows:

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 or 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;*
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.*

Given the foregoing, several questions might be asked. Did the Accused intend to cause death or grievous bodily harm? Did the Accused possess requisite knowledge that his acts or omission would result into death of Mosi Mduhu? Answers to these questions require a thorough exploration of the acts of the Accused prior to the act of stabbing the deceased using a knife. This is a matter of evidence. In the first place, the Accused was not armed. He went to the crime scene with prior intention to arrest the deceased. After approaching the crime scene, he informed the then 2nd Accused person to assist in arresting the deceased. The evidence

on record also reveal that even before what happened on the fateful day, the Accused reported to the Hamlet Chairman one Mchela Hamisi. As if this was not enough, the Accused also reported to the "Sungusungu commander". In my view, going by those facts, one may not hold that the Accused pre meditated that in the event he locates the deceased then must terminate his life.

It appears the prosecution evidence on intention to terminate the life of the deceased is in the testimony of PW3. Ideally, this witness stated that, the Accused after approaching the deceased, who was seated with her at the pub, never talked to the deceased and abruptly took a knife from the waist of the deceased and ultimately, stabbed him. in other words, there was neither fight nor any sort of commotion. I think this evidence needs a careful thinking. I am saying so because, according to PW3, the Deceased and her had spent more than one hour taking local brew.

It is also doubtful whether or not the deceased was sober, for it is not usual for the deceased to be seated waiting for the Accused to take a knife from his (deceased) waist and do the stabbing. This is not normal. What in my view is the correct version is what forms the contents of both extra and caution statements. For clarity, part of the statement, beginning with the extrajudicial statement (D1) reads as hereunder:

*Siku zilipopita kama tatu hivi, mnamo tarehe 3/6/2016 niliondoka nyumbani kwenda kilabuni nikiwa na matembezi ya kawaida ilikuwa muda was aa 11.00 jioni. Nilipofika tu hapo nikamwona huyo Mosi Mduhu akiwa na fimbo na kisu. Basi nilimwona sungusungu mmoja aitwaye Lungwa Juma **nikamwambia mwizi wangu tunayemtafuta kila siku huyo hapo tufanye mpango tumkamate. Basi mimi nilimzunguka na nikafaikiwa kumkamata. Nilifika tu kukamata kile kisu chake. Tukawa tunavutana na hicho kisu. Ndipo nilipofanikiwa kumnyang'anya na baada ya kumnyang'anya, alinirukia tena kutaka kunipiga na kuninyang'anya kisu hicho. Katika kurupushani hizo za kunyang'anyana kutaka kunipiga/ kuniangusha chini, ndipo katika hali ya kujihami nilikuta nikiwa nimemchoma kisu ila sikujua ni eneo gani la mwili wake.....(emphasis supplied)***

This is more less a similar version in the caution statement (D1) recorded by the Accused before the recording of the extrajudicial statement. As said, it was not usual for the deceased to be seated waiting for what the Deceased did. In essence, unlike what PW3 testified, the correct version in

my view, is what the accused testified being supported by the caution and extrajudicial statement. In this, there was a commotion and each one was struggling to have a knife. Under the premises, the Accused never premeditated the consequences of his acts. I therefore find him not guilty of murder and he is accordingly acquitted.

In the foregoing analysis, there is overwhelming evidence that the accused person did not act with malice aforethought. It was stated in the case of **Misoji Ndebile @Soji vs Republic [2015] TLR 517** that:

*It is trite law that to secure conviction for murder, the prosecution must prove beyond reasonable doubt that the deceased was killed by the Accused with **malice aforethought***

In the instant case the evidence both from the prosecution and the defence therefore constitutes the offence of manslaughter under the provisions of section 195 of the Penal Code. May the Accused person be convicted of the offence of Manslaughter though not charged? Section 300 (1) and (2) of the Criminal Procedure Act, Cap. 20 on this provides that:

300 (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete

minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

- (2) *When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*

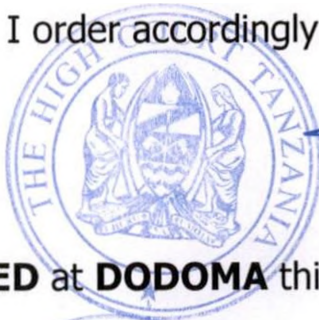
It was also stated in the case of **Godfray Mwasumbi & Rashid Shabani vs. Republic, Criminal Appeal No.29 of 2015** (unreported) regarding the above quoted provisions that:

1. *When a person is charged with an offence and the facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged.*
2. *The above is the position of the law. However, case law has construed that provision and stated that, an accused person in order to be convicted of a lesser or minor offence, the offence should be on the face of it*

*minor and cognate in character to the greater offence
to which the accused person was initially charged with.*

With this position, I have no iota of doubt that the offence of manslaughter which the evidence in this case proved to exist, is minor to the offence of murder which initially, the accused was charged with. Under the premises, I therefore find the accused Juma Nkaka Mbedulwa guilty of manslaughter under the provisions of section 195 of the Penal Code, Cap.16 and he is accordingly convicted.

I order accordingly.



Gerson J. Mdemu
JUDGE
28/6/2022

DATED at DODOMA this 28th day of June, 2022



Gerson J. Mdemu
JUDGE
28/6/2022