

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

SITTING AT TABORA

CRIMINAL SESSIONS CASE NO. 25 OF 2021

THE REPUBLIC

VERSUS

THOMAS S/O THOBIA @NIKILANDULI

JUDGMENT

Date: 3/6/2022 & 9/6/2022

BAHATI SALEMA, J.

The accused, **Thomas Thobias s/o Nikilanduli** is charged with an offence of murder contrary to section 196 of the Penal Code, Cap.16 [R.E 2019]. It is the prosecution case that the accused person on the 27th day of January 2019 during the night hours at Kariakoo-Kigamboni area within the Municipality and Region of Tabora murdered one *Esther d/o Gwai Almas*.

The prosecution evidence adduced by the witness can be summarized as follows; the accused was dealing with mason activities. In 2017, he was requested by Esther Gwai, now deceased, to construct a house for her. In 2018, he completed the construction at Kariakoo Tabora where she moved in around February 2018. The deceased asked the accused

to stay there as a guard while she went to Zanzibar in April, 2018 for training. That is when, in August, 2018 the accused went back to Tabora and stayed with the deceased, working as his houseboy.

When this matter came up for hearing, the accused pleaded not guilty to the offence of murder. In a bid to prove its case, the prosecution procured the attendance of seven witnesses and tendered three exhibits. Patrick Masota Ntobi, **PW1**, doctor who examined the body of the deceased; Mambazi Peter, **PW2**, the deceased neighbor; E.4606 Sargent Dotto, **PW3**, a police officer; Rehema Mohamed, **PW4**, a neighbor; Jumanne Haruna, **PW5**, a neighbor, Inspector Ezekiel Regis, **PW6**, a police officer, and Leticia Waitara, **PW7**, a chemist. The oral testimonies of the prosecution witnesses were supplemented by three exhibits, to wit, the postmortem examination report (**Exhibit 1**), a cautioned statement (**Exhibit 2**), and a report from the Chief Chemists (**Exhibit 3**).

The prosecution case was opened with the testimony of **PW1 Dr. Patrick Masota Ntobi**, a doctor at Kitete who testified to the court that while on his official duties on 28/01/2019 at Kitete he was assigned by his supervisor to perform an autopsy at Milambo Barracks hospital where the body of the deceased was placed. According to **PW1**, the body was at Milambo barracks where he went with the police officers to examine the body. He testified that the examination was conducted in the presence of Capt Japhet Maganga and LtN Christine Kamota,

DCPL Dotto and DCI Seith. PW1 also told the court that the examination of the deceased body revealed, *inter alia*, that the deceased was seen with a history of being raped and had finger marks around the neck, bruises on the right shoulder, and a bruise on the right knee joint. The deceased had bruises on her face, hand and neck, showing that she was strangled. In that regard, PW1 formed an opinion that the cause of death was *asphyxia* due to suffocation, leading to a cardio-pulmonary arrest.

Next on the list was **PW2, Mambazi Ernest Peter**, her neighbor, testified to the court that on the material date 27/1/2019 at about 19 hours while at her home she was at home when she heard an alarm coming from her neighbor, Esther Gwai who is now deceased and heeded to it. The scream came from the kitchen as if the person was suppressed. She started calling her but the deceased never replied. She went there and tried to open the door, but it was closed. After that, she went behind her house, where there is a neighbor called Rehema, who is an old woman. She found Rehema with her siblings sitting outside and asked if she had seen the deceased, Esther since she heard an alarm from inside. She replied that Thomas Tobias who was living with Esther had just taken his hen to her place. Then they went with that old woman, Rehema, to Esther's place. After arriving there, they found Tobias coming from the "maize plants and asked he asked them if they had already passed to their house, "*Mama Eliud ulisha kuja kwetu.*"She

asked him if there was any problem but he remained silent. He then stated that he left Esther cooking, but upon looking at him she noticed he was worried and was somehow suspicious. She then asked him where he was from, and he told them he was coming from Rwanzali. Her neighbor, Rehema who was with her, told him that "*mbona umekuja kuchukua kuku na Rwanzali unaposema ni mbali*"?

She then requested him to open the door, and he opened the door. Upon entering the house, PW2 went directly to the kitchen with that old woman where they found the cooker was still on and the deceased was lying down. Her dress was uncovered and her underwear was beside her. He went again into the sitting room. She testified that they went out and the accused wanted to run away. That is when she raised an alarm that attracted neighbors to the scene. She further testified that Haruna, her other neighbor, came and arrested him, and thereafter they called the police. She went on to say that while arrested, the accused had the phone of the deceased, and he had already separated the battery and a handset.

During cross-examination, she told the court that she had never heard of any dispute except on a fateful day her sibling told her that the deceased complained about Tobias' behavior, which was not normal for these few days.

PW3, E 4608 Sergeant Dotto, a police officer who testified to the court that he was an investigator, told the court that the accused was arrested since he was living with the deceased as a houseboy. Rehema Mohamed testified as **PW4 a neighbor** that she recalled that on that day while living with her siblings, she went to Mbugani to collect rice paddy. On 27/1/2019 around 18 hours- 19 hours, she was at home preserving the rice paddy. Later, around 19 hours, Tobias Thomas came to her place to fetch his chicken, which used to come to her place, and he left.

Before she went to take shower, her neighbor, mama Eliud aka **PW2, Mambazi**, came to her place and asked if she had heard some scream but she told her she never heard. Then they went to the place where Esther was living and started calling her. But there was no reply.

After a while, around 19 hours, they saw the accused person coming from the farm and he was terrified and frustrated. They asked him about his sister Esther. He remained silent. Then he was told to open the door. Upon entering, they found a person laying down. **PW2, Mambazi** called the police. Also, **PW2** requested the deceased phone where the accused handled it to her. Then the police came and found her lying down. After that, the police took the body of the deceased and arrested him.

On cross-examination, she stated that the accused did not run. She did not see him kill the deceased.

Another witness, **PW5, Jumanne Haruna**, testified to the court that on 27/1/2019 around 19 hours, while he was praying, he received a call from his wife, Mwanaidi Rashidi, who told him to go to Esther's place. He went there and found Thomas Thobias coming, and he was told to arrest him. He told him while trembling, "*Esther is dead.*" At that time, PW2, Mambazi had already called for the police. The police arrived, and they entered the house and found Esther dead. The police took the body and Thomas Thobias was arrested.

Inspector Ezekiel Regis was lined up as **PW6**, a police officer who recorded the statement of Thomas Tobias. Testified to the court that upon arrival at the scene of the crime, they found the door open and there were many people outside. They entered the house of the deceased and found she was already covered, but he found she was tied with a piece of cloth around her neck. Upon interviewing him, the accused confessed that there was no dispute but he loved the deceased. PW6 said that they found people gathered at the scene with the suspect already arrested. The incident happened at the residency of the deceased Esther Gwai.

The accused confessed to having raped her. PW6 who recorded the statement prayed to tender the caution statement of the accused

which was objected to by the defence on the ground that it contravened section 57 (3) (a) (i) of the Criminal Procedure Act, Cap. 20. The court rejected the objection to the certification on the ground that the provisions of section 57 of the Criminal Procedure Act, Cap. 20 seek to ensure that the statements allegedly made to the police by the suspect are voluntary and free from error. The fact that the accused made the verification in his handwriting signifies that he was aware of the content of the cautioned statement.

The last witness was **PW7** Leticia Waitara who testified to the court that she was a senior chemist with experience of 14 years of experience in DNA profiling. On 25/2/2019 she received a tied parcel. It was attached with a letter from the Regional Crime Office and a letter from Mwanza for examination and providing expert opinion. She examined the species and prepared a report, which was admitted to this court as Exhibit P3. In her report she submitted that;

"Kutokana na matokeo ya uchunguzi wa mpangilio wa vinasaba kielelezo A- chupi mbili za mtuhumiwa kimedhihirisha kuwa kuna mahusiano na mpangilio wa vinasaba na kielelezo A1 – (shahawa zilizokutwa kwenye sehemu za siri za marehemu)

Hitimisho: Tegemeo la nafasi (chances) ya vinasaba toka kwenye kielelezo "A" – Chupi mbili za mtuhumiwa kutokuwa na mahusiano

ya mpangilio wa vinasaba na kielelezo A1– shahawa zilizokutwa kwenye sehemu za siri za marehemu) ni moja kati ya billion."

That marked the end of the prosecution's evidence. The Court thereafter delivered the ruling on whether the prosecution established *a prima facie* case to allow the accused person to defend the case. The Court ruled that the prosecution had established a case against the accused and, in the absence of any contrary evidence, the accused could be convicted. Therefore, in line with Section 293 of the Criminal Procedure Act, Cap. 20 [RE 2019], the Court informed the accused of his right to defend the case under oath and call a witness for defence. The accused person, on the other hand, elected to testify under oath and he had no other witness or exhibit to tender during the defence.

In his reply, **DW1 Thomas Tobias @Nikilanduli** testified that he had been living at Kariakoo- Tabora since 2018 and was a mason. He was living with his so-called sister, Esther d/o Almas Gwai as her houseboy. Further, he stated that they started to know each other in 2017 after he was hired to construct a house. After he completed construction the deceased requested him to live there as her younger brother while keeping the house.

He testified that after living with her for a long time he started to love her. He started to seduce her twice but in vain. On 27th January 2019 while at home around 19 hours. He requested again to have

sexual relationship, but the deceased did not accept it. During the evening, he again followed her while she was cooking and asked for sex. She told him he should not disturb her. He went to the sitting room and then he followed her and held her hand. That is where the commotion started and the deceased slipped on the watery and slippery tiles. Upon seeing that, he made love to her and after satisfying his desire he went out. When he came back home, he found people outside asking about the whereabouts of Esther and he was arrested. Upon entering the house, he found her already dead.

During cross-examination, he stated that he did not strangle nor assault her. He stated that the deceased refused to make love with him. He also had no intention of killing her.

After the closure of evidence by both parties, counsel made their closing submissions. On their part, the prosecution insisted that the case was proved beyond reasonable doubt. Mr. Mwakalinga, learned State Attorney, submitted that the prosecution managed to prove that Esther Gwai is dead, that the death was unnatural, and that the accused is the one who murdered her with malice aforethought.

Ms. Nyaki, advocate for the accused, submitted that the intention of the accused was to fulfill his desire of having sex with the deceased and not kill her, and she submitted that even the caution statement states clearly that he said he loved her. She further submitted the evidence

from prosecution PW2, who also corroborates that they lived at peace and the accused has been trustworthy since day one, and in that case, there was no weapon used. The postmortem reveals that the deceased's death was caused by suffocation as he squeezed her strongly. The accused went away after that, but he did not run away after the incident. He did not intend to escape; that is why he came back. The accused also cooperated with people to open the door as he was confidant.

This Court having heard from both parties, the final submission for the counsel, the issue for determination, in this case, is whether the prosecution has proved the "*malice aforethought*" of the accused person.

As it is the law, the burden of proof in criminal proceedings, especially in a murder case like the one at hand, lies with the prosecution. That burden does not shift to the accused at any stage of the proceedings. See Section 3 (2) (a) of the Evidence Act, Cap. 6 [R.E 2019] and the case of **Hemed v. Republic [1987] TLR 117**. By this principle, the prosecution is required to prove all the ingredients of the alleged offence, as well as the accused's malice aforethought therein, beyond reasonable doubt. This was said in the cases of **Woolmington vs. DPP (1993) AC 462** and **Okale vs. Republic (1965) EA55**.

Having summarized the evidence by parties, this court is under a duty to evaluate the evidence on record and find whether or not the offence with which the accused person is indicted has been proved to the required standard. The crucial issues for determination in this matter, therefore, are:

- i. *Whether Esther d/o Gwai is dead and whether her death was unnatural,*
- ii. *Whether the accused is responsible, if yes,*
- iii. *Whether the killing was actuated by "malice aforethought".*

I will determine the first and second issues together. Going by the evidence on record, there is no dispute that Esther d/o Gwai is dead and that she died on 27th January 2019 in a violent manner after she was raped and strangled to death. This was confirmed by PW1, a doctor through a postmortem report who was admitted as Exhibit P1.

As to the second issue, the testimony of PW1, PW2, PW3, PW4, PW5, and PW6 and the accused himself, who confessed through the caution statement, which was admitted in this court as Exhibit P2. Her death was unnatural. I am of the firm view that the deceased died an unnatural death as per the facts of the case and reliant on the evidence of the prosecution and also that if a person inflicts bodily injury on another which would have caused death, the person causing the injury

is responsible for the said death. I am therefore of the considered view that, the death of the deceased was unlawful.

The last issue is whether the killing was actuated by "*malice aforethought*." This court will determine the issue which has been put into question by the parties disputing whether the accused killed with malice aforethought.

It is trite law that for an offence of murder to be established, there must be *malice aforethought* on the part of the accused, and the prosecution has to establish whether the accused killed with malice or not.

The law in relation to what is entailed by malice aforethought is settled. The word "*malice aforethought*" is defined by section 200 (a) of the Penal Code, Cap 16 [R.E 2019] that;

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

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;

According to the above provision of the law, the basic element in proving malice aforethought is the existence of an intention to cause death. Therefore, there must be a premeditated or planned intention

to cause the death. In the absence of the accused person's premeditation to kill, the conviction cannot stand.

Under the law, Section 200 of the Penal Code, Cap.16 [R.E 2019], and malice aforethought is established when an attack is directed at the sensitive and vulnerable part of the body. In the present case, the evidence from the post-mortem report reveals that the body was found with bruises on the neck, swelling with a bruise on the right shoulder and bruises on the right knee; hence the death was caused by asphyxia due to suffocation. This type of killing may be within the provision in section 200 of the Penal Code, Cap. 16, and also in responding to this, the case of **Enock Kipela v Republic Criminal Appeal No. 150 of 1994 (unreported)** has discussed what entails malice aforethought, when the Court of Appeal held precedents in relation to malice aforethought;

"Usually an attacker will not declare his intention to cause death or grievous bodily harm, whether or not he had the intention must be ascertained from various factors, including the following:

- i. The type and size of weapon which was used in the attack leading to the death of the deceased;*
- ii. The amount of force that was used by the attacker in assaulting the deceased;*
- iii. The part or parts of the body of the deceased where the blow of the attacker was directed at or inflicted;*

- iv. *The number of blows that were made by the attacker, although one blow may be enough depending on the nature and circumstances of each particular case;*
- v. *The kind of injuries inflicted on the deceased's body;*
- vi. *The utterances made by the attacker if any, during, before or after the incident of the attack".*

From the above extracts, in the current case, it is true that the accused inflicted injuries on the deceased body however, according to the prosecution evidence, there was no any weapon used to attack the deceased, and also from the caution statement the accused explained his intention of having sex with the deceased since he loved her, and the accused did not run at the scene of the crime but was guilty of his conscience. I cannot say that his actions constituted malice aforethought.

Likewise, in the case of **Augustino Kaganya, Athanas Nyamoga and William Mwanyenje v. Republic**, 1994 TLR 16 (CA) where it was held that ;

(iii) in a charge of murder, only where it is doubtful on the evidence that an accused intended to kill or cause grievous harm to the deceased will the court give the benefit of doubt to the accused and find him guilty, not of murder, but of manslaughter."

Therefore gathering from the testimony of the defence the caution statement, the accused confessed his intention was to have sex with the deceased and not kill her. I will quote part of his statement verbatim that;

"Ilipofika majira ya saa 19hrs leo tarehe 27/1/2019 nikitokea mitaa ya Rwanzali, nilimkuta dada Esther Almas jikoni anapika na kumkumbushia ombi langu kuwa nampenda; yeye alikataa, ndipo nilipoamua kutumia nguvu ili nimtombe; hivyo katika purukushani ya kuvutana tulianguka chini nilimwngusha chini kwa nguvu na kumkaba shingoni naye akawa anapiga kelele lakini mimi sikumwachia hatimaye akakaa kimya, na ndipo nilipomvua chupi yake na kuanza kumtomba na kumaliza haja yangu; mara baada ya kumtomba na kumaliza haja yangu nilimwacha na kutoka nje."

With this, I am not certain whether, in the circumstances of this case, the accused person established malice aforethought. This is because the conduct of the accused before and after the rape of the deceased may not suggest clear malice aforethought. The prosecution in their evidence revealed that the accused did not run away but cooperated with people to open the door. I hesitate to rule that there was malice aforethought as per law. The law is that a defendant may not be convicted by the court when doubts about their guilt remain, i. e., where there is doubt, don't act. Though the act was unlawful, I am not

certain that it was really murder. In the circumstances, I consider it manslaughter.

For the above reasons, I find the accused, Thomas Thobias Nikilanduli, not guilty of murder, the crime with which he was charged. I, however, enter a substituted conviction of the offence of manslaughter contrary to sections 195 and 198 of the Penal Code, Cap.16. As it is established that there is a person who died of an unnatural death; the killing is unlawful and not certified by law. That there is no established malice aforethought as per law and it is alleged that the person arraigned before the court is the one who killed the deceased.

Also, considering the whole of the prosecution's case and the defence case the accused admitted to having raped her. According to the evidence on the caution statement admitted as Exhibit P2, the accused confessed plainly that he raped her, and also the report from the Chief Government Chemists revealed that;

"Kielelezo A—chupi mbili za mtuhumiwa kimedhihirisha kuwa kuna mahusiano na mpangilio wa vinasaba na kielelezo A1—(shahawa zilizokutwa kwenye sehemu za Siri za marehemu)".

I have thoroughly considered the evidence of the accused and found it to be clear, spontaneous, and consistent. His detailed account of what happened on the fateful day when the deceased was in the kitchen

cooking is so coherent, compelling, and unshaken. It is my view that suggested that he had a motive for raping her for his pleasure. Since the accused confessed to the rape, the statutory rape is thirty years. The gravamen of the offence of statutory rape facing the accused is grounded on sections 130 (1) and (2) (e) and section 131 of the Penal Code, Cap. 16 [R.E 2019].

Order accordingly.

A. BAHATI SALEMA

JUDGE

09/6/2022

Judgement delivered under my hand and seal of the court in the open court, this 09th day of June, 2022 in the presence of both parties.

A. BAHATI SALEMA

JUDGE

09/06/2022

Right to appeal is hereby explained.

A. BAHATI SALEMA

JUDGE

09/06/2022

