

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT TARIME

CRIMINAL SESSIONS CASE NO. 20 OF 2022

THE REPUBLIC

VERSUS

MGAYA S/O NYANOKWE @ MARWA

JUDGMENT

25th July & 4th August, 2022.

A. A. MBAGWA J.:

The accused Mgaya Nyanokwe Marwa stands charged with murder contrary to sections 196 and 197 of the Penal Code. According to the information, the accusations are to the effect that the accused Mgaya Nyanokwe Marwa on 19th day of March, 2020 at Merenga village within Serengeti district in Mara region murdered one Chiku Mwita Chacha (the deceased). When the accused was arraigned before this court, he pleaded not guilty hence the matter was scheduled for a full trial.

At the hearing of the case, the Republic was ably represented by Monica Hokororo, learned Senior State Attorney whilst the accused enjoyed the service of Pili Otaigo Marwa, learned advocate.

The prosecution, in a bid to establish the allegations, paraded five witnesses namely, Hadija Magoiga (PW1), Nyamuhanga Naigwa (PW2),

William Marwa Mogeke (PW3), Moses Samwel Ryoba (PW4) and F5834 D/SGT James (PW5). Further, the prosecution produced in evidence postmortem examination report during preliminary hearing.

In defence, the accused stood the only witness and did not produce any exhibit.

According to the prosecution evidence the accused Mgaya Nyanokwe Marwa and the deceased Chiku Mwita Chacha were living together (cohabitation) as lovers at Merenga. Their cohabitation was characterized by frequent quarrels which they often referred to the village authority. On 18th March, 2020 another misunderstanding arose between them. Chiku Mwita Chacha wanted to part ways with her lover but the accused was not ready to let the deceased go. As such, the deceased decided to refer the matter to village authority (PW4) in order to help her safely part ways with the accused. She thus met Moses Samwel Ryoba (PW4) and registered her complaints. However, PW4 could not attend her as it was already late hours of the day instead PW4 directed the deceased (Chiku) to take the matter before the hamlet chairman one William Marwa Mogeke (PW3). At around 23:00hrs, PW3 received a call from one White telling him that Chiku and Mgaya had quarreled and Chiku had fled to White's home. White requested PW3 to come at her home in order to resolve the dispute. On

the very night PW3 went to White's home where he found both the deceased and accused. Having learnt the prevailing situation, PW3 advised Chiku to sleep at White's home until the following day when he would attend their quarrels. PW3 also told Mgaya to return home with the view to meet at the village office on the following day.

On the following day i.e., on 19th day of March, 2020 in the morning PW3 William Marwa Mogeke went to the accused's home with the view to take them to the village office to resolve their dispute but he did not find him at his home. He thus went to their neighbour White where he found both the accused and deceased. PW3 told the two to follow him to the office. However, as they were on the way to the village office, the accused parted them saying he was going back to take his land lord's contacts. PW3, the ten-cell leader one Thomas Mgaya and the deceased went to the village office where they waited for the accused to no avail. As such, the hamlet chairman for Centre (PW3) along with ten cell leader one Thomas Mgaya resolved to accompany the deceased up to their home and supervised her to take her belongings from the accused's room. After the deceased had taken her properties, she went to her friend Hadija Magoiga (PW1) to keep them and prepare herself for the journey to Tarime to visit her child who was reportedly sick.

As the deceased was still dressing up at Hadija's home, the accused followed her. The accused stood at the door and started asking Chiku furiously as to why she was leaving him. Aware of Mgaya's violent behaviours, the deceased quickly sent Hadija (PW1) to call the hamlet chairman in order to arrest the situation. Hadija rushed to the village office while leaving the accused, deceased and her two children Nyamhanga Naigwa and Bhoke at home.

Hardly had Hadija left than Mgaya Nyanokwe attacked Chiku (the deceased). He took a machete from his waist which he had covered with a jacket and cut Chiku on the head and left hand. Thereafter the accused, Mgaya fled into the bush. Mgaya cut the deceased in front of Nyamhanga Naigwa (PW2).

On being informed, the hamlet chairman (PW3) closed the office and started going to Hadija's home. On the way, they saw Chiku running while crying and all of the sudden she fell down on the ground while excessively bleeding. PW3 asked Chiku as to what had transpired. She told him that she was cut by Mgaya Nyanokwe (the accused). Chiku was therefore taken to Merenga dispensary and subsequently referred to Mugumu Designated

District Hospital. As bad luck would have it, on 23rd day of March, 2020 Chiku passed away at Mugumu DDH while receiving treatment.

Following the demise of Chiku, the efforts to trace and arrest Mgaya Nyanokwe were heightened as such, on 23rd March, 2020 the accused was arrested at Merenga while in the process to flee. He was subsequently arraigned in court and charged with murder.

In defence, the accused vehemently denied the charge. He raised the defence of *alibi* to the effect that on 18th and 19th March, 2020 he was not at home. He stated that he spent two days at the mines without returning home. However, during cross examination the accused said that he returned home on 18th and 19th March, 2020. Further, the accused disputed to have relationship with the deceased Chiku. He expounded that he was living with his wife one Christina Kisiori. As to why William Marwa Mogeko (PW3) and Moses Samwel Ryoba (PW4) would testify against him, the accused said that the two had competing interests over the mining plots. He contended that PW3 and PW4 wanted to have shares in the mining plot but the accused refused hence they developed hatred against him. As to PW1 and PW2, the accused said that he does know them.

Upon closure of the case for both sides, counsel made their final submissions.

Pili Otaigo Marwa, learned defence counsel was at one with the prosecution that there is no dispute that Chiku Mwita is deceased and died unnatural death as exhibited through a post mortem examination report (exhibit P1). She continued to submit that it was the prosecution's duty to prove the case beyond reasonable doubt that it is the accused who committed the offence. The counsel was opined that the prosecution evidence leaves a lot to be desired because even PW2's evidence cannot be accorded much weight as the prosecution did not bring evidence to prove that PW2 was at the material time not suffering from epilepsy. As such, according to Pili, it is not certain whether PW2 Nyamhanga Naigwa was of sound mind at the time of commission of offence.

Further, the learned counsel lamented that PW2 testified that the deceased was attacked by a person called Mzee and that PW2 could not tell who was that Mzee whom he saw on the fateful day. Ms Pili Otaigo was of the view that, to clear the doubt, prosecution ought to conduct identification parade.

In addition, the defence counsel assailed the testimonies of PW1 and PW3 on the grounds that they were contradictory. Pili submitted that whereas PW3 testified that the deceased was given her bag only, PW1 said that the deceased went at her home with a bag, big bucket (diaba) and a chair. Pili was thus opined that their evidence was unreliable.

The defence counsel remarked that the only duty casted on the accused was to raise reasonable doubt. Since the accused stated that on the fateful day, he was at the mines, the counsel prayed the court to believe him and therefore find him not guilty of the offence charged. The defence counsel invited the court to consider the principle in **Goodluck Kyando vs the Republic**, TLR and finally believe the accused's testimony.

In contrast, Monica Hokororo, learned Senior State Attorney, was of the firm view that the prosecution case was proved against the accused to the hilt. Monica said that the prosecution brought both direct and circumstantial evidence in this case. The Senior State Attorney submitted that PW1 told the court that the accused went to her home on the fateful day and her testimony was corroborated by PW2 who saw the accused attacking the deceased. She further clarified that the incident took place in the morning when the sun was shining hence there was no any obstacles

whatsoever for PW2 to identify the assailant (the deceased). She continued that the accused is a well-known person in the village as testified by PW1, PW3 and PW4 as such there was no chances of mistaken identity.

In addition, Monica explained that after she had been attacked, the deceased immediately mentioned the accused to PW1 and PW3 hence this credited the prosecution evidence that it is the accused who attacked the deceased. To support her argument, Monica cited the case of **Jaribu Abdallah vs the Republic** TLR [2006] 245.

With regard to the credibility of PW2, Monica said that the witness was reliable as the court got opportunity to assess his demeanour and competency before his testimony was received and he appeared to say the truth on what he witnessed. She continued that PW2 proved that he remembers the accused and he even identified him in the dock despite the fact that there were many men in the court.

Furthermore, learned Senior State Attorney commented on the alleged contradictions in the testimonies of PW1 and PW3 in respect of the items that Chiku carried and took to Hadija's home. Whereas the counsel admits contradictions, she was quick to submit that the alleged contradictions do not go to the root of the case. Monica added that PW3 did not say that the bucket (diaba) and chair were among the items that

were left in the room thus the fact that the deceased went to Hadija with diaba and chair does not mean that there were contradictions.

Moreso, Monica prayed the court not to accord weight to the accused's defence in that the *alibi* was not established. She lamented that the accused did not bring any witness whom he alleged to have been with them on the fateful day. As such, the Senior State Attorney submitted that the accused failed to establish the defence of *alibi*.

Finally, Monica, with all confidence, submitted that the prosecution has proved the case against the accused beyond reasonable doubt. Consequently, she beseeched the court to find the accused guilty and convict him accordingly.

Having gone through the evidence presented along with the submissions from learned counsel, the pertinent issue for determination is whether the prosecution proved the case against the accused beyond reasonable doubt. It is a trite law that in murder case, the prosecution should prove basic four ingredients namely, that there was deceased, the deceased died unnatural death, the accused unlawfully caused deceased's death and the accused had malice aforethought. See the case of **Abdallah**

Rashid Namkoka vs the Republic, Criminal Appeal No. 206 of 2016
CAT at Mtwara.

In this case there is no gainsaying that the Chiku Mwita Chacha is deceased and that she died unnaturally. The nagging questions therefore, is whether it is the accused Mgaya Nyanokwe who caused her death with malice aforethought.

PW2 clearly testified that he saw the accused, whom he was referring to as Mzee, cutting the deceased on the head and hand. PW1 further identified the accused in the dock as a person who cut the deceased on the fateful day. Although PW2 was 14 years old, he promised to tell the truth to the court as such after inquiry by the court, his evidence was received under section 127(2) of the Evidence Act. I had an occasion to assess his demeanour and indeed, the witness was firm and consistent in his answers. His evidence was corroborated by PW1 and PW3. In addition, there is a dying declaration from PW1 and PW3 whom the deceased told that she was cut by Mgaya Nyanokwe, the accused. The accused denied his involvement and raised the defence of *alibi*. However, after analysing the prosecution evidence against the defence evidence, I decline to accept the accused's version that he was not present when the offence was

committed. In the circumstances, it goes without saying that it is the accused Mgaya Nyanokwe whom caused death of Chiku Mwita Chacha.

The next question for deliberation is whether the accused had malice aforethought. It is a settled position of law that malice aforethought may be inferred from the type of weapon used, the amount of force applied, part or parts of body where blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attackers' utterances made before or after killing, and the conduct of the attackers before and after killing. See **Awadhi Gaitani @ Mboma vs the Republic**, Criminal Appeal No. 288 of 2017, CAT at Dar es Salaam and **Abdallah Rashid Namkoka vs the Republic**, Criminal Appeal No. 206 of 2016 CAT at Mtwara.

Coming to the circumstances of the instant case, it was established that the accused used a dangerous weapon namely, a machete to cut the deceased on the sensitive part of the body to wit, the head and hand which resulted into the deceased's death. Further, the post-mortem examination report (exhibit P1) indicates that the cut wound on the head was eight (8) units long and three (3) units deep.

In view of the foregoing, I am satisfied that the accused killed the deceased with malice aforethought.

As rightly submitted by the defence counsel, PW3 William Mogeke testified that they handed the deceased only a bag whereas PW1 Hadija Magoiga testified that the deceased went to her house with a bucket, chair and a bag. However, these contradictions are so minor and do not go to the root of the case. Whether the deceased went to PW1 with only a bag or with other items it does not defeat the fact that she was attacked and cut by the accused.

In the event, it is my findings that the prosecution case was proved beyond reasonable doubt. The defence raised by the accused did not shake the prosecution evidence to the extent of creating reasonable doubt. Consequently, I find the accused Mgaya Nyanokwe Marwa guilty of murder and therefore convict him of murder contrary to section 196 and 197 of the Penal Code.

It is so ordered.

Right of appeal is explained.




A. A. Mbagwa

JUDGE

04/08/2022