

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

SITTING AT BARIADI

CRIMINAL SESSION NO 119 OF 2022

THE REPUBLIC

VERSUS

RASHIDI S/O KAYEJ BUGALI@ SHISHI..... ACCUSED

JUDGMENT

27th September & 5th October 2022

MKWIZU, J:

The deceased, **MAGRATH JIHANGALA KIDIGA@ MAMA KEVI** and the accused lived as a wife and husband blessed with one issue named Kelvin. Between July to August 2018, they both lived in Hollo Jibenya's house located at Ng'ongwa Village within Maswa District in Simiyu Region. The accused was a peasant, a paddy grower while his wife, the deceased was dealing with Vitenge business. The accused is alleged to have cut by a panga, his wife Magreth Jihangala Kidiga @ Mama Kevi to death on the night of the 6th day of August 2018 after she had refused to give him the money he wanted from her. The killing was executed in the presence of accused's aunt, Hollo Jibenya (PW1) and one Yasinta Zacharia and witnessed immediately thereafter by Michael Zacharia (PW2) and Kitongoji chairperson John Lwenge (PW3).

The incident was reported to the police, a sketch map plan of the scene was drawn, and an autopsy examination was conducted by the Doctor

from Maswa District Hospital (PW4) revealing the cause of death as excessive bleeding caused by the cut wounds sustained by the deceased. The accused who escaped from the scene after the incident was traced and arrested almost a month later in Shinyanga region. He according to the facts by the prosecution confessed to having committed the offence before the police and a Justice of the Peace. The Accused was finally charged with murder contrary to sections 196 and 197 of the Penal Code, (Cap. 16 RE 2002 now RE 2022).

During the trial and after consultation with the parties it transpired that the facts of the case and the intended evidence did not require the use of the assessors and therefore this trial was conducted without the aid of the assessors under section 265 of the CPA. RE 2022.

The learned State Attorney, Ms. Rehema Sakafu appeared for the republic and the accused was assisted by Ms. Zawadi Lazaro learned advocate. The accused's plea of guilty to the information of murder was recorded instigating the prosecution to summon five witnesses and tendering three main exhibits namely the post-mortem examination report (exhibit P1); a sketch map of the scene (exhibit P2) and accused's caution statement (exhibit P3) to prove the offence of murder. The defence had only one witness, the accused himself.

Recounting the incident with the assistance of an interpreter, PW1, Holo Jibanya said, in August 2018, she lived in Ngongwa village within Maswa District with Yasinta Zacharia, Michael Zacharia, Rashidi @ Shishi (the accused) and his wife Magreth @ mama Kevi. And that at that time Rashidi @Shishi and his wife, the deceased had stayed with her for about half a month only. On 5th August 2018 at around 18.00hrs, the accused person

had demanded money from his wife (the deceased) the request which was refused by his wife. PW1 said, accused decided to leave the place and did not come back. At 00.00 hrs of 6th August 2018 while sleeping in her room with Yasinta Zacharia and the deceased who came to sleep in her room scared of husband's lust for money, they were awakened by a big bang on the door. She together with the deceased, Magreth / Mama Kevin, and Yasinta rushed to the seating room. There, they found the accused holding a panga telling them to remain silent. The accused forced them back to their bedroom and started to ask for money from his wife again. The deceased insisted on his refusal to surrender her money to him. It is at this point that the accused pushed the deceased to the mattress and began to cut her with a panga. He, according to PW1 cut mama Kevi on the head, hand, the backside of the head, and on her back. The accused left the room and escaped to unknown immediately after he had committed the offence.

PW1 went further to state that, they then rushed to Michael Zacharia's (PW2) house and found the door locked from outside. They opened for him and informed him of the incident. Michael (PW2) together with his neighbor notified the Kitongoji Chairman followed by a **mwano** that gathered the villagers at the scene. Police were then notified and visited the scene later.

Speaking on how she identified the accused, PW1 said, she was aided by a solar light that illuminated the house both in the seating room where they first met the accused and, in the bedroom, when the accused was cutting the deceased and that she observed the accused at a distance of one meter apart in an approximated period of half an hour.

The evidence of PW1 was supported by Michael Zakaria (PW2), who informed the court that, on 6th August 2018, at around midnight while asleep in his house which is three meters from PW1's house, he was awakened by a big bang (Kishindo) from the PW1's door which is made by an iron sheet. He could not get out for he found his door locked from outs. He then heard the accused telling PW1 (Holo Jibanya), Yasinta, and the deceased to keep quiet. He just waited inside until when his house door was opened by PW1 and his sister Yasinta Zacharia telling him that accused has killed his wife. He ran to the PW1's house and found the deceased already dead. He then rushed to his neighbor and together with the neighbor they rushed to the Kitongoji chairperson John Lwenge (PW3) who later ordered people to raise an alarm for all the villagers to gather.

PW3 is the kitongoji Chairman, John Lwenge, he first learned of the incident from the accused himself who called him via his mobile phone on the night of 6/8/2018 asking him to go to PW1's house to see what he has done telling him "***nimefanya jambo la kishenzi pale***" PW3 told the court that he asked the accused of what had happened but he insisted that he should go to see by himself. Before visiting the scene, PW2 notified him of the incident, that the accused had killed his wife at PW1's house. He notified other leaders of the locality and they together rushed to the scene. While on his way to the scene, he again received the accused's call asking whether he has visited the scene but PW3 told him that he is on his way. At the scene, he found Mama Kevi(the deceased) lying inside a room dead with big cuts wounds on his back head (kwenye kisogo), another side of the head, and on her shoulder.

While still there accused called him again to know if he has witnessed the incident. PW3 said he called him so that they can rush the victim to the hospital but to his dismay, the accused said to him that he would not come back because he is sure that the victim is not alive. On inquiring of what had happened, PW1 told him that it is the accused who killed his own wife after she had refused to give him money. This witness also confirmed to the court that the house in which the deceased was had a solar light that illuminated the rooms

On his part, Richard Charles Shija (PW4) who conducted the post-mortem examination testified that the deceased body was lying inside the bedroom on a mattress. He observed multiple cuts on her pictorial neck, head, shoulders, and bruises on her hand. He filed a post-mortem examination report (exhibit P1).

The evidence by PW5, Assistant inspector Gasper is similar to that of PW3 and PW4 on what was found at the scene. This is a police officer who visited the scene after he was so instructed by his commander in charge of Maswa Police station. This witness said they visited the scene of the crime with the Doctor. At the scene, they found villagers gathered. They saw a female dead body introduced to them by PW1 as Magreth Jihangila @ Mama Kevi lying dead with cut wounds on her posterior neck, head, and bruises on the hand. A sketch map plan (exhibit P2) was drawn, and an autopsy examination was conducted by the Doctor (PW4) who told them that the deceased died due to excessive bleeding. They were also informed by PW1, Holo Jibenya that the killer is Rashidi @Shishi and Kitongoji chairperson (PW3) informed them of the calls he had received

from the accused requesting him to visit the scene and see what he had done.

PW5 was later, according to his testimony assigned the file to investigate. He collected all the available evidence including the post-mortem report, sketch map plan, and witnesses' statements, and continued to search for the accused person who had run to an unknown place. He said the accused was through cybercrime systems arrested in Isalamaganzi Shinyanga region by Bariadi Police and taken to Shinyanga police. He personally took the accused on 10/9/2018 from Shinyanga police to Maswa Police where they arrived at 16.00hrs and interrogated the accused who confessed killing his wife resulting into recording his cautioned statement from 15.30 hrs. to 17.55 hrs of the same date. During the trial, however, the accused objected to the admission of the caution statement, which was admitted after a trial within a trial, as exhibit P3.

The Accused's defence is an admission of the commission of the offence. He expressly admitted to having cut the deceased with a slasher on the night of the incident. He was specific that, he married the deceased in 2013 at Mwadui Shinyanga. In the same year, the accused said, the deceased, who was three months pregnant stole 3700,000/= from his NMB ATM card which he had given her for withdrawing some money he needed for his medication when he was admitted at Shinyanga hospital and ran to the unknown place. She then resurfaced in 2016 with a born child Kelvin claiming that the child is suffering from ellipsis. She received his wife (the deceased) in July 2016, and they again started living under one roof. In September 2016 Magreth (the deceased) again ran away with

all the household including the bed, Tv, sofa set, and his personal belonging leaving him empty. He reported the matter to the police and was issued RB Number.

It is the accused defence further that, the deceased came back to him in July 2018 asking for a pardon so that they can live together. The accused said he refused but later agreed after his Aunt (Mama Mdogo) Hollo (PW1) and their uncle had reconciled them. They then lived together in PW1's house which had two bedrooms and seating in Ngongwa village where the accused was growing paddy and doing clothes business.

Testifying specifically on what caused the death of his wife, DW1 said on 5/8/2018 he left home in the morning to guard the family water well leaving behind a trouser with 300,000/= cash at home. He, unfortunately, did not find his money after his return. He asked his wife and PW1 who refuted to having no knowledge of the whereabouts of the money. He later found the money deposited in his wife's mobile phone. He made a trial of withdrawing the money but could not manage at that moment. They then fought as his wife wanted back her mobile phone and he wanted to retain it till he gets back his money. In that fight, his wife (the deceased) picked a piece of wood and hit him on his back. He was advised by his Aunt Holo (PW1) to leave the place. And they were again reconciled by John Lwenge. He decided to leave for the center where he spent the evening.

He then came back home at 22.00hrs went straight to their bedroom and took the deceased phone, the deceased ran outside and picked up a pestle (mchi) and started to beat him. He then in defence, took a slasher and began to cut the deceased. It is the accused's own version of the evidence

that the deceased fell, and at that time his aunt, PW1 ran to them to see what was happening before they went to work up Michael (PW2). He said he left the scene and later he received a call phone from John Lwenge (PW3). He insisted that he did not intend to kill her wife and that had it been so he could not have allowed their reunion.

I have prudently considered the evidence on the records. The accused in this case is charged with a murder case under section 196 of the Penal Code (Cap. 16 RE 2002). The section provides:

"a person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder"

This section creates three main elements.

1. Death of the deceased
2. Malice aforethought of the killer
3. Whether the accused mentioned in the information is the killer.

It is certain from the evidence that the deceased is dead and that it is the accused who killed the deceased. The two elements are well supported by both the prosecution and the defence case. All the prosecution witnesses testified on the condition of the scene including the condition of the deceased who was found dead with multiple cut wounds on her head, shoulders, and bruises on her hand. PW1 was specific that the deceased was cut by a panga. In his defence accused has confirmed to have attacked the deceased with a slasher. In confirming death, the Postmortem examination report dated 6/8/2018 tendered in court as exhibit P1 by the Doctor, PW4 without objection from the defence, described the deceased body as having "**deep big at the posterior**

neck, at the back, and at the central head causing severe bleeding causing hypovolemic shock to death "

On whom killed the deceased, both prosecution evidence and that of the defense point to the accused as a murderer. This was stated by the prosecution witnesses, PW1 who witnessed the killing named the accused as responsible. Though the incident happened at night, PW1 said, she identified the accused through the solar light that was illuminating the house in which the deceased was killed and that she observed the accused at a distance of one pace in a room of two meters in the incident that took about half an hour. The identifying witnesses did name the accused to PW2, PW3 and PW5 immediately after the incident the information which led to the arrest of the accused person. This evidence is confirmed by the accused himself in his defence who categorically admitted to having cut his wife Magreth Jihangala (Mama Kevi) with a slasher on the material night

The only question to resolve is whether the accused acts were actuated by malice aforethought. So far, the penal code has no definition of malice aforethought. Section 200 of the penal code, however, prescribes malice aforethought as follows:

"Malice aforethought shall be deemed to be established by evidence proving anyone 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."

Gleaned from the above is that malice aforethought being a mental element is difficult to prove by direct evidence. In **Enock Kipela v. R.** Criminal Appeal No. 150/1994 (CAT unreported), the Court of Appeal gave a list of factors that may be used to infer malice aforethought. The Court said:

"...usually, an attacker will not declare his intention to cause death or grievous harm. Whether or not had that intention must be ascertained from various factors, including the following:

- i. **The type and size of the weapon, if any used in the attack;***
- ii. **The amount of force applied in the assault.***
- iii. **The part or parts of the body the blows were directed at or inflicted on;***
- iv. **The number of blows, although one blow may depending upon the facts of a particular case, be sufficient for this purpose;***
- v. **The kind of injuries inflicted.***
- vi. **The attacker's utterances, if any, made before, during or after the killing; and***
- vii. **The conduct of the attacker before or after the killing, (emphasis supplied)***

And like other criminal cases, the burden to prove malice aforethought in a murder case lies on the prosecution and the standard is that of beyond reasonable doubt.

It is the prosecution case that, the accused had started with begging money from the deceased during the day, that is 18.00 hours of 5/8/2018, and left the place after his request was refused by his wife. PW1 evidence is to the effect that, on his return at midnight. He then forced the door open telling the deceased and PW1 to remain silent. All these actions interpreted give one conclusion that the accused had an ill motive and that he did not want interference from anyone. While inside the house, where everyone is quiet, PW1 said, the accused kept on requesting the money, which resulted in cutting the deceased with a panga to death after failing to get the same. I really find PW1's evidence credible. Though an indigenous witness, illiterate, she was well composed in court and straightforward. I find her a witness of truth. Her credence was as well supported by all the prosecution and there is no reason brought even by the defence on why she should have unnecessarily given incriminating evidence against the accused person.

Thus, it is open that a panga was used in this incident. The brutality with which the weapon was used can be determined from the impact. The deceased body had sustained multiple cut wounds and the blows were directed to the vulnerable parts of the deceased body. This is supported by the nature of the injuries found on the deceased body as exhibited in the post-mortem report which included cut wounds on the posterior neck, head, and shoulder. The post-mortem describes the sustained wounds as "**Deep big cut wounds**". And cause of death as "**severe bleedings**

causing hypovolemic shock". This evidence remained unchallenged both during cross-examination and during defence.

That apart, the accused is said to have locked Michaels's (PW2) house from outside meaning that he does not want interference in the execution of his ill motive. The accused also left the scene immediately after the incident. He is also reported to have made several calls to PW3, the hamlet chairperson telling him to go and see what he called, "***jambo la kishenzi***" and when called by PW3 so that they can rush the victim to the hospital, the accused refused saying he is sure that the victim is dead. Had it been accidental as suggested by the accused, he would not have been so sure of the outcome of his action.

The court has also considered the defense version of the story. The accused said the attack on the deceased was on self defence after he was attacked by a pestle by the deceased. He also alleged to have used a slasher and not a panga. I find this defence as an after sought. Had it been a true story, the accused would not have the courage of naming the incident as ***jambo la kishenzi***. He was even sure of the death after the incident. His own evidence places himself out of the alleged dispute after his return that night. He himself confirmed that their dispute was resolved during the day before he left for the Centre. His coming late in the mid of the night, armed with a panga, breaking the door open, muzzling the deceased, PW1 and Yasinta, and locking PW2's house from outside establish that the accused person had an intention to kill or cause grievous harm to the deceased.

The prosecution has undoubtedly proved that Magreth Jihangala's death was caused with malice aforethought. Consequently, I wholeheartedly

find the accused **RASHID S/O KAYEJI BUGALI @ SHISHI** guilty of murder and proceed to convict him accordingly under sections 196 of the Penal Code (Cap. 16 R.E. 2002, now R.E. 2022).


E.Y. MKWIZU

JUDGE

5/10/2022

Court: This judgment is Delivered today in an open court, in the presence of the accused person who is in court represented by Mr. Geni Vitus Dudu advocate holding the brief of Ms. Zawadi Lazaro defence counsel, and Ms. Violeth Mushumbuzi the learned State Attorney for the Republic.


E.Y. MKWIZU

JUDGE

5th October 2022

State Attorney: We do not have the accused's previous criminal records. We pray for the imposition of a proper sentence on the accused according to the law.

Defence counsel: We understand that there is only one sentence for murder, but we pray for leniency.

SENTENCE

Having convicted the accused for murder c/s 196 of the Penal Code (Cap. 16. R.E. 2002), sections 197 of the same Act provide death by hanging as a sentence for a person convicted of the offence of murder. I sentence the accused to **SUFFER DEATH BY HANGING** under section 197 of the Penal Code (Cap. 16 R.E. 2002, now Cap. 16 R.E. 2022).




E.Y. MKWIZU

JUDGE

5th October 2022

Right of appeal explained.




E.Y. MKWIZU

JUDGE