

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IRINGA DISTRICT REGISTRY
AT IRINGA
CRIMINAL SESSION CASE NO. 16 OF 2021
REPUBLIC
Versus;
ANITHA D/O KIBIKI

JUDGMENT

30th Sept & 4th November, 2022.

UTAMWA, J:

The accused person, ANITHA d/o KIBIKI stands charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E 2019 (Now RE. 2022). The charge alleges that, on the 29th day of April, 2018 at Malangali village within the district and region of Iringa the accused murdered one Rose d/o Kalolo. The charge was read and explained to the accused person, who pleaded not guilty, hence a full trial.

During the preliminary hearing conducted under section 192 of the Criminal Procedure Act, Cap. 20 RE. 2019 (Now RE. 2020), hereinafter referred to as the CPA, the following facts were not disputed: that, the accused's name was Anitha d/o Kibiki and lived with her mother, one Isabela Kalolo at Malangali village. It was also undisputed that, the deceased Rose d/o Kalolo aged 7 years died on the material day and that, the accused had quarrelled with her mother.

The trial of this case proceeded without the aid of assessors vide the provisions of section 265(1) of the CPA as repealed and replaced by section 30 of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022. The current provisions of the Act no longer makes it compulsory for a trial of this nature to be conducted with the aid of assessors.

During the trial, the Republic was represented by Mr. Matiku Nyangero, learned State Attorney whereas the accused person was represented by Mr. Cosmas Charles Kishamawe, learned advocate.

In supporting the charge against the accused, the prosecution paraded a total of four (4) witnesses supported by six (6) exhibits.

The prosecution evidence according to its witnesses was essentially as follows: the first prosecution witness (PW.1) one Patric Kilyakus Mpagama, the chairman of Malangali village at the material time, testified that, in the noon of 29th April, 2018 one Elizabeth Kalolo informed him that her daughter, the accused had beaten her. In the night hours of the same day five police officers accompanied by the accused visited him at home. They asked him to accompany them to the farm of one Ally Mpagama

where the accused had left the body of the deceased. It was the accused who led them to the scene of crime (in the farm of the said Ally Mpagama). In that farm, they found the body of the deceased with the raptured head. He also saw an axe near the body and a piece of cloth squeezed into the mouth of the deceased. The police officers then took the body to the mortuary.

The PW. 2, Asp. Joseph Leonard Manjalahu testified that, in 2018 he was an Inspector of police working at Iringa Central Police station in the investigation department. On 29th April, 2018 at 20:30 hours while at his working place a lady went there and introduced herself as Anita Kibiki (The accused). She informed him that she went to surrender herself because she had murdered someone in Mangalali Village. Upon interrogating her, the accused informed him that, she had taken the deceased to a farm, squeezed a piece of cloth in her mouth and killed her. The accused thus, wanted to direct police officers to the scene of crime. He (PW.2) thus, went to the scene of crime accompanied by other police officers together with the accused herself.

It was also the PW.2's testimony that, when they reached at Mangalali village they got the company of the Chairman one Patrick and Ally Mpagama. The accused then led the team to the crime scene where they found a dead body with the said piece of cloth in the mouth. There was also an axe stained with blood near the dead body. The dead body had a wound on the head. They then took the deceased to the mortuary at Iringa Referral Hospital. The accused was kept in the police lock up. The axe and the piece of cloth were handed to the exhibit keeper of police and

labelled No. 114/2018 (admitted in evidence as exhibit P. 2 and P. 3 respectively). The dead body was examined by one Dr. Mwakipakile and filled Post Mortem Report (Exhibit P. 4). The doctor opined that, the cause of death of the deceased was severe head injury.

One Mr. Rajabu Ramadhani testified as PW.3. He said that, at the material time he was a Primary Court Magistrate. He recorded the accused's extra judicial statement (The EJS) on the 3rd May 2018. On that date, while at his work place in Bomani Primary Court, Iringa one D/Cpl. Glentina visited his office. She was accompanied by a suspect who wanted to have his cautioned statement recorded. He thus, instructed the police officer to stay away from his office so that he could remain with the accused only. Upon following all the procedures required by law, he recorded the accused's statement. The same was admitted as exhibit P. 5 without any objection from the accused and her counsel. The PW.3 added that, in the EJS, the accused confessed to have killed the deceased by hitting her head with an axe. The statement showed also that, she killed her because she (accused) had quarrelled with her mother.

Another prosecution witness was WP. 3539 D/Sgt Grentina Adolf who testified as PW.4. Here evidence was that, in 2018 she was working as a D/Cpl. in Iringa Central Police Station in investigation department. On 30th April, 2018 at night she was assigned to interrogate a suspect named Anita Kibiki (The accused) who was at the material time in the police station. The accused had arrived at 20:00 hours on 29th April, 2018. She then left the station together with police officers so that she could show the crime scene and the dead body to the officers. When the accused was brought back to

the police station, she (PW.4) recorded her cautioned statement. She did so upon informing her of her rights. The said cautioned statement was admitted in evidence as exhibit P. 6 without any objection. In cross-examination, PW.4 told the court that the accused was put under custody on 29th April, 2018 at 22:00 hours and she interrogated her at 00:31, i.e. on 30th April, 2018.

Having heard and considered the prosecution evidence, the court made a ruling, under section 293(2) of the CPA finding that a *prima-facie* case had been established against the accused and accordingly informed her of her rights to defence under the same provisions of the law. She opted to give a sworn defence without calling any other witness in her support.

In her sworn defence, the accused testified that, before being in prison she was living with her mother, one Isabela Kalolo together with two children, including the deceased. She was married and had five children, but she went to live with her mother because there were some misunderstandings between her and her husband. On 29th April, 2018 she had a misunderstanding with her mother that led to a fight, however her mother escaped. She then took the deceased to a farm and hit her on the head with an axe which she picked while on the way to the farm. After the commission of the offence she went to Iringa Town and reported the matter to Iringa Police Station so that the deceased could be saved. This was because, when she left her, she was still breathing.

I have considered the charge sheet, evidence from both sides and the law. The major issue for consideration is *whether the accused person, Anitha d/o Kibiki is guilty of murder of the deceased Rose d/o Kilowoko.*

In law, for the court to convict an accused person of murder, the following key ingredients must be proved:

- i. That, the victim of the crime (murder) mentioned in the charge, actually died,
- ii. That, it was the accused person who in fact, caused the death of the deceased (or killed him),
- iii. That, the killing of the deceased was with malice aforethought,
- iv. That, the killing was performed by committing an unlawful act or omission.

It is also the law that, the prosecution bears the burden of proving the case as provided under section 3(2)(a) of the Evidence Act, Cap. 6 RE. 2022 (The Evidence Act) and underscored by the Court of Appeal (The CAT) in the case of **Nathaniel Alphonse Mapunda and Another v. Republic (2006) TLR 395**. The law further guides that, the standard of proof is beyond reasonable doubts and the accused person bears no duty of proving his innocence. His duty is only to raise reasonable doubts in the mind of the court. It is also a legal requirement that any reasonable doubt left by the prosecution evidence should be resolved in favour of the accused person.

In the matter at hand, I will test one ingredient after another before I answer the major issue posed above.

On the first ingredient of the offence of murder, the sub-issue is *whether or not the victim of the charge mentioned in the charge sheet (Rose d/o Kalolo) actually died*. This fact is not disputed by the parties. It is also corroborated by Exhibit P. 4 which showed that, the deceased died due to severe head injury. Another evidence corroborating the death of the deceased is that of PW.1 and PW.2 who went to the scene of crime and saw the dead body of the deceased. The first sub-issue is thus, answered affirmatively that the victim of the murder mentioned in the charge sheet actually died. The first ingredient of murder has therefore, been proved beyond reasonable doubts.

Regarding the second ingredient, the sub-issue is *whether it was the accused person who in fact, caused the death of the deceased (or killed her)*. In the case at hand, the evidence clearly shows that, no any prosecution witness said he/she saw the accused committing the charged offence. The prosecution case is based on the confession of the accused made before the justice of peace (PW.3) and that before PW.4 recorded as the accused's cautioned statement. In the EJS (Exhibit p. 5), the relevant part reads as follows in Kiswahili language:

"Aliyefariki ni mtoto wa mjomba wangu aitwaye Rose Kalolo ambaye alikuwa analelewa na mama yangu na mimi nikiwa hapo. Nilimuwa mimi mwenyewe huyo mtoto kwa shoka baada ya kumpiga kichwani kwa sehemu ya nyuma ya shoka hiyo."

The quoted passage simply means that, the accused killed the deceased by hitting her on the head using an axe. Moreover, part of the accused's cautioned statement reads thus, in Kiswahili:

"Kwa hasira niliingia chumbani kwa mama yangu nikachukua shoka pamoja na sweta jekundu ambalo ni la Rose d/o Kalolo kisha nilimuambia Rose d/o Kalolo twende shambani..... Kisha niliingia nae shambani kwenye mahindi nikamwambia akae chini baada ya kukaa chini nilichukua sweta nikalivilingisha nikamuingizia mdomoni ili hasipige kelele kisha nikachukua shoka na kumpiga nalo mara tatu sehemu za kichwani kisha alidondoka chini."

The meaning of this quoted paragraph is that, the accused was angered, she then took the axe and cloth from her mothers' house. She also took the deceased to the farm and ordered her to sit down. She squeezed the cloth into her mouth so that she could not make noise. She then hit her by the axe three times and she fall down.

It is also notable that, the accused's confession in both the EJS and the cautioned statement consists of a detailed series of events that occurred on the material date. It is the position of the law that the best witness is an accused person who confesses to a crime; see the cases of **Mohamed Haruna @ Mtupeni and Another v. Republic, Criminal Appeal No. 259 of 2007, CAT at Tabora** (unreported), **Dawa v. Republic, Criminal Appeal No. 260 of 2016** (unreported) and **Jacob Asegelile Kakune v. Republic, Criminal Appeal No. 178 of 2017, CAT at Mbeya** (unreported).

Moreover, the evidence by PW.1 and PW.2 corroborated the accused's confession. PW.1 testified that, the accused led them to the scene of crime where he saw the body of the deceased. Her head had been ruptured. He also saw the axe near the body and the piece of cloth inserted into her mouth. PW.2 also echoed this evidence.

In her own defence, the accused did not dispute that she killed the deceased by the axe. Her contention was only that, she did so while unconscious due to the anger caused by the fight between her and her own mother. Whether or not she was justified in doing so is a subject to be discussed later under the third ingredient of murder.

Owing to the above reasoning, I answer the second sub-issue in the affirmative that the accused person in fact, caused the death of the deceased, hence a proof for the second ingredient of murder.

In relation to the third ingredient listed above, the sub-issue is *whether the killing of the deceased was with malice aforethought*. Section 200 of the Penal Code provides for various circumstances that constitute malice aforethought. Section 200(a) of the same statute provides that, malice aforethought shall be deemed to be established by evidence proving 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. In the present case the accused intended to harm the deceased. This was after the fight with her own mother who later escaped. She then killed the deceased.

In her sworn defence, the accused also told the court that, she was unconscious of her actions at the material time. In my view however, that

version of the story is an afterthought which cannot help her. This is because, her conduct before and after the event did not reflect that she did not know what she was doing. This view is based on the following reasons; in the first place, according to her confession, before committing the offence, the accused made some preparations for accomplishing her mission. She took the axe and the cloth from her mother's house. The cloth was intended for plugging the deceased mouth to avoid noise that could attract other people for her help. She then led the deceased to the farm of maize so that her acts could not be detected by anybody. She then ordered her to sit down so that it could be easier for her to accomplish the mission. Thereafter, she inserted the cloth into the month of the deceased so that she could not make an alarm for help, and hit her trice on the head which is a delicate part of the human body. The axe was also a lethal weapon when applied against a human body, especially a child like the deceased in the case at hand. Besides, she hit her three times and not once.

Moreover, even after committing the crime, the accused went back home, took bath, collected her clothes and left home for Iringa. She also went back to the scene of crime to verify the condition of the deceased before departing to Iringa. She left the deceased breathing with difficulties. She thus hesitated from informing other people of the event.

The above demonstrated conduct of the accused is inconsistent with the behaviour of a person who is unconscious or who does not know what he/she was doing. Indeed, the accused's conduct shows clearly that she had planned to eliminate the deceased's life in anger and revenge to her

(accused) own mother following their fight from which the mother had escaped.

In my further view, the accused's defence also tried to raise the defence of provocation on the ground that, her mother had provoked her. Nonetheless, the same is not available to her. This is because, she killed a different person from her own mother, in fact the innocent child. The law does not protect a person who kills another person for provocation (if any) caused by another person. In the case of **Bura Ae v. Republic [1994] TLR 13** the CAT held that, the defence of provocation was not available to the appellant because, the deceased had not uttered or try to carry out the threats alleged by the appellant to be provocative.

Based on the above reasoning, I find that, the accused in fact, killed the deceased with malice aforethought, hence a positive answer to the above posed sub-issue. The third ingredient of murder was accordingly proved.

The fourth and last ingredient of murder calls for a sub-issue of *whether the killing of the deceased was performed by committing an unlawful act or omission*. As observed above, the accused killed the deceased with malice aforethought. I am thus, inclined to answer this sub-issue in the affirmative. This is because, the law prohibits inflicting bodily injury or using violence on other people. Section 225 of the Penal Code also prohibits causing grievous harm and provides for a punishment for anyone who causes grievous harm to another. The sub-issue posed above

is thus, answered affirmatively, hence proof of the fourth ingredient of murder.

Having answered all the sub-issues posed above affirmatively, I find that, the prosecution has established beyond reasonable doubts all the four important ingredients of the offence of murder against the accused. I accordingly answer the major issue posed previously affirmatively that, the accused Anitha d/o Kibiki is guilty of the murder of the deceased, Rose d/o Kilowoko. I accordingly convict her of murder as charged, contrary to Section 196 of the Penal Code. It is so ordered.



JHK UTAMWA
JUDGE
04/11/2022.

Date: 04/11/2022.

Coram: JHK. UTAMWA, J.


For Republic: Ms. Hope Masambu, State Attorney.

For Accused: Mr. Alfred Stephano, advocate.

Accused: Present.

B/C: Gloria

Court: Judgement delivered in the presence of Ms. Hope Masambu, State Attorney for Republic, the accused in person and Mr. Alfred Stephano, advocate holding briefs for Mr. Cosmas Kishamawe, advocate for the accused, in court, this 4th November, 2022.



J.H.K UTAMWA
JUDGE
04/11/2022