

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)
AT BUKOBA**

CRIMINAL SESSIONS CASE NO. 68 OF 2020

REPUBLIC

Versus

IMAN JOSIAH @KASANO

JUDGMENT

23rd November & 16th December 2022

OTARU, J.:

IMAN S/O JOSIAH @KASANO stands charged with the offence of **murder** contrary to Section 196 of the **Penal Code** (Cap. 16 R.E. 2002). It is alleged by the prosecution that on the evening of 28th June 2018 at Bukono village within Muleba District in Kagera Region, Iman Josiah Kasano, the accused herein, did murder one **YULITHA D/O FELICIAN @JULITHA D/O JOSEPH** by using a panga.

The accused pleaded not guilty to the information of murder thus the prosecution called five witnesses and tendered four exhibits to wit, the sketch plan (Exhibit P1), the post mortem examination report (Exhibit P2), statement of Regina Feliciani @Alinda (Exhibit P3) and statement of the deceased Julitha (Exhibit P4), to prove their case. The accused testified under oath and tendered medical and

appointment cards for Bugando Medical Centre as well as an X-Ray image (Exhibits D1-D3) to show how badly he was injured on the day in question.

At the trial, the prosecuting Republic was represented by Ms. Judith Mwakyusa and Amani Kyando & Yusuph Mapesa learned Senior State Attorney and State Attorney, respectively, while the accused was represented by Mr. Evance Kaiza, learned advocate. The case was heard without the presence of assessors.

The evening of 28th June 2018 was the evening like any other in Bukomo village within Muleba District in Kagera Region. The deceased had her grandchildren visiting her. They were Nestus Nelson (PW1) and Anna Nelson. According to PW1, the two visiting grandchildren joined Magreth and their grandmother (the deceased) washing their feet just outside the house in preparation for retirement for the day. it was around 19.30hrs. It is alleged by the prosecution that suddenly and without any warning came the accused holding a panga in one hand and a stick in another. He was ready to strike. And strike he did. He started hitting PW1 with a stick. Then attacked the deceased with a panga on the hand and her right arm (testified by PW1, Alinda (Exhibit P3), E. 6688 Sgt. Ludovick PW4, PW5 – H 1509 Cpl. Cliff and the deceased herself (Exhibit P4)). The children and the deceased panicked and raised an alarm for help. Alinda came outside and saw the accused holding the panga. The accused was going to the neighbors' house but then came back again. Meanwhile, Alinda assisted the

children together with the deceased into the house and locked the door. The accused is said to have knocked on the door but the screams and alarm raised by the children and the family in general was heard by good Samaritans who came to assist. By then, the accused had already injured the deceased with a panga and PW1 with a stick. Edward Sijaona PW3 who was the street chairman at the time was called. He came and took the family to the hospital (the deceased, Alinda and the three grandchildren). On the way there, they rushed to the police station to fill in the PF3 for the deceased and write her statement (Exhibit P5). The deceased died in hospital at 08.00hrs the following day. The accused was arrested and charged for the offence of murder.

The accused on his part did not deny going to the house in question on alleged day and time. He however vehemently denied to have killed the deceased. He stated under oath that on the material day he had a special plan of catching his wife red handed with his own brother. He told the court that he had been informed one year earlier that his wife was having an affair with his brother who used to rent a room in the house where the deceased lived. The accused claimed that in the morning of 28th June 2018 he told his wife that he was travelling but hid somewhere instead. When he returned in the evening, the children told him where their mother was. It was where he had suspected she would be. So he went straight to that place. He claimed that carried neither a panga nor a stick. He

further claimed that he entered the deceased's house and went straight to the room his brother was renting. He caught his wife in bed with his brother. A fight ensued. At that moment he claimed that the deceased, Alina and everyone else in the house attacked him in the move to protect his wife. That he was beaten terribly so he just left and went back home. Later in the night a mob attacked him at his house and took him to the police station.

In proving the offence of murder the following ingredients need to be conclusively established;- that there was an unnatural death of a person, that the said death was a result of unlawful act or omission by the accused and that *malice aforethought* was involved. Each of these ingredients have to be proved beyond reasonable doubt by the prosecution.

On the first ingredient concerning whether there was an unnatural death of a person, the prosecution tendered a post mortem examination report (Exhibit P3) which indicated the cause of death as hemorrhage due to cut wound in simple terms, the deceased is said to have bled to death. Initially the defence side notified the court of their intention to summon the doctor who prepared the report for cross examination under Section 291 of the Civil Procedure Code, but later decided to abandon the move. PW3 took the deceased to the Kaigara hospital, he saw her cuts up close. He described them. One was on the head and the other on the hand. This is also supported by PW4 and PW5. Although these witnesses did not see who

inflicted the cuts upon the deceased, but she saw the extent of the cuts and how fatal they were. The testimonies of PW3, PW4, PW5 and Exhibit P3 conclusively prove that the deceased's death was unnatural.

In proving the second ingredient, of connecting the death of the deceased with the accused, the prosecution has relied on an eye witness, PW1 a boy of 12 years old (at the time of the incidence he was 9 years old), Alinda (whose statement was admitted without objection, she died before she could testify in court), a dying declaration of the deceased to PW5 and her written statement recorded at the police (Exhibit P5).

A statement of the deceased on the circumstances of her death (Exhibit P5) was recorded by PW5 under Section 34 of **the Law of Evidence Act** (Cap. 6 R.E. 2019) and tendered in court by the prosecution, without objection. PW5 however stated in court that he did not read the statement to the deceased because the deceased was seriously injured thus rushing her to hospital was a priority. Under such circumstances, the statement should be considered with caution. I have read Exhibit P5. The first part thereof indicates that the accused is the one who inflicted the injury upon her. The witness explains how she came to identify the accused. That the accused was her neighbor whom she knew well; there was enough light for her to see; as well as the fact that the accused was very close to her. It is unfortunate that the statement was not read to the deceased for her verifications.

Her testimony being in line with that of Alinda and PW1, it is my considered view that not reading the statement to the deceased was not significant and substantial so as to require the evidence to be excluded. As such, that evidence is necessary for the fairness of the proceedings.

It is the rule of practice that evidence of a dying declaration recorded under Section 34 of **the Law of Evidence Act** (Cap. 6 R.E. 2019) needs material corroboration before it can be acted upon (See **Elisante Simon @Kilinganya v. Republic**, Criminal Appeal No. 154 of 2003, CAT (unreported)). As stated above, the corroborating evidence is found in the testimony of PW1 as well as of Alinda (Exhibit P4).

On the part of PW1, before relying on the statement of the child witness, the court satisfied itself that the child possessed sufficient understanding about oath, the difference between a lie and truth and importance of telling the truth, thus he testified under oath. PW1 like the deceased, testified about how he identified the accused. The accused beat him up close. The two were about one meter apart and he is someone well known to him. In any case, the accused places himself in the crime scene. Such that the question of mistaken identity does not arise here.

As stated earlier, in his defense, the accused testified to the effect that he himself was a victim. That he did not go to the house in question with any weapon

and provided a story different from the prosecution's. The accused did not cross examine any of the prosecution witnesses concerning his assertions. The fact that he chose not to cross examine, is an indication that he was in agreement with the prosecution's case and his assertions are a mere afterthought. Thus can not be given much weight. The evidence of the prosecution is sufficient to connect the accused with the death of the deceased. That the death in question was a result of unlawful act by the accused.

I have considered the evidence of both sides and I understand that it is trite law that the accused's guilt is not based on the weakness of his evidence but on the strength of the prosecution's case. The prosecution has proved the 2nd element beyond reasonable doubt.

On the third element of *malice aforethought*, *malice aforethought* is provided for under Section 200 of the **Penal Code** and the leading case in this area is **Enock Kipela v. Republic**, Criminal Appeal No. 15 of 1994, CA (unreported) which explains the indicators of *malice aforethought* as follows:-

'Usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any, used in the attack, (2) the amount of force applied in the assault, (3) the part or parts of the body the blow was directed at or inflicted on, (4) the number of blows, although

one blow may, depending upon the facts of the particular case, (5) the kind of injuries inflicted, (6) the attacker's utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing.

The evidence clearly shows that the accused did not go to the deceased's house with good intentions. If going by his story that he went there with intention of catching his wife with another man, it goes without saying that it was not a peaceful visit. His story does not add up. It leads me to believe that he must have taken a weapon or two with him, as testified by PW1. I am thus strongly inclined to believe that the accused had intended to cause grievous bodily harm, if not to cause death altogether. It does not matter if it was intended to kill her or anybody else. He used a panga, a deadly weapon on a defenseless person. as if that is not enough, he cut the deceased on her head and arm. Exhibit P3 indicates that the cuts were deep. As such, I do not hesitate to state that the prosecution has proved that the accused killed the deceased with *malice aforethought*.

Consequently, it is my finding and decision that the prosecution has proved the case of murder against the accused **IMAN JOSIAH @KASANO** beyond reasonable doubt. I therefore find the accused, **IMAN JOSIAH @KASANO**, guilty of the offence of murder contrary to Section 196 of the **Penal Code** (Cap 16 R.E. 2002) as charged, and convict him accordingly.

M. O. Oduor

It is so ordered.

Dated at BUKOBA this th16 day of December 2022.

M. Oturu
M.P. Oturu
Judge

SENTENCE

There is only one sentence for murder provided by the law. That sentence is death by hanging. I sentence you, **IMAN JOSIAH @KASANO** to suffer death by hanging.

Right of appeal to the Court of Appeal is explained.



M. Oturu
M.P. Oturu
Judge
16/12/2022