

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA
CRIMINAL SESSIONS CASE NO. 33 OF 2022

REPUBLIC

VERSUS

MASHIMBA s/o SILINGI

JUDGEMENT

5th & 13th December, 2022

M. L. KOMBA, J.:

Mecklida w/o Hassani met her demise on Valentine's Day 14th day of February, 2018 at Buturi village in Butiama District, Mara Region while making love. In this case, deceased and accused were lovers. Mecklida Hassani's death was said to be unnatural because she was found lying in bush near her home. The accused person admitted to see deceased dying in his hands, the prosecution took the position that the accused killed deceased with malice aforethought hence charged him with the offence of murder.

Accused, **MASHIMBA s/o SILINGI** was charged with the offence of murder contrary to Section 196 and 197 of the Penal Code, Cap. 16 [R.E. 2019]. It was alleged that on the 14th day of February, 2018 at Buturi village within Butiama District in Mara Region, the accused person murdered one

Mecklida w/o Hassani. After the information read over and explained to the accused person in the language he understood, he denied the offence and the plea of not guilty entered against him.

Brief facts of the case goes like this. On fateful day, the husband of the deceased (PW1) left home in the morning heading to the farm leaving behind his wife. On his return he did not see his wife and started looking for her to neighbours in vain. Around 20:00 hours he involves fellow villagers to look for her until 22:00 hours there was no fruits to that effort. Next morning villagers gather at the house of PW1 and continue looking for her and eventually they recover her body in certain bush near her home dress less with some condoms (used and unused), besides the body had bruises around her neck. Police were informed and the body was taken to Butiama hospital. Some villagers knew about love affairs between the deceased and the accused and decided to inquire what happened. They went to accused home where he was around and found used and unused condoms.

On these grounds they decided to arrest accused and surrendered him to Butiama Police for inquiry where in caution statement (Exh. P1) he explained what happened.

As the cardinal principal in criminal law, the burden of proof always lies on prosecution side. In the case at hand, the prosecution was led by Mr. Nico Malekela assisted with Ms. Evangelina Ephraim both learned State Attorneys. They marshalled a total of three witnesses and tendered one exhibit (caution statement) to prove the charge laid against the accused person. Accused was represented by Mr. Christopher Waikama, Advocate.

The testimony of the first prosecution witnesses Hassani Nyamazazala (PW1) was to the effect that, it was morning of 14/2/2018 he went to the farm alone. When he returned, he did not find his wife. After a while Mashimba Silingi (accused) went to his home asking for the maize flour and PW1 informed accused that his wife has gone for a walking he has to wait when she returns, she will give him the flour. Accused left and the wife did not show up. PW1 started worrying because it is not the habit of his wife to return home late. He informed the court that he walked around and look for her and raised an alarm (yowe) people gathered and started to look for her till down. He further testified that in the morning people raised an alarm again yowe around 9:00 hours when they went at the place where alarm came from, they found the body of his wife laying down, naked and condoms beside her body. During cross examination he testified that he did not know

who killed her wife and that him and the accused were neighbors who lived in good terms.

Wandiba Hassani Nyamazazala, (PW2) testified to the effect that in the material date, evening hour he went to the market '*gulioni*' then he received a call from Mika who informed him that their mother is missing. When he went home, he found his father and young brothers and was told by his father, PW1 that his mother is nowhere to be seen. He informed the court that on 15/02/2022, which was the morning of the following day they we raised alarm and people came and were divided into two groups and started looking for their mother (deceased). Few minutes later they heard an alarm from other group and they find the body of his mother. It was naked with condoms besides it.

It was PW2 testimony that the body was taken to hospital for examination. Out of curiosity PW2 asked PW1 who came at home before the incidence, he was informed it was Mashimba Silingi who asked for flour. PW2 and other fellows decided to go to Mashimba Silingi house to search and see whether he has flour or not. While at Mashimbas' house, they found the door was broken and found he had flour, and there was used and un – used condoms. He informed the court that they decided to arrest and surrender him to

Butiama Police Station the morning of 16/02/2018. During cross examination by Mr. Waikama, PW2 informed the court that he was aware that accused and his mother were having affairs by their conduct and that his father did not know.

E. 9989 D/Sgt Asukile testified in court as PW3, a Police Officer working in criminal department with 13 years experience. He testified to the court that on 16/02/2018 he conducted interrogation of one accused who was brought in the police station. He was called Mashimba Silingi. He was alleged to be involved in murder of Mecklida Hassani. He informed the court that accused was informed of his accusation and his rights during interrogation and that he is at liberty to call advocate or relatives to witness while interrogation was going on. He did not call advocate nor relatives. He consented to proceed. It was the testimony of PW3 that the room used for conducting interrogation had one table, two chairs, there was no weapon and there were only two persons, PW3 and the accused. The recording started around 08:39 hours up to 09:30 hours, it was morning.

This witness informed the court that by his mouth the accused denied to kill the deceased but he explained what happened. Accused informed (PW3) that him and deceased were lovers. On that day they agreed to make love

as usual, the 1st round was successful but during the second round accused saw the deceased becoming weak, he stopped doing thinking she is tired. The condition deteriorates and the deceased dead while on bed. Accused said he was confused then he decided to go to the house of the deceased, to see whether they are aware of the incidence. He found the deceased husband and asked for the flour and he was informed there is no flour and the mother house was not around. Accused confirmed that the atmosphere at the deceased home is calm.

PW3 testified further that he wrote all what was narrated by accused, he read to the accused and accused signed by stamping his thumb and PW3 certified that he is the one who conducted the interrogation. This witness informed the court that before they started interrogation, the accused was fine without any mark on his skin nor was he punished. Accused consented freely to give his statement and that there was no force used. Witness prayed to tender statement in court which was objected by defence counsel and later on after trial within a trial the statement was admitted and Marked **Exh P1**.

During cross examination PW3 informed the court that he was not present during the death of deceased, he doesn't know how the death occurred but he was informed by the accused.

Upon closing the prosecution case and this court to rule out that the *prima facie* case has been established against the accused, leading by advocate, Mr. Waikama, the accused entered his defence.

DW1 (Mashimba Silingi) who was the only defence witness informed the court that he knew the deceased is the wife of Hassani Nyamazazala and that on 14/02/2018 around 20:00 hours he heard an alarm and found people met at the house of Mr. Nyamazazala only to be told that they are looking for the mother of that house. The following day 15/02/2018 an alarm again raised, people gathered and were divided into groups. He informed the court that one group found the deceased laying on ground, dead. Accused confirmed that he participated on searching party.

It was his testimony that all the time he was in mourning at deceased place and on 15/02/2018 in the evening he was confronted by a group of people including PW2 who said they have the feeling that he was connected with the death of the deceased as some of the deceased clothes was missing.

DW1 informed the court that they beaten him and forced to search for deceased clothes while they had no introduction letter from the village office. During search he confirmed they found maize flour in his house. He was arrested and latter was sent to Police Butiama.

DW1 further informed the court that they had no quarrels with the deceased husband and pray for the court to release him from the custody where he has been detained for five years now.

During cross examination by Mr. Nico (SA), DW1 confirmed to go to the deceased home in the afternoon to ask for maize flour and he joined wana yowe (group of people) in looking for the deceased. He further said he has grievances with PW2 as he encroached into his farm although he did not register that dispute to any authority.

Having gone through the evidence adduced by both parties, I find the pertinent issue to deal with is whether the prosecutions proved their case beyond reasonable doubt. And in doing so, I will stand firm to see whether all elements of murder are proved against the accused person. In the case of **Philimon Jummane Agala @ J4 vs. The Republic** Criminal Appeal No.

187 of 2015, the Court of Appeal held that in murder trial, the prosecution must prove the elements of murder.

I will sail in the same boat that, in trials like this, the prosecution has to prove beyond reasonable doubt. By that, it means the proof of the charge against an accused person must not leave a shadow of any reasonable doubt that the person charged did indeed kill the deceased in the manner stated in the information. By doing so, prosecution has to prove the elements of the offence of murder, which are; **one**, that the person alleged to have been killed is in fact dead; **two**, that the alleged death was unnatural one; **three**, that the accused before the court is the one who killed the deceased; and **four**, that the killing was done with the intention of either causing death or causing serious bodily injury. That is the killing was done with malice aforethought.

In case the evidence leaves the court with any reasonable doubt as to the accused person's guilt, the court must acquit the accused person even though it believes him to be guilty. In the premises, the acquittal of an accused person does not always mean the accused person is innocent; it simply means that a case against him has not been proved to the required standard; that is, beyond reasonable doubt.

Regarding 1st and 2nd elements, it is undisputed throughout prosecution and defence evidence that **Mecklida Hassani** (the deceased) died.

Despite the fact that the accused did not dispute the deceased death during the preliminary hearing and even during trial, there is no evidence, professionally that explained the cause of death. The crucial issue is whether the deceased was murdered by the accused person who is before this court.

In a murder charge, it is also important to prove malice aforethought, for murder entails the killing of a person with malice aforethought. Section 196 of the Penal Code, under which the accused person in the present case was charged provides as follows:

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

Therefore, it is the duty of the prosecution to prove the case against the accused persons at two stages; first that it is the accused person who killed the deceased Mecklida w/o Hassani and secondly, that he did commit the killings with malice aforethought as stipulated under section 200 of the Penal Code.

It is from the court record that the accused denied having murdered the deceased and there is no any eye witness who testified to have seen the murderer. The prosecution accusation is based on caution statement, Exh. P1. It is alleged that the accused in his cautioned statement explained how the death of deceased occurred. As hinted earlier on, accused and deceased were lovers. On Valentine's Day, that is 14th February, 2018 accused and deceased were making love, it was noon time. Accused explained that it was the deceased who went to accused house for that purpose. Without wasting time, they started making love. According to the accused person, the first round went well. When they were at the middle of the second round accused see his partner, the deceased, becomes weak, he stopped so that he can wait for her to gain energy. It was the accused narration that deceased did not regain energy, her condition deteriorates and she died on bed in his hand. Part of the accused caution statement read as follows;

'Nakumbuka mnamo tarehe 14/02/2018 majira ya saa sita mchana marehemu alikuja nyumbani kwangu, nikiwa naanika mahindi, tukaingia ndani na kuanza kufanya mapenzi, bila kutumia condom, tukiwa kitandani kwangu. Tulifanya mapenzi mara moja tukamaliza kitendo halafu tukapumzika. Tukaanza tena mara ya pili kufanya mapenzi lakini ndipo nilianza kuona hali iliyo tofauti kwa mwenzangu ambapo nilianza kumuona akiwa kama ananyong'onyea tofauti na

kawaida yake. Mimi baada ya kuona hali hiyo nilisitisha kitendo cha kuendelea kufanya mapenzi nikidhani labda tu amechoka anataka kupumzika. Hata hivyo pamoja na mimi kusitisha kufanya mapenzi bado mwenzangu aliendelea kunyong'onyea na hatimaye alikata roho na kufariki dunia ndani kwangu Kitandani. Baada ya kuona Mecklida w/o Hassani amefariki dunia ndani kwangu nilikuwa kama nimechanganyikiwa.....'

The caution Statement of the accused person was admitted by this court after dealing with Mr. Waikama's objection that the caution statement was recorded without free consent, accused was under torture and that the accused denied to alter those words at all. This court in its ruling stated that accused failed to prove torture as alleged and found caution statement was admissible as it met all the requirements under sections 57 and 58 of the Criminal Procedure Act, (the CPA). Specifically, the following part of the cited section reads;

'57. (3) A police officer who makes a record of an interview with a person in accordance with subsection (2) shall write, or cause to be written, at the end of the record a form of certificate in accordance with a prescribed form and shall then, unless the person is unable to read—

(a) show the record to the person and ask him-

(i) to read the record and make any alteration or correction to it he wishes to make and add to it any further statement that he wishes to make;

(ii) to sign the certificate set out at the end of the record; and

(iii) if the record extends over more than one page, to initial each page that is not signed by him; and.....'

Caution statement which was admitted by this court in trial within a trial shows the accused was warned before stating recording, each page signed by accused person, it has starting time and finishing time, the accused himself, being capable read and write, he wrote in the sheet certifying that he has read his statement which was recorded by police officer and found it to be correct. He wrote that he gave information with his free consent. It was the testimony of PW2 that accused person was surrendered to police in the morning of 16 February, 2018. Exh. P1 shows that interview by the police officer started at 08:00 hours and completed at 09:30 hours. It is my considered opinion of which I stand to believe that caution statement was recorded basing on the requirement of law and was free taken.

As I stated early, the cardinal principal in criminal law is that the burden of proof always lied on prosecution shoulders. See the decision of the

Court of Appeal in **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 CAT at Mbeya where it was held as follow;

*"It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. In the case of **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika** [2002] T.L.R. 296 the Court held that: "A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt"*

The important issue here is whether this evidence in record has established murder. As a matter of law, the offence of murder involves unlawful killing of another person (human being) with malice aforethought. Malice aforethought is well established as provided for in section 200 of the Penal Code provides as follows;

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
(a) an intention to cause the death o f 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)

I need to address my mind to the predominant legal principles which are of relevance to this case and will guide me in the final verdict of this judgment. These cover aspects of criminal law, as well as the law of evidence. These principles are meant to ensure that no innocent person is convicted but guilty and on proof of evidence beyond reasonable doubt.

In the case of **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994 (unreported) discussed what entails malice aforethought, saying that: - "Usually, an attacker will not declare 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 blows were directed at or inflicted on; (4) The **number of blows**, although one blow may, depending upon the facts of the particular case be sufficient for this purpose; (5) The **kind of injuries** inflicted. (6) The attacker's utterances if any; made before, during or after the killing and **the conduct of the attacker** before and after the killing. (7) The conduct of the attacker before and after the killing.

The facts of the present case don't establish existence of violence between the deceased and the accused person prior to the death of the deceased. They were making love. There is no proof of any weapon used, no force used to injure, deceased had no wound/injury apart from the accused to be sorry for the lost his partner in love making.

It was in record that during night, he pulled the body of deceased in the nearby bush where it was easily to be seen in the morning. His action of pulling the body of his lover by using a rope which was tied on the neck, caused bruises on the neck of deceased. It must be remembered that accused lover, who is deceased, was the wife of his neighbor, Mr. Hassani Nyamazazala. Accused had no option than letting villagers found the body in the nearby bush. The way accused gave his statement show that there

was no quarrel among the two and that the death occurred in the cause of making love. Accused had no intention to kill as making love to the person you love in itself is not dangerous *per se*.

What was recorded in statement connotes what was testified by PW2 in court that accused had love affairs with the deceased.

I am aware that if admission was freely taken, is the best evidence to be relied upon than any other evidence in criminal charge and does not need corroboration if not repudiated (see **Muhongwa Simu Vs Republic**, Criminal Appeal No 480 of 2019. In my considered view, this confession declaration by the accused person which were freely taken shows there was no malice aforethought to the accused.

Let me reiterate that in the circumstances of this case, upon analyzing and evaluating the evidence and directing my mind in Exh. P1, absence of the expert opinion to verify what was the cause of death makes the big gap to prosecution and therefore, they failed to prove the offence of murder against the accused. That is to say, it was not proved that it is actually the accused who killed the deceased as said, making love is not dangerous to threat life of a human being.

In the upshot, through evidence analysed, I find without any scintilla of doubt that prosecution has failed to prove the offence of murder beyond reasonable doubt and the accused person **MASHIMBA s/o SILINGI** is hereby acquitted from the charge.

It is so ordered.

Dated at MUSOMA this 13th day of December, 2022.




M. L. KOMBA

Judge

13th December, 2022

Right of appeal is fully explained.


M. L. KOMBA

Judge

13th December, 2022