

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL JURISDICTION

CRIMINAL SESSION NO. 14 OF 2021

REPUBLIC

VERSUS

JOHN ^{S/o} MASUKA @ SHIMBI

4/10/2022 & 25/10/2022

JUDGMENT

MWENEMPAZI, J.

The accused herein named is arraigned in this Court and charged with the offence of Murder contrary to section 196 of Penal Code, Cap 16 R.E 2019. It is alleged that on the 2nd day of December, 2019 at Mtenga village within Nkasi District, in Rukwa Region, the accused did murder one Minza d/o Mahima. When the charge was read over and explained to him in Swahili, he denied to have committed the offence. A plea of not guilty was entered by the Court and the case went for full trial. The prosecution informed the Court that they will call seven witnesses and four exhibits will be tendered. However, at the hearing they called six (6) witnesses.

At the hearing the prosecution was being led by Mr. Simon Peres, learned Senior State Attorney and Ms. Marietha Maguta, State Attorney and the defendant was being defended by Mr. Deogratias Sanga, learned advocate.

The first witness for the prosecution was Shida d/o Gembe, a 13 years old girl, the daughter of the deceased in this case, testified as PW1. She testified after she had promised to speak the truth and also affirmed that she will speak the truth. Affirmed due to the fact that she is a pagan.

According to this witness, on the material date at around 18:00 hours her mother, Minza d/o Mahima, now deceased, sent her (PW1) to the residence of Boniface s/o Nyandu to collect beans. She went there but she found nobody. Later Boniface s/o Nyandu came; he gave her beans and she left for home. On the way home, she saw a person following her. When that person came close to her, she recognized that it was her uncle, known by the name MLISE or JOHN MASUKA. A few minutes later, still on her way home, she met her sister-in-law (the wife to her brother) who was coming from the river where she had gone to fetch water. She told her that she saw MLISE. The sister-in-law proposed that they wait for him. They were

Shida d/o Gembe

surprised when MLISE arrived at the place they were waiting, he passed by them without greeting.

According to the testimony, PW1 and her sister-in-law, were staying at the same homestead (boma). Thus, PW1 went home accompanying her sister-in-law. At home she told her mother about them meeting and or seeing their uncle MLISE. She was ordered to take beans inside the house and then she came out and together with Masanja s/o Karacha PW2 and the victim they sat at the Luganga. Luganga is a shade made in a rectangular or square form, with poles at the angles and covered with grasses or it is thatched. On the date, the trio sat under the shade. Masanja s/o Karacha is a shepherd who takes care of cows. He takes them to the grazing field from morning and normally he comes back at around 18:00 hours.

On the material date, the testimony by both PW1 and PW2 shows that Masanja s/o Karacha came back from grazing field, took cows to the kraal and came to the luganga where he joined PW1 and Minza d/o Mahima, the deceased. He asked for food and he was given. After he had eaten, PW1 took the utensils used to serve food into the house. she came back and they sat down having evening stories. At around 19:00 hours, the assailant came holding a torch which is built-in the mobile phone and on the other hand, as

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per PW1, he was holding a machete (panga). According to PW2, the assailant came from behind PW1 and went straight to him. He just looked at him with intention to attack, after he had recognized that the person in front of him is not the target (the victim), he turned to Minza d/o Mahima, the victim. The latter was in the front of Shida s/o Gembe (PW1). The assailant started to hack Minza s/o Mahima with a machete he was holding. The witness testified; I quote: -

"The person came said we are under arrest (chini ya ulinzi) he wanted to hack the shepherd, Masanja. Then he left towards our mother. May be he recognized that masanja is not the target. He hacked my mother and run away. I was sitting nearby her. He cut her on the neck. I recognized that man who had just cut my mother to be my uncle MLISE".

At the luganga there were three people. Shida d/o Gembe, Masanja s/o Karacha and Minza d/o Mahima. Shida d/o Gembe and Masanja s/o Karacha are the sole eye witnesses who witnessed the event happening. It is only Shida d/o Gembe who identified the assailant and mentioned the assailant to the shepherd, Masanja s/o Karache and her brother PW3 Ng'wandu s/o Gembe. She mentioned the assailant categorically that it is

Shida d/o Gembe

MLISE or Mjomba John as she was telling her brother, Ng'wandu s/o Gembe(PW3).

According to the doctor who conducted post mortem examination, who testified as PW4, RAPHAEL CHOTARA NTAGANGO, the cause of death of Minza d/o Mahima was large wounds which caused excessive bleeding. There were big sharp cut wounds, cut on the neck, touching all bones leaving only a small skin on the left side of the neck. A Post Mortem Examination Report was also tendered as exhibit P1. It is recorded that in an external examination there is a big sharp cut wound on the neck right side, face, head and clothes were stained with clot blood. Internal examination – inside cut wound only small skin remained in tack. All neck bone cut off. Pharynx cut off and cut off left and right jugular vein.

It was testified by PW1 and PW2 that the assailant ran away from the scene of crime after he had cut the victim, Minza d/o Mahima. Shida d/o Gembe(PW1) and Masanja s/o Karacha(PW2) are the witnesses to the fact. According to Shida d/o Gembe, the assailant ran heading for the direction to where he has shifted to; and, Masanja s/o Karacha testified that he remained at the scene and Shida d/o Gembe ran into the house. He did not identify the assailant but Shida d/O Gembe told Masanja that it was their uncle who

had attacked and hacked their mother, Minza d/o Mahima. Masanja s/o Karacha raised the alarm and people responded to the call for help.

Shida d/o Gembe informed his brother Ng'wandu s/o Gembe that the assailant was her uncle MLISE or JOHN. The words used by Ng'wandu s/o Gembe when reporting what he was told by his sister are: - "She said: *mjomba John ndiyo amefanya hivyo*".

It is in the testimony of PW3 that his father advised them in the morning that they should spread and guard all exit roads and at the bus stand to block him from leaving; relying on the words of Shida d/o Gembe that she met her uncle yesterday and also that she identified him at the scene of crime as the assailant. They did it and found the suspect at Paramawe. He was heading for Lyanzumbi.

During trial G. 4773 D/Cpl. Fredrick, PW6, testified that on the 3rd December, 2019 he was at his work station Paramawe Police Station. Their OCS received a phone call that there has been a murder at Mtenga village and the perpetrator/culprit has been spotted at Paramawe road. They followed the road to Nzumbi and met relatives who showed them the suspect. They arrested him and sent him to Namanyere Police Station. He was also assigned to draw the sketch map of the scene of crime which was

received as exhibit P2. He also testified that at the scene he was able to see the body of the deceased which had wounds on the neck and face. The deceased was a woman. At the scene they heard that the event was perpetrated by a relative of Minza d/o Mahima, that is John Masuka @ Mlise.

G.6875 D/C Moton Magesa, is a police officer working in the investigation department. He testified that on the 3rd December, 2019 he was among police officers who went at the scene. There, they found the body of the deceased at the luganga. They also interviewed some relatives Shida d/o Gembe, Ng'wandu s/o Gembe and Masanja s/o Karacha. Shida d/o Gembe told them that their uncle John Masuka @ Mlise went there and placed them under arrest. He took a machete and started to hack one of the members of their family, Minza d/o Mahima. After he had cut her he left the scene of crime.

After arrest of the suspect at Paramawe, he was taken to Namanyere Police Station where they interrogated the suspect. He admitted to have committed the offence. He was also taken to the justice of peace Hon. B.L. Sheila; unfortunately, the justice of peace, though she was one of the witnesses to be called, she could not turn up, on the reason of being sick under strict bedrest.



At the trial it was ruled that the prosecution has made a prima facie case against the accused. When addressed under section 293(2) (a) and (b) of the Criminal Procedure Act, Cap 20 R.E 2022, the accused opted to defend himself under oath. In his defence he testified that he resides at Itenka Mpanda. Before shifting to Itenka he was residing at Mtenga Village in Nkasi District.

According to the accused in his defence he transferred to Itenka in 2019, so that he can take his children to school. Mtenga is hilly and his children will suffer going to school. Another reason is his sister Minza d/o Mahima who told him that his children who passed away had been bewitched by his neighbour. In his view the statement by Minza d/o Mahima had the effect of perpetrating quarrels. However, he was not amused by the statement by her sister.

The accused in his defence testified that on the date he was arrested at Paramawe, he was on the way to Namanyere to his young brother Makolyo. He wanted Makolyo to accompany him to Mtenga where he wanted to meet Ndingu S/O Hoyo. However, on the night when the event occurred, he received news that his father has passed away at Simiyu. Thus, he decided to go back to Mpanda with intention of arranging for the attendance



to the funeral at Simiyu. He was planning to travel to Simiyu. Upon cross examination as to what common sense would be if you hear such news. Whether you will go to a relative so that you discuss how to deal with the funeral of the father or you will do as the accused did; he said common sense would demand to arrive to one of the relative to arrange how to deal with the funeral of their father.

The question for consideration under the circumstances is whether the accused is the one who hacked the deceased with the machete and if the question is in the affirmative, then whether it was with malice aforethought. We have referred to the evidence and as it will be seen or recalled it is only PW1 who testified that she identified the assailant to be his uncle MLISE. In her account of events, on the date, she met with him in the evening hours before sunset. At the time when she met him, she was coming from the residence of Boniface Nyandu. His uncle however, was in a different attire not as the attire described in the what the assailant was wearing. When they met in the evening, he was wearing a 'maasai' shuka, black short and black shoes. This time the assailant was wearing white shirt black short and black shoes.



At the scene it has been described by PW1 and PW2 that they were sitting having evening stories. The assailant came from behind PW1. He was holding a phone with a torch on and radio on. He was holding a machete on the other hand, the right hand. He first approached PW2 and then left for the victim who was sitting near PW1. He cut her with the machete and left. PW1 ran to her brother's house, she told her sister-in-law that her uncle has hacked her mother.

It has been proved by the doctor who conducted post mortem examination that the whole neck bones were cut and only a thin skin was left intact holding the head to the main body.

PW2 testified that he made an alarm to seek assistance of the people around. Also, the brother of PW1, Kabisi Gembe, raised an alarm. PW1 told those who responded, including PW3, that it is her uncle who hacked her mother with a machete. She was able to recognize and identify him using the light from fire flames, there is a solar bulb at the nearby house of his brother (PW3) and also moonlight. In the case **Republic Vs. Mohamed Bin Athin [1942] 9 EACA 72** it was held that:

"The ability of a witness to name a suspect at the earliest opportunity is an all – important assurance of his credibility in the

same way as an unexplained delay or complete failure to do so should put a prudent Court to inquiry.

In this case PW1 was certain immediately that it was his uncle MLISE. It may be argued that; the assailant held a torch toward the occupants of Luganga, the place the victim and her children were sitting. However, PW2 categorically stated that the assailant came from the hind of PW1. Thus, it was possible for PW1 to identify the assailant. That is the analysis of the issue from the direct evidence at the scene.

The prosecution has led the evidence that the accused was seen in the evening on the pathway from Boniface s/o Nyandu. He passed by PW1 and her sister-in-law without even greeting them. The duo informed the deceased of the fact. After the event, the husband of the deceased advised young men to block all exit roads and early in the morning the accused was seen at Paramawe heading for Nzumbi. The police at Paramawe were informed and he was arrested. Also, the conduct of the accused person is a leading point to his involvement on the event leading to the murder of Minza D/O Mahima. The accused in his defence he alleged that while at Paramawe he received news that his father has passed away thus he decided to go back to Mpanda instead of continuing with his journey to Namanyere



where he says he went to follow Makolyo, his young brother, so that they go together to see Hoyo Ndingu at Mtenga village.

The accused testified that he decided to go back home (Mpanda) on the reason that he was going to arrange for a journey to Simiyu where his father has passed away. He however, admitted that it would be prudent to go to one of his relatives so that they can arrange funeral to mourn their father. He denied even to have called his sister Minza d/o Mahima alleging Makolyo had called he. The conduct of the accused, was such that he was avoiding to be associated with Minza d/o Mahima as the truth may be uncovered. It was shown when he met PW1 and her sister-in-law and behaviour change

In the case of **Hassan Fadhili Vs. Republic [1994] TLR 89 (CA)** it was held that *to ground conviction on circumstantial evidence, it must be incapable of more than one interpolation*. The accused in this case was seen at Mtenga Village in the evening, then Minza d/o Mahima was murdered. In the morning, he is found at Paramawe heading for Nzumbi. People were tracking the suspect mentioned by PW1. I have no doubt the evidence leads to the accused person as the perpetrator of the murder of Minza d/o Mahima.



Moreover, he had grudge that she has been bewitching his children something which changed his behavior vis a vis his sister.

It may firmly be concluded that the accused person is the perpetrator of the murder of his sister by virtue of identification by PW1 at the scene of crime and also circumstantial evidence of his conduct before and after death of Minza d/o Mahima.

Now that I have concluded in the affirmative on the first issue, the question is whether there is malice aforethought. We have the evidence by Dr. Raphael Chotara Ntabago, PW4. The body he examined had cut wounds on the neck and face. All the bones on the neck had been cut and that included main blood vessels to the head. In the case of **MOSES MICHAEL ALIAS TALL v REPUBLIC [1994] T.L.R 195 (CA)** it was held that:

"Malice aforethought may be inferred from the amount of force which an offender employs in inflicting fatal injury;"

There cases which have held that the kind of weapon used may be referred to determine whether there was malice aforethought or not. In this case, the kind of tools used, a machete and the force used is a clear indicative sign that the appellant had malice aforethought to cause death of the victim, one Minza d/o Mahima. For the reasons therefore, I find the accused is guilty for

the offence of Murder. He is therefore convicted of the offence of Murder Contrary to section 196 and 197 of the Penal Code, Cap. 16 R.E.2019. It is ordered accordingly.




T.M. MWENEMPAZI
JUDGE
25/10/2022

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T.M. MWENEMPAZI

JUDGE

25/10/2022

Court: Judgment delivered.



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T.M. MWENEMPAZI

JUDGE

25/10/2022

Sentence: There is only one sentence for murder. Accused is sentence to suffer death by hanging.



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T.M. MWENEMPAZI

JUDGE

25/10/2022