

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY

AT BUNDA

CRIMINAL SESSIONS CASE NO. 67 OF 2021

THE REPUBLIC

VERSUS

SHADRACK SOSPETER @ MKARUKA S/O MAGANGALI

JUDGMENT

7th & 10th MARCH, 2022.

A. A. MBAGWA, J.

The accused **SHADRACK S/O SOSPETER @ MKARUKA S/O MAGANGALI** was arraigned before this court on an information of murder contrary to sections 196 and 197 of the Penal Code.

The particulars of offence allege that on 4th day of June, 2009 at Igundu village within Bunda district in the region of Mara at around 18:00hrs the accused murdered one **JOEL S/O JAFFER @ ASUBUHI**. The accused pleaded not guilty to the charge.

In the endeavours to prove the offence, the prosecutions called three witnesses namely, **PW1 KABULA MABINDO, PW2 GAUDENSIA ANGAGA** and **PW3 E4392 D/SGT JUMA**. In addition, two exhibits namely, postmortem examination report (P1) and caution statement of the accused

(P2) were produced. Whereas exhibit P1 was tendered during preliminary hearing, exhibit P2 was produced through DW1 during cross examination under section 164 of the Evidence Act at the request of the State Attorney.

In defence, the accused stood the solo witness and did not tender any exhibit.

At the hearing of this case the Republic was represented by Frank Nchanila, learned State Attorney whilst the accused had the service of Leonard Magwayega, learned defence counsel.

The prosecutions account was that the accused Mkaruka Magangali on 4th June, 2009 at Igundu village within Bunda district in Mara region at around 18:00hrs attacked the deceased Joel Jaffer @ Asubuhi and cut him on various parts of his body with machete. It was the evidence of PW1 Kabula Mabindo that on the fateful day the deceased Joel Jaffer @ Asubuhi went to visit her as her child was sick. Asubuhi found the sick child in a dire situation hence he advised PW1 to take the child to hospital. They thus started walking to hospital.

While on the way to hospital, the accused suddenly emerged from the back. He passed PW1 and followed the deceased who was in front of PW1. On approaching the deceased, Mkaruka Magangali took out a machete

which he had hidden under the shirt and started cutting the deceased. He cut him on his head and hand. The deceased fell down but the accused continued cutting him. PW1 raised an alarm but she could not get any assistance. She thus ran to the deceased's home to inform his family. PW1 found the deceased's wife one Gaudencia Angaga (PW2).

Kabula Mabindo informed PW2 of the incident. PW1 and PW2 went together to scene of crime where they found Joel Jaffer Asubuhi laying on the ground. He was unconscious and excessively bleeding. However, before they could render him any assistance, Joel Jaffer Asubuhi passed away. PW2 thus made a call to Kibara Police Post who arrived at the scene of crime shortly. The police officers examined the deceased body and thereafter allowed the relatives to take the deceased body home.

On the following day i.e. 5th June, 2009 the police officers from Bunda Police Station in company of a medical doctor came to the deceased's home. They interviewed various people including PW1 and PW2 and thereafter went to the scene of crime. In addition, a medical doctor conducted an autopsy and observed a deep wound on the left side of the head. According to the postmortem examination report (P1), the doctor was opined that the cause of death was severe bleeding which resulted from cut wounds.

PW1 Kabula Mabindo mentioned the accused Mkaruka Magangali to be the culprit immediately after the incident hence the efforts to arrest him commenced instantly. According to PW3, they mounted a hunt for the accused right from 5th day of June, 2009 but their endeavours could not yield fruitful results until ten years later i.e. 26th February, 2019. This was because the accused fled from his village immediately after the incident.

PW1 identified the accused in dock and emphasized that she knew him in the name of Mkaruka Magangali and not Shadrack Sospeter. Similarly, PW2 Gaudencia Angaga told the court that PW1 immediately told her that the deceased had been attacked by Mkaruka Magangali (the accused). PW2 identified the accused as Mkaruka Magangali. She continued to tell the court that she knows the accused very well for she taught him at Igundu Primary School. PW2 added that the deceased and accused were in bad terms due to land disputes. Both PW1 and PW2 testified that immediately after the incident the accused disappeared in Igundu village. Further PW1 and PW2 forcibly shifted from Igundu to Ukerewe and Musoma respectively due to fear that Mkaruka Magangali could as well endanger their lives.

PW3 said that they arrested the accused at Igundu centre on 26th February, 2019 when he was watching football. Upon his arrest, the accused denied the name of Mkaruka Magangali instead he told the police that he was

called Shadrack Sospeter. However, during preliminary hearing and later in defence, the accused admitted both names to wit, Shadrack Sospeter and Mkaruka Magangali.

While testifying, the accused admitted that he killed the deceased Joel Jaffer @ Asubuhi by cutting him with a machete but he contended that he had malice aforethought. DW1 stated that on the fateful day he was coming from lake for his chores i.e. fishing. He was holding a machete because it was a practice to carry it as it helped him in emergencies. He said that while on his way he met the deceased with Kabula Mabindo (PW1) but when he was about to pass the deceased, to his dismay, the deceased pushed him down. DW1 continued to testify that when he was struggling to stand up, the deceased attempted to seize him the machete but he resisted hence they started fighting in which course he inadvertently cut the deceased on the head. DW1 stated that he only cut him once accidentally. Further, the accused admitted that he had, for long time, land disputes with the deceased which started in the Primary Court of Nansimo and ended in the High Court at Mwanza in favour of the deceased.

During closing submissions, Mr. Frank Nchanila, learned State Attorney forcefully submitted that the prosecutions had established malice aforethought of the accused. Nchanila further beseeched the Court to

ignore the defence raised by the accused that there was fight. On the part of the defence, Mr. Leonard Magwayega, learned advocate did not have much to submit. He simply left the matter to the Court to decide.

It is worth noting that, while testifying, PW1 did not mention any kind of fight between the deceased and accused. She was clear that the accused suddenly emerged and attacked the deceased. The defence did not cross examine PW1 to suggest that there was a fight. DW1 for the first time raised the issue of fight during defence. It is a settled law that where a person does not cross examine on an important matter but comes to controvert it during defence, such a defence is an afterthought and should not be considered. See the cases of **Athanas Ngomai vs. the Republic**, Criminal Appeal No. 57 of 2018, Court of Appeal at Dar es Salaam, **Imamu Selemani Msovu and another vs. the Republic**, Criminal Appeal No. 306 of 2010 Court of Appeal at Tanga and **Moses Nobert Achiula vs. The Republic**, Criminal Appeal No. 63 of 2012, Court of Appeal at Mbeya. In view thereof, I reject the defence evidence that there was a fight.

After going through evidence of both sides, it is common cause that the deceased JOEL JAFFER @ ASUBUHI died unnatural offence. It is also uncontested that the deceased's death was caused by the accused as testified by the prosecutions witnesses and confirmed by the accused in his

defence testimony. The only issue for determination therefore is whether the accused killed the deceased with malice aforethought.

As already hinted above, PW1 was very clear that the accused emerged and brutally attacked the deceased. He cut the deceased more than once on different parts of the body. PW1 said that he cut the deceased on his head and hand. She further said that the deceased's palm was separated from the arm. PW1 continued to narrate that she raised an alarm but the accused threatened her hence she ran to the deceased's home. More so PW1, PW2 and PW3 all testified that the accused fled from the village shortly after the incident. Lastly, the accused admitted that he was in bad terms with the deceased because of land disputes. All these facts, in my view, lead to an inference of malice aforethought on the accused. See the case of **Enock Kapela vs the Republic**, Criminal Appeal No. 150 of 1994, CAT at Mbeya.

When the matter was summed up, all the three assessors returned the unanimous verdict of guilty. Their reason was that they were very much convinced by the testimony of the eye witness one PW1 Kabula Mabindo.

I have dispassionately examined and analysed the evidence presented by both parties. Indeed, given the strength of the prosecutions evidence in

particular PW1, the accused defence that he inadvertently cut the deceased in the course of fight is a mere fanciful defence which can hardly be entertained.

In the event, I am of the similar views with the assessors that the accused killed the deceased with malice aforethought. That said, I am satisfied that the prosecutions have proved the case beyond reasonable doubt. I therefore find the accused person **SHADRACK S/O SOSPETER @ MKARUKA S/O MAGANGALI** guilty and consequently proceed to convict the said **SHADRACK S/O SOSPETER @ MKARUKA S/O MAGANGALI** of murder contrary to sections 196 and 197 of the Penal Code.

It is so ordered.

The right to appeal is explained.




A. A. Mbagwa

JUDGE

07/03/2022