

ORIGINAL

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KASULU

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 19 OF 2019

REPUBLIC

VERSUS

YOHANA S/O FILIPO


JUDGMENT

2nd March & 15th March, 2022

L.M. MLACHA, J.

The accused, Yohana Filipo, a Burundian by nationality is charged of murder contrary to section 196 and 197 of the Penal Code, Cap.16 R.E. 2002 (now R.E. 2019). It was alleged that he murdered Scholastica James on 23rd October, 2017 at Rungwe Mpya village, Kasulu district Kigoma region. The information for murder was read over and explained to him in Kiswahili and he pleaded not guilty saying "siyo kweli". A plea of not guilty was entered accordingly. The prosecution called six (6) witnesses and had 2 exhibits; the Report on Postmortem Examination and the Sketch map of the Scene of Crime. The accused was the only defence witness.

It was the evidence of PW2 Shamimu Moshi (28) that the deceased was her friend. She was formerly married to Yohana Filipino, the accused person, but later moved to be married to PW5 Bakweli Lucas, her husband. They lived in the farmlands of Rungwe Mpya village in a place called Mariba. On 23/10/2017 during the evening, she passed at the house of Scholastica, the deceased, with the aim of going to the well to pick water. Both had buckets and moved to the well. They arrived at the well and picked water. They started to move towards home. The deceased was ahead and she was behind. Suddenly she saw the accused coming from behind with a knife and held the deceased on the neck. He stabbed her with the knife on the left side of the neck. She run away saying "Tusaidieni". She returned back and fell to the well. She could not get out as it was deep. She proceeded to raise an alarm while there. Three boys appeared. They pulled her out of the well but being afraid of the issue, could not give any further assistance, they run away. She proceeded to raise an alarm and people came. They moved together to the scene of crime and met Scholastica on the ground. She was already dead. She had three deep cut wounds on the left neck, shoulder and hand.



Giving details, she said that she knew the accused earlier for he was renting a room near their house at the village. He was also the x-husband of her friend Scholastica. She knew him for about 4 years before the date of crime. She described the area as an open area. It was also during the day with sun light. And that she stood for observation for about 2 minutes in a distance of 3 meters. Further that, the accused looked at her after stabbing the deceased on the neck.

PW3, Tumaini Anthony (34) the first wife of PW5, told the court that the accused came at the farmlands on 22/10/2017 and said that he needed to handle the child to Scholastica, the deceased. The accused, the deceased and PW5 had a discussion. They agreed that he should bring the child on the other day. The accused brought the child on 23/10/2017 but the deceased requested to receive the child before her father, PW4 James Fupi. Three of them moved to the village with the child but could not get PW4. They returned to the farmlands but left the accused at the village. PW5 left later to same place leaving the deceased at the home.

PW3 went on to say that while at home, at Mariba, PW2 came and picked the deceased whom they went to the well to bring water. She soon heard an alarm "Tusaidie, Tusaidie". It was Scholastica who was raising the



alarm. She run away also calling "Tusaidie, Tusaidie". She met some people on the way who returned her home. She was soon told that Scholastica had been murdered by the accused. She could not go to the scene of crime that day. PW5 who was away came back and moved to the scene of crime on the same day. He saw her wife dead with cut wounds on the neck, shoulder and hand. PW3 saw her on the next day. She also said that she had cut wounds on the neck, shoulder and hand.

PW4 agreed that the accused happened to live with her daughter Scholastica whom they had a child. They then separated and she moved to be married by PW5. He added that they were on daily conflicts and that he used to threat to kill her. Describing what had happened to his daughter, he said that he got the reports that day but could not go to Mariba because it was night. He moved to the scene of crime on the other day. He saw his daughter on the ground. When the cloth which covered her was opened, he saw the deep cut wounds and fell down. He fell and lost consciousness.

Dr. Mageni Pondamali (53) appeared as PW1. He told the count that he came at the scene of crime on 24/10/2017 in the company of the police. He saw the dead body which was identified to be Scholastica James. She had but wounds on the left side of the neck, shoulder and hand. The



doctor had the opinion that death was caused by lack of oxygen in the brain. He said that the nature of the wounds (deep and big) resulted into loss of blood moving to the brain and caused the death. He filled the Postmortem Examination Report, Exhibit P1.

PW6 x - D6163 DSGT Ladislaus was the investigator. He described the way they received the report and moved with PW1 to the scene of crime. They saw the body of the deceased on the ground covered with a cloth (khanga). They opened the body and saw cut wounds on the neck, shoulder and left hand. They questioned PW2 Shamimu who was the eye witness. She told them that she was stabbed by Yohana Filipo, the accused who was her x-husband. He drew the sketch map of the scene of crime (exhibit P2). They moved to the village to arrest the accused without success. They arrested him after 4 months.

It was the defence of the accused that he came to Tanzania in 2011. His home place is Kitega Burundi. He was brought by PW4, Mzee James to work for him. He worked for him for 2 years. He then married his daughter Scholastica. He bought a plot at Ostabei and built a house. He lived with her up to 2016 when she deserted her. She moved to live with another man at Kasulu. He decided to return to Burundi. He stayed in Burundi up to



February 2018 when he recalled his child, Kakore. he decided to come back. He moved to see Mzee James who told him that his wife was dead. He picked his child and planned to go to Burundi with him. He was then arrested and accused to kill Scholastica something which is not true. He denied to commit the crime.

DW1 proceeded to say that he happened to work for Shamimu at her farm. He cultivated one acre for Tshs. 70,000/= but could not be given the money. Shamimu offered sex in exchange but he was not ready. A grudge developed between him and her which he think is the basis between the current accusations. He asked the court to set him free.

I sat with three (3) assessors. I made a summing up of the evidence and the relevant law to them. I thereafter asked each of them to give his or her independent opinion and tell me if the accused was the one who killed the deceased and if so, whether he had killed her intentionally. And further, whether there was evidence proving the offence of murder beyond reasonable doubts. They all said that there was good evidence beyond reasonable doubts showing that the accused is the one who killed the deceased and that he killed her intentionally. They had a verdict for murder.

Murder is killing with malice aforethought; otherwise known as killing intentionally. There is no murder if the killing was done without intention. The accused is charged of murder of Scolastica James his x-wife. He admits to know the deceased, whom they had a child-Korode. He did not deny the way she was killed. He only said that he was in Burundi in 2017. He was not in Tanzania in the period. He is not the one who killed the deceased because he was out of the country in the period. Prosecution witnesses say that the accused is the one who killed the deceased and they have described the way she was attacked and wounds sustained. She was attacked by a knife on the neck, shoulder and hand. The court will now move to find out if the accused is the one who killed the deceased and if so, whether he killed her intentionally. The court will also have to be satisfied that the accused was properly identified.

I had time to examine the evidence closely. I could also examine all witnesses who appeared before the court closely. The intention to kill or malice aforethought is the subject of section 200 of the penal code Cap 16, R.E. 2019. It provides as under:

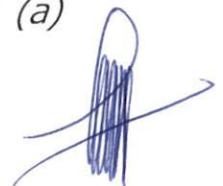


"200 – Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- a) An intention to cause the death of 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) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence."*

In WEISIKO RUCHERE@ MWITA V.REPUBLIC, Criminal Appeal No.348 of 2013, the Court of Appeal had this to say on malice aforethought at Page 12:

"Under section 200 of the penal code malice aforethought is deemed to be established by providing one or more of the stated circumstances. Key among the circumstances are (a)



and (b) thereof i.e. **intention to cause death, e.t.c. and knowledge that the act, etc will cause death...** it is also trite law that malice aforethought may be inferred from other factors like **the weapon used, the part of the body inflicted with injury, etc.** In this case the weapon used was a gun which was, no doubt, a dangerous weapon. According to the postmortem examination report, the bullet was aimed at a vulnerable part of the deceased body. The report is clear that the body had "a penetrative wound at the back and exit at left side of the neck". By any stretch of imagination, this was, no doubt, a very serious injury." (Emphasis added)

In **ELIAS PAUL V.R** Criminal Appeal No. 07 of 2004 the Court of Appeal made a similar emphasis when it said:

"Malice may also be inferred from **the nature of the weapon used and the part or part of the body where the harm is inflicted.** In this case a stone was used and was hit on the head, chest and abdomen which are vulnerable parts of the human body...The conduct of an accused person before or after the killing may also infer malice. ...the appellant left the scene immediately after the killing. If he was all that of an innocent person he would not have left the said scene...he was seen and arrested hiding under a bed in his house. If he was innocent there was no need to hide." (Emphasis added)



The prosecution brought the evidence of PW3 and PW5 which showed that the accused came at Nyamariba farmlands on 23/10/2017 in a mission to bring the child (Korode) to the deceased. They had divorced each other but he had the child. He could not maintain him and sought it important to return the child. Both PW3 and PW5 said that there were discussions which involving the accused, PW5 and the deceased on 22/10/2017 and 23/10/2017. They said that the accused returned on 23/10/2017 with the child. He needed to hand it to the deceased who resisted saying she needed the engagement of her father. They moved to the village but could not get him. The deceased returned to the farmlands.

PW2 came later to pick her to go to the well. They moved to pick water. She was attacked on her way back. PW2 witnessed what happened and described what she saw, an attack of the accused on the neck of her friend using a knife. She sustained three cut wounds on the left side of the neck, shoulder and hand. She saw the accused stabbing her on the neck before she run away seeking for help. PW3, PW4, PW5 and PW6 saw the deceased later. They all said that she had three cut wounds on the left side of the neck, shoulder and hand. PW1 described the three cut wounds as



'deep and big'. He had the opinion that death was caused by the deep cut wounds.

Looking at the nature of the weapon (a knife), the place where it was applied (neck, shoulder and hand), the size of the wound (deep and big), the number of blows (three times) and the force which was applied, there is no doubt that the one who attacked the deceased had intention to kill her. Applying a knife to ones neck with force, cannot have another description other than the intension to kill.

Now who killed the diseased? We have the evidence of PW2 who is an eye witness. She said that it was during the evening in a broad day light. There were no bushes. It was an open area. She was close and could identify the accused properly. I think that PW2 could see and identify the accused properly because it was during the day on a broad day light, she knew him and was at a close range. She could also mention him to people who came at an early stage and later to the police on the other day. PW5, the husband of the deceased who appeared on that very day, was told that it was the accused who killed her. PW3 and PW6 who appeared on the other day were also told that it was the accused who did it. The ability to name the suspect at an early stage add credit to the witness (see **Marwa**



Wangiti Mwita and another v. Republic, (2002) TLR 39 and **Abdalah Rashid Naomkoka v. Republic** CAT Criminal Appeal No.2006 of 2016)

Looking at the evidence of PW2 who witnessed the crime being committed and the evidence of PW3 and PW5 who had a discussion with the accused on 22/10/2017 and 23/10/2017, one can see clearly that there is good evidence both direct and circumstantial showing that the accused is the one who killed the deceased.

PW2, PW3, PW4 and PW5 appeared credible. They did not appear to have any reason to lie against the accused.

The accused said that he was in Burundi from 2016 to 2018 without giving any proof. He could not even produce a bus ticket. He had a duty to prove that he was in Burundi in those days for he who allege must prove. See **The Attorney General and 2 Others v Eligi Edward Masawe and 104 Others**, Civil Appeal No. 86 of 2002, CAT, at Dar es salaam (unreported) at page 7 & 8 which was making reference to section 110 and 111 of the Evidence Act. The court said thus:

"We are fortified in our view by the provisions of Sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E. 2002 which state inter alia:



"110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."

Further, what he said amounts to the defence of *alibi* but he did not give any notice to the prosecution. Failure to give the notice as required by section 194 (4) of the CPA makes the defence baseless (see **Kubezya John v. Republic**, CAT Criminal Appeal No. 488 of 2015). It remains a mere lie as it appears. Again, my assessment of his demeanour could not come up with any credibility. It was very doubtful. I could not believe that he was in Burundi. I think he was just hidden somewhere in the bush from 23/11/2017 when the crime was committed to February 2018 when he was arrested. The defence of the accused that he was in Burundi was therefore an open lie. It did not manage to inject any doubts to the prosecution case. It is baseless and dismissed.

That said, I find that the prosecution has proved their case beyond reasonable doubt. I find the accused guilty of murder contrary to section 196 and 197 of the penal code cap 16 R.E.2019 as charged and convict him accordingly.



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L.M. Mlacha

Judge

15/3/2022

SENTENCE

There is only one sentence for Murder which is Death by Hanging. I personally do not want this sentence but my hands are tied.

I sentence you the said YOHANA FILIPO to suffer death by hanging.



A handwritten signature in blue ink, identical to the one above, consisting of a stylized, elongated shape with vertical strokes, followed by a horizontal line that curves upwards at the end.

L.M. Mlacha

Judge

15/3/2022