

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

**AT BUNDA
CRIMINAL SESSIONS CASE NO. 65 OF 2021**

THE REPUBLIC

VERSUS

- 1. CHACHA MARWA @ NYANDUTA**
- 2. CLIFORD MISANGO**

JUDGMENT

03rd & 10th March, 2022.

A. A. MBAGWA, J.

The accused persons Chacha Marwa @ Nyanduta and Cliford Misango hereinafter to be referred as the 1st and 2nd accused respectively stand charged with murder contrary to sections 196 and 197 of the Penal Code.

It is alleged that the 1st and 2nd accused on 30th day of May, 2020 at Mariwanda village within Bunda District in Mara region murdered Juma Mokera @ Ronzegera.

Upon arraignment, both accused pleaded not guilty to the charge as such the matter went to a full trial. In the efforts to prove the allegations, the Republic called a total of five witnesses namely, PW1 INSPECTOR THEOPHIL MAZUGE, PW2 JULIANA LEONARD CHACHA, PW3 HERI

MANZIMOTO KEKAZURI, PW4 DR JAMES ALLAN and PW5 E4532 D/SGT EDWIN. Besides, the prosecutions produced in evidence three exhibits to wit, the seizure certificate dated 02/06/2020 in respect of a motor cycle No. T917 ATP (exhibit P1), Motor Cycle No. T917 ATP make Toyo, red in colour (exhibit P2) and Postmortem Examination Report in respect of death of Juma Mokera @ Ronzegera dated 31st May, 2020 (exhibit P3).

The accused, on their part, fended themselves. Both of them testified under oath and without calling other witnesses. Chacha Mwita Nyanduta testified as DW1 whereas Clifford Misango testified as DW2. In addition, the defence, during cross examination of PW1, tendered one exhibit namely, the statement of Inspector Theophil (exhibit P1) with the view to impeach his credibility.

At the hearing of this case the Republic appeared through Mr. Frank Nchanila, learned State Attorney on the one part. On the other part, both accused were represented by Mr. Leonard Magwayega, learned counsel.

In brief, the prosecutions account is that on 30th day of May, 2020 around at 20:00hrs at Mariwanda village Chacha Marwa Nyanduta (1st accused person), Juma Mokera (the deceased) and Mashaka Ikongola were

drinking local brew at Juliana's home. Juliana Leonard who testified as PW2 was a concubine of Chacha Marwa Nyanduta (1st accused) and was selling local liquor for living. While drinking, there arose fight between Chacha Marwa Nyanduta, Mashaka Ikongola and the deceased Juma Mokera. According to Juliana Leonard (PW2), Juma Mokera seemed to overpower the duo hence Chacha Marwa Nyanduta picked up a stone and threw it on Juma's head who consequently collapsed. On realizing that Juma Mokera was unconscious, Chacha Marwa Nyanduta briefly left at the premises and came back with Clifford Misango (the 2nd accused) on the motorcycle. Chacha Marwa and Clifford Misango carried the deceased who was laying on the ground and put him on the motorcycle (exhibit P2). Chacha Marwa told Juliana (PW2) that they were taking him to hospital. Later on, the 1st accused came back alone and when Juliana asked him the name of hospital where they took the deceased, he became furious without providing the answer.

On the following day i.e. 31st May, 2020, PW2 heard an alarm to the effect that the deceased's body was found laying at the border of Mariwanda and Kihungu villages alongside the road. PW2 went to the scene of crime where she met other villagers including the village chairman one HERI

MANZIMOTO KEKAZURI (PW3). PW2 confirmed that the dead body was of Juma Mokera (the deceased) who was at her premises in the previous night. PW2 narrated to the crowd what had transpired at her home in previous night.

Thus, PW3 called to Mugeta Police Post to inform them about the incident. Soon thereafter the police officers arrived at the scene of crime in the company of Dr. James Allan (PW4). PW4 conducted a postmortem examination and found that the deceased's death was caused by traumatic brain injury which resulted from a heavy blow by a blunt object. PW4 recorded his findings in the post mortem examination report which he tendered in evidence as (exhibit P3).PW4 expounded that the deceased was found with two wounds on his head which suggest that he was hit by a blunt instrument. He also said that there were bruises at the deceased's left big toe. PW2's evidence was corroborated by PW3 who testified that Juliana Leonard (PW2) narrated the story and mentioned the 1st and 2nd accused at the scene of crime (where the dead body was recovered). Further, PW3 said that neither Chacha Marwa nor Cliford Misango appeared at the scene of crime.

Following the information volunteered by PW2, the efforts to trace and arrest the 1st and 2nd accused were put in motion. As such, on the 1st day of June, PW5 D/SGT Edwin managed to arrest both accused at the 1st accused's home in the hamlet of Kiganza within Mariwanda village.

PW2 further told the court that on the 2nd day of June, 2020, she, in the company of police officers from Bunda, went to Neema Paul where the police recovered and seized the motorcycle (exhibit P2) which the 1st and 2nd accused used to carry the deceased in a pretext that they were taking him to hospital.

During defence, both accused persons denied the allegations. They raised the defence of alibi. 1st accused stated that he did not visit Mariwanda village at Juliana's premises on the fateful day. Although he admitted that Juliana Leonard (PW2) was his concubine since 2015, he stated that their love relation went astray from 2019 hence he stopped going to her. He said that he was a mechanic and had two work places, one at Mariwanda and another at Mugeta. Marwa stated that on the 30th day May, 2020, he spent the whole day at his work place at Mugeta and went to sleep at Mihingo where he had a home. He also denied owning the motorcycle (exhibit P2).

Chacha Marwa said that PW2 concocted the case against him because of their misunderstandings.

2nd accused, on his part, testified that he spent the whole day in the bush burning charcoal. However, during cross examination, he said that he was cutting trees for toilet. Furthermore, Clifford Misango admitted that he was a regular customer of PW2 and that for the last time he saw the 1st accused at PW2's premises, was sometimes in May, 2020.

In his closing submissions, Mr. Leonard Magwayega, learned defence counsel was opined that the prosecutions failed to prove the offence to the required standard. He said that the only eye witness one Juliana Leonard (PW2) did not properly identify the accused. He submitted that the incident allegedly took place at night at around 20:00hrs hence it was not easy for PW2 to identify people who were fighting.

Mr. Magwayega further attacked the prosecutions evidence on the ground that it was full of contradictions as compared to the facts that was read during preliminary hearing. He said that during preliminary hearing it was alleged that the 2nd accused was the one who hit the deceased with the stone but, to his dismay, PW2 testified that it is the 1st accused who threw a stone on the deceased's head.

In addition, the learned defence counsel lamented that the chain of custody in respect of the motorcycle (exhibit P2) was broken. He said that PW1 did not explain how he handled exhibit P2 from Mugeta Police Post to Bunda Police Post and finally to court. Mr. Magwayega submitted that no any document was brought in court to prove the chain of custody. To bolster his argument, Mr. Magwayega referred the court to the case of **Oscar Nzelani vs. the Republic**, Criminal Appeal No. 48 of 2013, CAT at Mbeya

On the above account, the learned defence counsel concluded that the case was not proved against his clients beyond reasonable doubt. He thus prayed the court to find them not guilty and consequently acquit them.

In the alternative, with regard to the 2nd accused, the learned defence counsel submitted that it was the prosecution evidence (PW2) that Clifford Misango, 2nd accused came at the scene after the incident had occurred. He said his only role was to assist the 1st accused to carry the deceased. As such, the 2nd accused cannot be held responsible, he opined. Mr. Magwayega, continued to submit that even if the prosecution evidence is found to be sufficient and reliable, still the 1st accused is guilty of manslaughter because the prosecution evidence is to the effect that the cause of death resulted from fight.

In contrast, Mr. Frank Nchanila, learned State Attorney was of different views. He strongly submitted that their prosecution proved the case beyond reasonable doubt hence both accused were guilty of murder. Nchanila said that PW2 properly identified the accused for there was enough light and more so, she was familiar to both accused. Further, the learned State Attorney argued that PW2 mentioned the accused at the earliest stage on 31st day of May, 2020 when she went at the scene where the dead body was found and for that reason she was entitled to credence. To support his argument, he referred this court to the case of **Chacha Jeremiah Murimi & 3 others vs. the Republic**, Criminal Appeal No. 551 of 2015, CAT at Mwanza, page 18 and **Jaribu Abdallah vs. the Republic**, 2003 [TLR] 271

Nchanila further submitted that the prosecution evidence is very clear that the accused persons were the last persons to be seen with the deceased. He reasoned that the accused killed the deceased after they had taken him from Juliana's premises. Nchanila argued that the evidence suggests that the deceased was still alive at the time when he was taken from Juliana's home but the accused took him to the place best known to themselves and killed him before they abandoned him at the border of Mariwanda and Kihungu village. He invited the court to the case of **Herman Faida vs. the**

Republic, Criminal Appeal No. 479 of 2019, CAT at Bukoba page 21 where the last person to be seen with the deceased was held responsible for his death.

With regard to the contradictions between the testimony and facts for preliminary hearing, Mr. Nchanila replied that it was a human error on the part of the State Attorney who prepared the facts. He said that the anomaly cannot be held to be contradictions because facts for preliminary hearing are not testimony. He was opined that contradictions arise either in the testimony of the same witness or of different witnesses.

Besides, Mr. Nchanila invited the court not to consider the defence of alibi purportedly raised by the accused. He submitted that the accused did not give a notice as per requirement of law. He further challenged the defence of alibi on the ground that the accused failed to establish it as they did not call any witness to support their defence.

The learned State Attorney continually submitted that the prosecutions established malice aforethought. He said that the accused used a dangerous weapon (a stone) to hit the deceased on the sensitive part, the head. In addition, he told the court that the accused did not appear when

the alarm was raised. He was thus of the views that all these conducts lead to no other inference than malice aforethought on the part of the accused. On this, the learned State Attorney relied on the case of **Semburi Musa vs. the Republic**, Criminal Appeal No. 236 of 2020, CAT at Kigoma, page 15 and 16. The learned State Attorney finally beseeched the court to find both accused guilty of murder.

Upon summing up of the case, all the three assessors returned the verdict of guilty of murder in respect of the 1st accused Chacha Marwa Nyanduta whereas they found Clifford Misango, 2nd accused not guilty.

I have keenly gone through the evidence adduced and accorded the deserving attention to the submissions made by both counsels. There are about four issues that call for deliberation of this court;

- i) whether there was a death of a person
- ii) whether the death was unnatural
- iii) whether the said death was caused by the accused
- iv) whether the accused caused death with malice aforethought

To begin with the first and second issues, it is undisputed throughout the prosecution and defence evidence that the deceased Juma Mokerera died

unnatural death. This was clearly established through PW4 DR JAMES ALLAN and postmortem examination report (exhibit P3). The fact was corroborated by PW2, PW3 and PW5. Further, DW1 and DW2 confirmed the prosecution evidence on this aspect during defence.

As to whether the accused caused the death of Juma Mokera, the only direct evidence is that of PW2 Juliana Leonard, the concubine of the 1st accused. PW2 was very clear in her evidence that she saw the 1st accused hitting the deceased on his head with a stone. Further, PW2 clearly stated that there was fight between the 1st accused, Mashaka Ikongola and the deceased and that the 1st accused picked a stone and threw it at the deceased in the course of fight. Moreover, PW2 said that the 1st accused hit the deceased with a stone after he and Mashaka Ikongola were almost defeated by the deceased. Juliana went on to state that the deceased fell down unconsciously and later on the 1st and 2nd accused put the deceased on a motorcycle and left with him in a pretext that they were taking him to hospital. PW2 believed that Juma Mokera was taken to hospital until the following day i.e. 31st day of April, 2020 when she learnt that Juma Mokera was dead and abandoned at the border of Mariwanda and Kihungu villages. The evidence of PW2 was in consonance with the medical findings

of PW4 who testified that the cause of death was traumatic brain injury which resulted from a heavy blow by a blunt object.

The accused raised a defence of alibi. The 1st accused told the court that PW2 lied to the court as she framed up a case because of their marital misunderstanding. DW1 said that he parted way with PW2 hence he stopped going to PW2's home since 2019. However, his evidence was controverted by DW2 who testified that he last saw him at PW2's home in May 2020.

Although the accused raised defence of alibi without giving a prior notice in total contravention of section 194(4) of the Criminal Procedure Act, this court found it prudent to consider their defence. It should be noted that though the accused did not give a notice of *alibi*, the Court is not prevented from considering it. See the cases of **Charles Samson Vs. Republic [1990] TLR 39** and **Siza Patrice Vs. the Republic**, Criminal Appeal No. 19 of 2020, CAT at Mwanza. Nonetheless, after assessing their defence of *alibi vis a vis* the prosecution evidence in particular of PW2, I find myself declined to accept it. Indeed, PW2 was consistent in her testimony and there is nothing in the evidence to doubt her credibility.

I therefore find that it is the 1st accused Chacha Marwa Nyanduta who caused the death of Juma Mokera by hitting him with a stone in the course of fight.

Mr. Nchanila argued that it is possible that the deceased was still alive at the time when he was taken by the accused from Juliana's premises. He was opined that the accused killed him after they had taken him from Juliana's premises that is why the deceased was found with two wounds on his head. With due respect to the learned State Attorney, his contention is based on suspicion. There is no single evidence to that effect. Admittedly, throughout the prosecution evidence, there is no scintilla of evidence which establishes malice aforethought beyond reasonable doubt.

It is a trite law that where the death results from fight the offence committed is manslaughter. See the case of **Aloyce Kitosi Vs. Republic**, Criminal Appeal No. 284 of 2009, CAT at Iringa. I therefore part company with lady and gentlemen assessors and hold that, in terms of section 300 (1) and (2) of the Criminal Procedure Act, the 1st accused Chacha Marwa Nyanduta is guilty of manslaughter. Consequently, I convict Chacha Marwa Nyanduta of manslaughter contrary to sections 195 and 198 of the Penal Code.

With regard to the 2nd accused Cliford Misango, the evidence on record only points him after the incident. He was not among the persons who were drinking at Juliana's home nor was he present during fight. He came to render assistance to 1st accused to remove the deceased from Juliana's premises. Cliford Misango is therefore an accessory after the fact in terms section 317 (1) of the Penal Code. It is a settled law that a person charged with principal offence cannot be convicted of being accessory to that offence unless he was specifically charged for being accessory after the fact. Similarly, a person charged with murder cannot be convicted of being accessory after the fact instead, for it is neither cognate nor minor to murder. See the cases of **Mrisho vs. The Republic**, HCD 1972/42 and **Republic vs Mariam d/o Mihambo**, HCD 1967/72. In that regard, I find the 2nd accused Cliford Misango not guilty of murder and consequently acquit him.

It is so ordered.

The right of appeal is expressed.




A. A. Mbagwa

JUDGE

10/03/2022