

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB REGISTRY OF KIGOMA**

AT KIGOMA

ORIGINAL JURISIDCTION

CRIMINAL SESSIONS CASE NO. 21 OF 2022

REPUBLIC

VERSUS

SAIDI S/O JUMA@SHABANI

Date of Last Order: 17/02/2023

Date of Judgement: 10/03/2023

JUDGEMENT

MAGOIGA, J.

The accused person, **SAIDI S/O JUMA @ SHABANI** stand charged with murder of **AHMAD SALUM LUVOMA** contrary to sections 196 and 197 of the Penal Code [Cap 16 R.E. 2019]. This court was told that on 2nd day of December, 2021 at Nyabighufa village within the district and region of Kigoma, the accused murdered AHMAD SALUM LOVUMA. The accused pleaded not guilty to the charge of murder.

Facts parting to this homicide are simple to comprehend that; on 2nd day of December 2021, the accused person while at home took some sardine (dagaa) prepared for dinner and went into his room and took his dinner. This sparked exchange of words with his mother and later with his step father ending into the alleged killing using a sharp machete (panga) against his step father. The deceased's body upon being examined by the



medical doctor was found with several cut wounds on his body some of which caused severe traumatic brain injury leading to his death. While under treatment at Maweni Regional and Referral hospital, unfortunately, the deceased died on 5th day of December, 2021.

On 03/12/2021 the accused was arrested and upon interrogated confessed in his cautioned statement that he was the one who inflicted the wounds to the deceased person. Consequently, the accused was charged of murder, hence, this judgement after hearing both parties relating to commission of this offence.

During trial, the Republic was represented by Ms. Antia Julius and Ms. Happiness Mayunga learned State Attorneys, while the accused person was represented by Mr. Michael Mwangati, learned advocate.

Full trial was held whereby the Republic called a total of 6 witnesses and tendered 1 physical exhibit (panga) and 1 documentary exhibit. The accused person fended himself and had no exhibit to tender. The substance of both sides testimony in relation to murder was follows:-

PW1- H.4671D/CPL JUMA is a police officer and investigator of this case told the court that, he was involved in the interrogation of the accused person under caution who confessed to have killed the deceased and identified the accused person in dock. The reason for the killing was, according to PW1, the threats by the deceased that in case of death of

the mother of the accused person, the deceased could take all properties belonging to their mother, including the house they are living in. However, it should be noted that the cautioned statement was not tendered in evidence as exhibit for reasons known to the prosecutions.

PW1 went on telling the court that he witnessed the body of the deceased being examined by the medical doctor and witnessed the wounds inflicted. PW1 tendered Post Mortem Report as exhibit P1 and the court duly complied with section 291(3) of the CPA.

Under cross examination by Mr. Mwangati, PW1 told the court that when he recorded the accused person's cautioned statement, the accused told him that he had misunderstanding (ugomvi kutokana na kauli za babake wa kambo kuwa mama yao akifa mali zote zitakuwa zake) which caused a serious conflict and a fight between the accused and the deceased started leading to the death of the deceased. PW1 went on telling the court under cross examination that, on the fateful day, the fight started over a radio, sardine and went on to other former issues between the accused and the deceased relating to inheritance of the properties.

Nothing was re-examined to PW1.

PW2-AMINA SONGORO- Under affirmation introduced herself as the biological mother of the accused person and told the court that, on 2nd day of December, 2021 while at home with the deceased at around 7 pm

the accused person came back home and was with the panga and took some sardines prepared for dinner and went into his room to eat. Few minutes later, the accused came for the second round for the sardines and took all and she intervened and together with the deceased. According to PW2, the accused started attacking the deceased using the panga and managed to inflict several wounds on his body until the deceased was unable to stand. In the fracas, PW2 managed to run away and called people for help. PW2 went on telling the court that before the day of incidence, the relationship between the accused person and the deceased was good. PW2 identified the panga (exhibit P2) the accused used to inflict the wounds because she was the one who bought it.

Under cross examination by Mr. Mwangati, PW2 told the court that she was not legally married to the deceased but was let us stay marriage. PW2 pressed with questions admitted that the house she stays was constructed with joint efforts of his sons, (accused inclusive) and the deceased. PW2 insisted the relationship between his children and the deceased was good. PW2 went on telling the court that Juakali was not at home when the fight started and no quarrel over the radio was there on that day but it started with sardine (dagaa).



Under re-examination by learned State Attorney, PW2 told the court that he saw the panga on that day as she did not know where it was kept before.

Asked by the Court to clarify the source of all the fracas, PW2 told the court that she doesn't know the source of all the problem in her family.

PW3- MAGDALENA LEONARD KAGEGE-Under oath introduced herself as the Village Executive Officer of Nyabighufa since 2015. PW3's testimony in this court was almost hearsay because her testimony was what was told by militia and the village chairman. According to PW3, on 5th day of December, Yasmin (PW4) brought in her office a panga allegedly used by the accused person to inflict the wounds and later she handed it over to police and managed to identify exhibit P2.

Under cross examination by Mr. Mwangati, PW3 told the court that as VEO and justice of peace of the village she reported the incidence to police.

PW4- YASMINI KASSIM- under oath told the court that she was not present when the incidence occurred and but when she got the sad news and arrived home, she found the deceased seriously wounded and one of the neighbour by the name of Abubakari instructed her to take the panga and keep it and the next day she took it to the VEO.

Under cross examination by Mr. Mwangati, PW4 repeated exactly what she testified in chief of what she did in regard to this sad incidence.



PW5-G3685 CPL DENIS- under oath told the court that he is the exhibit manager of Central Police Kigoma and that on 05/12/2021, PW1 handed over a panga which was involved in the killing at Nyabighufa village. PW5 went on telling the court that he gave it a reference number as KIG/IR/2864/2021 and kept it and was able to identify it.

Under cross examination by Mr. Mwangati, PW5 told the court that his duties are to keep all exhibits after recording them to the register.

PW6- BONIFACE HAMAD SALUM MVUMA- under oath told the court that upon being told of the incidence, he went and verified the truth and was involved into taking the deceased to hospital. According to PW6, the deceased had 9 cut wounds; 5 in the back, 2 in the face and 2 in the head making a total of 9 wounds. PW6 told the court that the deceased died on 05/12/2021 and later after informing all relevant authorities was buried.

Under cross examination by Mr. Mwangati, PW6 admitted that he was not present when all happened but was the one who reported to police.

This was all about prosecutions' case and was dully marked closed.

This Court guided by the provisions of section 293(2) of the Criminal Procedure Act, [Cap 20 R.E.2022] found that the evidence on record suffices to call the accused person to enter his defence.



DW1- SAID S/O JUMA @ SHABANI under oath told the Court that on the material day and date of 02/12/2021 in the morning he went for harvesting palm oil tree (**migazi**) with Jualako (his younger brother who was not called to testify). DW1 told the court that, with them, they went with the radio for listening the music. According to DW1, the harvest was huge and that on the way back home passed through a club and drunk local brew- 'gongo'. DW1 went on telling the court that, he arrived home at 8 pm hungry and took some sardines to eat in his room. Further, DW1 testified that while eating, he heard the deceased complaining about the sardine he took to quench his hunger. It was the testimony of DW1 that while eating he heard a quarrel between the deceased and Jualako over the radio they went with in the harvest. DW1 told the court that by then he had finished eating and intervened by asking the deceased why quarrel for radio which belong to his mother and what about the other properties if their mother is not there? DW1 went on telling the court that, the deceased has been treating them with contempt and has repeatedly said that in the absence of their mother will throw them out with nothing to inherit. It was a further testimony of DW1 that, the deceased got angry and followed the accused person armed with the panga but he was quick to snatch the panga from him and started attacking him. In the course, DW1 told the court that he sustained injury on his head which was inflicted

by the deceased. DW1 insisted that, at that moment Jualako and his mother were present. DW1 told the court that the source of the fracas was use of radio, sardine and the inheritance of the house which was begotten on their joint efforts with his brother, mother and himself. DW1 admitted to have inflicted the cut wounds on the deceased as charged. According to DW1, on that night he went to sleep in the nearby unfinished house and was too drunk to remember exactly what transpired next. DW1 denied killing the deceased with malice aforethought but admitted killing the deceased out of misunderstanding on the radio, sardine, influence of alcohol and inheritance of properties after the death of his mother.

Under cross examination by Ms. Julius, DW1 insisted that they had a quarrel on the radio, sardine and house which they were living. DW1 pressed with questions told the court that he was too drunk to remember exactly what happened on that day but admitted to have killed the deceased with no malice.

Further cross examination by Ms. Masunga, DW1 told the court that formerly were peacefully living but later on had conflicts with his mother because of the deceased. DW1 insisted, he had no intention to kill him.

Nothing was re-examined to DW1.

This marked the end defence case and was dully marked closed.



In this case, the learned counsel for parties made oral final rivaling closing submissions on one aspect of malice aforethought because no dispute that it was the accused person who inflicted the wounds which were the cause of death of the deceased in this criminal case.

In the circumstances, therefore, the noble task of this court now is to determine one issue, i.e whether the prosecution has discharged their legal burden of proof which is always beyond reasonable doubt that, the killing of the deceased was actuated with malice aforethought.

However, before going into that noble and difficult task, having heard the rivaling stories of both sides in this case, I have noted some facts not in dispute between parties. These are; **one**, it is not in dispute that AHMED SALUM LUVOMA died on the day of 15/12/2021 and did not die a natural death but due to severe traumatic brain injury resulting from fatal wounds inflicted on his head by the accused person. **Two**, it is not disputed that the accused person in this case was the one who inflicted the wounds and was arrested, investigations mounted and was consequently charged with the murder of the deceased.

But what is in serious dispute between rivaling parties', in my own opinion, is one issue whether the accused person inflicted the injuries with malice aforethought.



The phrase "**Malice aforethought**" is defined under the provisions of section 200 of the Penal Code, [Cap 16 R.E. 2002] to mean and may inferred from a number of acts or omissions. For easy of reference, the said section provides as follows:-

Section 200. Malice aforethought shall be deemed to be established by evidence proving any if 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 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 it may not be caused;

(c) an intention to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by an act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit criminal offence.

Going by the literal wording of the above provisions of the law, in my own respective opinion, the four categories of malice aforethought have to be established by evidence on record without which, no safe convict can stand for murder.



I am equally aware of long celebrated holdings by the Court of Appeal of Tanzania, in a number of decisions, that in circumstances where a death results from a fight, the accused person should be found guilty of lesser offence of manslaughter and not murder. See, **NICODEM DAUDI vs. THE REPUBLIC, CRIMINAL APPEAL NO.528 OF 2015, CAT (ARUSHA) (UNREPORTED), BAKARI HASSAN vs. THE REPUBLIC, CRIMINAL APPEAL NO. 8 OF 2012, CAT (TANGA) (UNREPORTED), BAHATI NDUNGURU @ MOSES vs. THE REPUBLIC, CRIMINAL APPEAL NO.361 OF 2018 CAT (IRINGA) (UNREPORTED)** among the long list of the position/decisions.

Back to the instant criminal suit, in his final submissions, Mr. Mwangati focused, submitted that the death of the deceased was not caused with malice aforethought but was due to fight due to sardine eaten by accused person, radio, drunkardness, and inheritance of properties. Mr. Mwangati argued that much as the prosecutions have failed to prove any malice aforethought and there is evidence that there was exchange of words due to sardine eaten by the accused which developed into fight and consequently attack, then, no malice aforethought was established in this case. According to Mr. Mwangati, much as there is evidence that all was caused due to eating sardine there could be no murder but manslaughter instead. It was his submissions further that, the accused elaborately



explained the source of the problem which caused death which state of affairs shows there was no malice aforethought and in strong words urged this court to find the accused of a lesser offence of manslaughter and convict and sentence him accordingly.

On the hand of the Republic, in their final submissions, the learned State Attorneys strongly submitted that, they managed to establish malice aforethought because of the weapon used (**panga exhibit P2 was lethal weapon**), the parts inflicted (in the head and face 4 times and in the back 5 times) the number of injuries (were 9 in number) of which according to **exhibit P1** all too much force was used while the victim was defenseless. According to the learned Attorneys, the conduct of the accused person went hiding, there was no quarrel between the accused and a mere complaint for eating sardine was not enough to cause quarrel and attack as reported in exhibit P1. In the totality of the above reasons, in strong terms, the learned Attorneys urged this court to find the accused person murdered the deceased with malice aforethought.

In the alternative and without prejudice to the above, the learned Attorneys urged this Court that in case I agree with the defense that malice aforethought was not proved, but given the kind of weapon used and parts of the body inflicted and force, this court be pleased to sentence



the accused with the highest punishment provided in the law of life imprisonment.

Having carefully considered the evidence on record by both parties, the relevant law, case law as demonstrated above and the final closing submissions, I am inclined to agree with the Republic side that malice aforethought was proved in this case. I will explain. **One**, malice aforethought can be proved in a number of ways and the Court of Appeal in the case of **BUJIGWA JOHN @JUMA KIJIKO vs. REPUBLIC, CRIMINAL APPEAL NO 427 OF 2018 CAT (BUKOBA) (UNREPORTED)** quoting the case of **ENOCK KIPELA vs. REPUBLIC, CRIMINAL APPEAL No.150 OF 1994 CAT (UNREPORTED)** had this to say in regard to how malice aforethought can be inferred in murder cases:-

"usually an attacker will not declare his intention to cause death or grievous harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of 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 blow or blows 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 utterance, if any, made before, during or after the



killing; and the conduct of the attacker before or after the killing.”

In this case, therefore, no dispute that, the accused person used machete (panga) which is by itself lethal weapon exhibit P2 (panga), the force used was amply demonstrated in exhibit P1 by showing almost all wounds were forcefully inflicted measuring averagely 11 inches, the parts of the body blows were directed are head which extends through the skull to the brain, the number of blows in total were 9 (four in the head and face and 5 in the back) and kind of injuries were aggravating and the utterance of the accused that the deceased has been telling them that he will disinherit them in case their mother dies and the conduct of the accused after the killing all in their totality, no doubt, shows and proved that, the accused person intended to cause death or bodily grievous harm.

I have carefully considered the defence of the accused that, there was a fight between Jualako and the deceased over a radio and DW1 intervened. However, in this suit, PW2 eye witness testified that Jualako was not present at home on the material time of the commission of the offence. I am aware and live of the position of the case law as shown above that when a death occurs as result of a fight, the accused should be found guilty of manslaughter and not murder, but with respect to the accused person and the position of the law, each case must be decided on its



peculiar facts and circumstances. In my respective opinion, therefore, a whether it can be murder or manslaughter will depend on the facts on the ground. The mere fact that, there was fight should not always be interpreted to manslaughter for a person can develop a motive to kill in the course of fight. The facts as such must be examined closely. In this case, no doubt the accused initiated the attack not because of the sardine and radio but over the inheritance of the house they were living. The accused person repeatedly testified that; I beg to quote him:

"Mzee Ahmed has always been treating us with contempt and has repeatedly said that in the absence of our mother we will have nothing to inherit from the properties even that are begotten of our sweat."

This shows that the issue inside the heart of the accused person was not sardine or radio but inheritance. The sardine or radio cannot in this case justify the use of machete and the several cuts. At times, a fight has to be looked into the number of factors as demonstrated above in the case of **BUJIGWA JOHN @JUMA KIJIKO vs. REPUBLIC (supra)**. I find that the accused person in this case had accumulated malice vindicated in its execution and utterances that the problem was inheritance than a fight over sardine and radio. The defence of fight raised in this case sounds good theoretically but it has been eroded by the conduct of the



accused person which shows that he had a hidden motive which is exhibited by the use of panga and the several cuts. The manner in which the killing was done shows nothing but a full malice aforethought. Otherwise, there was no need of applying the panga 4 times in the head. He could simply take it and walk away.

While in this case it was unfortunate that, Jualako was not called by both sides but even if there was such a fight the intervention on the inheritance of the house was not among the issue that was at stake on that night.

Also, the defence that, he was drunk and that it was the fight over radio and sardine that ignited all these but have failed to raise any reasonable doubts to the prosecution case in view of what happened. It appears that he knew fully what he was doing right from the beginning and used the chance to execute it.

Equally to note, I have considered the defence of self defence that it was the deceased who started the fight by inflicting the wound, but that defence, in my considered opinion, was an afterthought on the part of the accused person because nothing was put forward to suggest that he was actually injured in the fracas as well and went for medical treatment. The testimony of PW2, her biological mother whom, I have no reason to doubt was cogent that the accused person after eating sardine and when asked abruptly started the attack and mercilessly inflicted so many injuries which



caused death. This piece of evidence was not challenged and was admitted by the accused person.

Not only that, but I have equally considered the defence of intoxication by reason of alcohol as raised by the accused person that he was drunk but with due respect to the accused person, the accused person despite alleging drinking alcohol but his conduct before and after do not suggest that he did not understand what was happening. He himself told this court that personally had misunderstanding with the deceased over the house they were living and it was one of the reasons he got angry and mercilessly inflicted the wounds in order to eradicate the threats over the properties. To accept his defence in the circumstances of this case will amount to condone someone who willfully go to drink and when he kills, raise it to exonerate from liability. This, in my respective opinion, is not what was intended by the drafters of the provisions of section 14 of the Penal Code, [Cap 16 R.E.2022]. In the circumstances of this suit and the evidence on record, no plausible evidence in relation to drunkardness can afford the accused person the defence of intoxication.

More so, the accused raised a defence of property that he asked the deceased why he has been saying that he will take all properties of his mother, once she dies. While I agree and I am aware that under the provisions of sections 18 and 18A of the Penal Code, a defence of person



or property is a defence in criminal charges but considering the evidence on record, nothing apart from the words from the accused person which suggests that, on the material date and time there were actual threats of taking of the property, hence, justifying the accused person to defend the house as he alleges was to be taken. The threats, if any, in my opinion, were too remote and the apprehension by the deceased was not enough to warrant what he did. This defence of the accused person, in my opinion, was against what is envisaged in that provisions and are equally rejected. For the above reasons, therefore, I am satisfied that the prosecutions have dutifully discharged their burden beyond reasonable doubt that, it was the accused with malice aforethought given the kind of weapon used and the parts of the body targeted, among others, murdered the deceased with malice aforethought.

Consequently, I find the accused person guilty of the offence of murder as charged contrary to section 196 and 197 of the Penal Code and convict him accordingly.

Order accordingly.

Dated at Kigoma this 10th day of March, 2023.




S. M. MAGOIGA
JUDGE
10/03/2023