

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**CRIMINAL SESSIONS CASE NO 84 OF 2022**

**REPUBLIC**

***VERSUS***

**FREDERICK S/O MICHAEL JOHN @ BASHITE**

**JUDGMENT**

16<sup>th</sup> February & 13<sup>th</sup> March 2023

**F. H. Mahimbali, J.:**

There is an old Swahili saying which can be translated this way: **"If you marvel at Moses, you will see that of the Pharaoh"** (*Ukiyastaajabu ya Musa, utayaona ya Filauni*), fits well the episode of this murder incidence in which a lover who hosted her boyfriend for about a week, in turn revenged by brutally killing her and her innocent sibling. The two deceased persons then are: **DORICE SAMSON OKECH** and **NICKSON CHARLES SENDAMA**. The question this Court is invited to respond is whether a person who made himself a love captive to a lady, upon killing her, steals some commodities there from, can be said to have killed with malice aforethought. This murder incidence though again is

associated with love affairs, is different from that of a side chick (mchepuko) dying in a course of sexual intercourse and on valentine day, which this Court ruled that, "*making love to a person you love is not dangerous to threaten life of human being*". The death resulting from it was neither homicide nor manslaughter (see **R.V. Mashimba Siling**, Criminal Sessions case no 33 of 2022, High Court Musoma).

In the current case, it concerns lovers (but not spouses) whose love then turned into soar and inexplicably led to the death of the female spouse and her innocent sibling. The incidence can remotely concede with the youth heating song of a Tanzanian singer and song writer known as Ali Kiba @ King Kiba with his current heating song recorded: "*Mahaba*". In its one verse reads:

*Siku hizi hakuna mahaba, yeah mahaba ...*

*Ni neema ukiwa unahema....*

*Nafsi yangu inasema, Bora nimpende tu alionizaa...*

The facts behind this murder case can be put this way. The accused person Frederick Michael John @ Bashite a young person of 19 years old (at the time of commission of the offence) had a sexual affair with the first deceased one Dorice Samson Okech.

A week before the incidence, he visited his love partner (Dorice Samson Okech) at Bunda from Mwanza and made himself a love captive there for a period of one week. Having lavished his sexual desire, on the 25<sup>th</sup> day of September, 2020 he killed both: his sexual partner (Dorice) and the young boy of 5 years old (Nickson Charles Sendama – sibling to Dorice). He then stole therefrom one TV flat screen (Exhibit PE5) and cell phone believed belonging to Dorice (Exhibit PE7) and disappeared to unknown.

The accused person pleaded not guilty to the charge but admitting killing the deceased but without malice i.e admitting to a lesser offence of manslaughter. In efforts of establishing the murder charge, the prosecution summoned a total of eight witnesses and tendered a total of nine exhibits.

Upon his return from school on 25<sup>th</sup> September 2020, PW2 (a boy of 7yrs by then – Junior Musa) testified that he could not see his siblings at home (the two deceased) he had left them at home together with the accused person and that the door was locked. Thinking that they were nearby, he kept on waiting but in vain. He eventually decided to go to his grandmother where he reported the locking of the door and the absence of

his siblings. Efforts to trace the missing siblings commenced until 27<sup>th</sup> day September 2020 when the door was broken and the two siblings were found dead. The report of it was made at Police Bunda where investigation commenced in which Pw2 – Junior Musa mentioned about the presence of this accused person at their home for about a week. Some police informers also reported about the presence of the said young person in that house and his immediate missing after the said incident. Further investigation led to the arrest of the accused person at Mwanza who then led police to persons he had sold the said Tv flat screen and cell phone (PE1 and PE2 exhibits) as recovered from PW5 and PW6. The said TV was well identified by PW8 the mother of the two deceased persons and issued the corresponding purchase receipts (PE9 Exhibit).

After the arrest of the accused person by PW1, the accused person admitted knowing the both deceased persons and finally alleged that he had been in a fight/quarrel with the deceased (Dorice Samson Okech) on a claim of refund of his bus fare money he had given her. As he wanted to go back home (after the captive), the deceased kept on insisting that they should go together. So, the quarrel had commenced after he had found that he had been made captive for a long time, locked in. He says it is the

quarrel that led to the death of the two deceased persons. However, how he killed the deceased persons, the accused person upon his arrest and interrogation he is recorded to have said the following as recorded in exhibit PE8:

*"... Alivyokatalia hizo hela, **nikamkamata, nikaanza kumkaba shingo kwa kumniga.** Wakati ninaendelea **kumniga huku anajitahidi kujinasua** hatimae tulianguka chini. **Niliendelea kumniga huku ninatikisa kichwa** wakati ameanguka chini alishika mikono yake miwili huku **ananiomba msamaha kwa ishara bila kusema huku anaishiwa nguvu.** Alikua hawezi kuongea anakoroma tu.....ndipo nikagundua amevunjika shingo wakati huo anaendelea kukoroma...Nickson alipotoka chumbani kumfuata dada yake huku analia, **nilimshika nikamnyonga shingoni kwa mkono wangu mmoja.** Nickson alianguka chini baada ya kumsukuma akapiga kichwa chini kwenye sakafu. **Nilimniga Nickson shingoni kwa nguvu akakosa pumzi.** Alivyoanguka chini Nicky hakuongea kitu wala kulia hatimae Nickson akafriki dunia.... Baada ya Doris kufariki dunia nilichukua simu yake aina ya Itel ya button rangi ya kijivu. Nikachukua pia TV aina ya HISENSE Pamoja na remote yake ya TV. Baada ya Doris na Nickson kufariki dunia niliwaficha chini ya Sofa (Kochi) kila mmoja kwenye sofa lake.... Baada ya kuchukua vitu hivyo nilifunga mlango kwa nje nikachukua kufuli la chooni na kufunga. Pale nilitoka*

*saa 11.30 hrs, nikaenda stendi. Nilivyofika stendi nilitoa line ya Doris kwenye simu nikaivunja. Nilivyoivunja hiyo line, nilipanda basi la Batco nikaenda Mwanza.....Tarehe 26/09/2020 niliuza TV kwa Gavana Michael mkazi wa Shibula kwa thamani ya Tsh. 200,000/=. Siku hiyohiyo nilimuuzia OMARY SAID KWIZOMBE simu ya DORIS kwa thamani ya Tsh. 15,000/=.....kwa upande wangu, mimi ninakiri kukubali kwamba mimi ndiye niliyowaua DORIS Pamoja na mdogo wake NICKSON. Nilifanya hivyo kutokana na hasira na wivu wa mapenzi niliyokuwa nayo kwa DORIS. Nickson nilimua kwakua nilijua atakua shahidi muhimu.....”*

According to PW3, the doctor who examined the corpse of Dorice established that the cause of death was due suffocation following heart and lungs failure of functioning due to neck strangulation (Exhibit PE1). He had established so, following the stature of the corpse itself. The neck had been broken as it was able of going around 180° (degree) as opposed to the normal human being's neck rotating only at 45° (degree) whether dead or alive. Exceeding that degree limit, means there is breaking, opined PW3. He demonstrated that for a human being neck to be broken there must be applied excessive force against it as the neck of a human being is interconnected with vertebral column which normally is not easily broken.

With PW4, the doctor who examined the corpse of NICKSON through exhibit PE2, established that the cause of his death was due to severe traumatic brain injury following the depressed fracture with multiple fragmented skull bones.

The testimony of PW5 and PW6 concern how they purchased the stolen items (one TV flat screen and cell phone- itel make) from the accused person (while at Mwanza) in which the recovered TV was identified by the mother of Dorice (PW8) and the same were admitted as exhibits PE5 and PE6. The said TV was the one missing at Dorice's home as per PW8's evidence and its purchase receipt (PE9 exhibit) tallied with the features in the said TV screen (exhibit PE5).

PW7 testified how he saw the accused on 26/9/2020 selling cell phone at a price of 15,000/=. He connected him with PW6 who purchased it. That surprisingly on 30/9/2020, he saw the accused person being under police custody on allegation of stealing amongst others the said cell phone in which he sold it recently to PW6.

PW8 who is the mother of the two deceased persons while in deep sorrow pain, testified how she got the shocking pain news of the missing of

her two children (Dorice and Nickson). By that time, she was at Mpanda. She had to travel up to Bunda only to find them dead. While puzzled, she just established that the TV screen also missing in the said house. She reported of its missing at police. She then tendered its purchase receipt (exhibit PE9) which then tallied with the features in the said TV.

In his defense testimony, the accused person maintained killing the two deceased persons but this time changing tune, that after being made a captive by his lover Dorice, he could not access the key for letting him out. Thus, the quarrel between them commenced and in the course, the duo fell over Nickson and possibly the cause of his death.

In a clear digest to the evidence of the case, it is undisputed that the two persons: Dorice and Nickson are dead and that they died of unnatural cause and that the killer is the accused person. The dispute appears to be whether the killing was pre-mediated, thus with malice aforethought or not. The prosecution's evidence is merely centered on the confession of the accused person which in law is the best evidence explaining the guilt of the accused person (See **Mohamed Haruna Mtupeni and Another v. Republic**, Criminal Appeal No. 259 of 2007, **Jacob Asegelile Kakune vs**



**DPP**, Criminal Appeal No 178 of 2017, CAT at Mbeya, **Ibrahimu Ibrahimu Dawa v. Republic**, Criminal Appeal No. 260 of 2016 (unreported) if voluntarily made. Nevertheless, the legal stand has always been one that in establishing the guilt of the accused person, is the Republic's first and foremost duty. The burden has never shifted to an accused person. Therefore, the accused person's story (defense testimony) as it is in this case, need not be true, but only suffices if it reasonably raises legal doubt. This is the essence of **section 3(2)a, and section 110 of the Tanzania Evidence Act**, Cap 6 R.E 2022 (See also the case **Magendo Paul and Another Vs The Republic** [1993] T.L.R 219 (CAT), it was held inter alia that;

*"..for a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed"*

As the accused person's latter story appears to be an afterthought from the former, this court can hardly rely on this second thought. It is merely a lie which in law, corroborates prosecution case (See **Nkanga Daudi Nkanga V Republic**, Criminal Appeal No.316 of 2013).

In fact it is also trite law that where death occurs as a result of a fight, the court should convict for a lesser offence of manslaughter, not murder. The Court of Appeal of Tanzania which is the apex court of the land in various instances has taken that position in a number of previous decisions such as **Moses Mungasiani Laizer Alias Chichi v. Republic** [1994] TLR 222, **Stanley Anthony Mrema v. Republic**, Criminal Appeal No. 180 of 2005 (unreported), **Jacob Asegelile Kakune vs DPP**, Criminal Appeal No 178 of 2017, CAT at Mbeya, and **Aloyce Kitosi v. Republic**, Criminal Appeal No. 284 of 2009 (unreported). In the latter case it was held that: -

*"It has been stated by this Court that where death occurs as a result of a fight or on account of provocation the killing is manslaughter and not murder."*

Now, reverting to the established facts of this case, can it be rightly said that there was a quarrel between the accused and the deceased persons behind their death? I have deeply digested the accused person's confessional words, "... ***Alivyokatalia hizo hela, nikamkamata, nikaanza kumkaba shingo kwa kumniga. Wakati ninaendelea kumniga huku anajitahidi kujinasua hatimae tulianguka chini.***

***Niliendelea kumniga huku ninatikisa kichwa wakati ameanguka chini alishika mikono yake miwili huku ananiomba msamaha kwa ishara bila kusema huku anaishiwa nguvu. Alikua hawezi kuongea anakoroma tu.....ndipo nikagundua amevunjika shingo wakati huo anaendelea kukoroma...Nickson alipotoka chumbani kumfuata dada yake huku analia, nilimshika nikamnyonga shingoni kwa mkono wangu mmoja. Nickson alianguka chini baada ya kumsukuma akapiga kichwa chini kwenye sakafu. Nilimniga Nickson shingoni kwa nguvu akakosa pumzi***”. In my full digest to these confessional words by the accused person, I might reluctantly agree that there was any fight between them to justify the accused person’s neck strangulation against Dorice. If the issue was money, upon overpowering her, he could have paused there and take the said money and quit. Since an alleged fight is a question of fact, there is no any proof that there was a fight between them at that moment, that led him holding her neck that much (kumniga shingo). Therefore, in the absence of fight, the death resulting from the acts of any person against the other even if lovers, unless proved to be of unsound mind or other provoking incidences, that act amounts to murder. In the current matter, I have tried my best to scale up the facts of the case to see

if it amounts to a lesser offence, I have missed supporting evidence. I have further digested how the innocent boy was killed; I have not seen how lesser offence can be aligned with the facts of this case.

The next question for consideration is whether the killer had malice aforethought as per law. In the case of **Enock Kipela v Republic**, (supra) has discussed what entails malice aforethought, when the Court of Appeal held that:-

*"Usually an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following:-*

- (1) the type and size of the 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 blows were 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 utterances if any; made before, during or after the killing and the conduct of the attacker before and after the killing.*

(7) *The conduct of the attacker before and after the killing.*

It is my finding that, since there were no elements of quarrel or fight prior to the said attacking as clearly stated in PE8 exhibit, contrary to what is suggested by DW1 (accused person) in his defense testimony, what was done: attacking the deceased persons on their necks, engulfing and twisting the same was dangerous and suggests nothing but the culprits' culpable mind of killing the deceased persons. That in law is malice aforethought. What constitutes malice aforethought or intention to kill is well defined by laws, literature and decided cases (see section 200 of the Penal Code and the case of **Enock Kapera and Ajili Ajili** (supra). According to the Black's Law Dictionary, malice aforethought is defined as:

*"A pre-determination to commit an act without legal justification or excuse.... An intent, at the time of killing, wilfully to take the life of human being, or an intent wilfully to act in callous and wanton disregard of the consequences to human life: but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed"* (see Criminal Law in Tanzania, A Case Digest, by Dr Fauz Twaib and Daudi Kinywafu at page 335).

By the evidence presented in this case, it has been proved beyond reasonable doubt that, **the two deceased persons** were killed by the

accused person, by engulfing and twisting their necks and instantly caused their deaths. Given the circumstances and the manner which includes, the force applied, the part of the bodies of the deceased where the said holding and twisting were directed, and the extent of injuries and his conduct after the attack. I find without any scintilla of doubt that it has been proved beyond reasonable doubt that the accused killed the deceased persons with requisite malice aforethought and he desired the deceased persons to die. That said, I find the accused person **FREDRICK MICHAEL JOHN @ BASHITE**, guilty and consequently convict him of the murder of the two deceased **DORICE SAMSON OKECH** and **NICKSON CHARLES SENDAMA** contrary to section 196 and 197 of the Penal Code [Cap 16 R.E 2019].



F.H. MAHIMBALI

JUDGE

Considering the punishment for murder is only one known as per law, the accused person is hereby sentenced to suffer death by hanging pursuant to section 197 of the Penal Code, Cap 16 R.E 2019 as read

together with section 322 (1) & (2) of the CPA, Cap 20 R.E 2019 for both counts.

DATED at MUSOMA this 13<sup>th</sup> day of March, 2023.



F. H. Mahimbali

JUDGE

Right of Appeal fully explained to any aggrieved party under section 323 of the CPA, Cap 20 R.E 2019.

F. H. Mahimbali

JUDGE