

IN THE HIGH COURT OF TANZANIA
AT SONGEA – SUB REGISTRY
ORIGINAL JURISDICTION
(SONGEA REGISTRY)
CRIMINAL SESSIONS CASE NO. 37 OF 2022
THE REPUBLIC
VERSUS
KHASIMU ZUBERY @ NJUGU
JUDGMENT

13/03/2023 & 21/03/2023

E.B. LUVANDA, J.

Khasimu Zuberi @ Njugu the accused person herein, is indicted for murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E. 2019. In the particulars of offence it is alleged that on 13th day of June, 2021 at Suluti Village within Namtumbo District in Ruvuma Region, the accused person murdered one Adam Rajab Twende.

At the arraignment, the accused person pleaded not guilty to the information. The prosecution side summoned eight witnesses to prove the accusation levelled to the accused.

Briefly it was asserted by prosecution witnesses that on 13/06/2021 at mid night around 03:00 hours towards 04.00 hours, at Mnazimmoja

Street Suluti Village, the accused person was apprehended at the scene in possession of a knife exhibit PE1, having blood stain spreading all over the knife, while running from the room where the deceased was sleeping at the backyard huts, the accused was attempting to escape. Meanwhile, there ensued fight between the accused person and Khassim Faraj Mchumke (PW3) who is the deceased step father, when PW3 was struggling to restrain and apprehend the accused person from escape at the scene with his knife exhibit PE1 into his hands. PW3 was later assisted by Ziada Siad (PW4) who is the wife of PW3 and deceased's biological mother. The accused slashed PW4's hand and sustained wound which incapacitated her to continue fighting, and therefore retreated from a battlefield. Shortly thereafter, Salum Athuman (PW6) and later Rashid Faraj (PW7) also joined forces and thereby managed to subdue and conquer the accused person who was ultimately grounded and roped his hands along with his knife exhibit PE1. A knife exhibit PE1 was seized via a certificate of seizure exhibit PE4 by police officer D/CPL Meck (PW2) who also formerly arrested the accused person and escorted him to hospital. Thereafter PW2 handed over a knife exhibit PE1 to George Elias Mkingwa (PW1) for custody, a handing over was done via chain of custody exhibit PE2.

As a flash back, at the scene the deceased was seen exiting from the same room where the accused was seen coming from, where the deceased got comfort upon seeing his step further fighting the accused, where the deceased was heard by PW3 uttered his final words that "it is better my father has come", then the deceased fall on the ground, speechless and unconscious while heading towards the door of the main house and was seen with fatal cut wound on his head and leg at a thigh. The deceased was taken to hospital by PW4, where on the same date in the evening the deceased passed away due to sharp, deep wound on the scalp which injured the skull and deep cut wound on right thigh which entailed cutting the greater vessel thus led to massive blood loss and intracranial haemorrhage, as per a report on post-mortem examination (legal), exhibit PE5.

The defence by the accused person Khassimu Zubery Njugu (DW1) is that he was arrested on 13/6/2022 at 05.00 hours while coming from the disco at Mwambao Street, where he was beaten by people who alleged he was a thief, where he lost conscious and only to find himself at the hospital under police observation. The accused dispelled a fact that he was arrested at the backyard house huts of PW3 and denied committing murder.

In other words the accused was attempting to introduce a defence of *alibi* at the stage of defence. It is elementary knowledge that *alibi* must be preceded by a notice to the court and prosecution made prior commencement of prosecution case and in absence of a notice, material particulars of the *alibi* must be furnished to the prosecution before close of prosecution case, see section 194(4) and (5), of the Criminal Procedure Act, Cap 20 R.E. 2019. Herein there was non compliance. However, for the interest of justice, I will consider the *alibi* on its merit, under subsection (6) of section 194, Cap 20 (*supra*). The corner stone of the accused's *alibi* is that he was from the disco, but DW1's *alibi* fall short because he was unable even to mention the specific destination or venue or disco hall where the alleged disco was held and performed, neither mentioned any peer member to the show. The accused did not explain at what time the alleged disco started or at what exact time he arrived there. Neither stated if it was a free show or charged entrance fees. The way this *alibi* was grounded, portray the alleged disco was one man show danced and attended by the accused solo and at unknown destination and time. It is quite unusual for a disco performed on rural areas where people are known and familiar to each other, to presume it was a secret to the accused alone. This alone render his *alibi* wanting and is therefore I accord no weight of any kind.

On the contrary to his unmerited *alibi*, the circumstantial evidence tendered by prosecution incriminate the accused as the one who inflicted those fatal deep cut wound on the skull and thigh of the deceased. This is because the accused was seen at the scene in possession of a knife exhibit PE1 with blood stain spread over the entire knife. The accused was seen by PW3 exiting from the room where the deceased was sleeping. Meanwhile the deceased was seen coming from the same direction or room with fatal cut wounds aforesaid. The deceased was heard having comfort and hope upon seeing PW3 resurfaced and heeded a call to assist him. The accused was struggling to retreat at a disarray when PW3, PW4, PW6 and PW7 were joining forces to control him with his knife. The accused slashed PW4 in his attempt to escape. To my view, this circumstantial testimony bring the accused to the scene being the one who inflicted those deep cut wounds to the deceased as aforesaid.

The rule on circumstantial evidence is that the same must be watertight and irresistibly implicating the accused to the commission of offence. This was the position in the case of **Hamida Mussa v. The Republic** [1993] TLR 123 where the apex Court held that,

'Circumstantial evidence justify the conviction where inculpatory fact or facts are incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of his guilty'

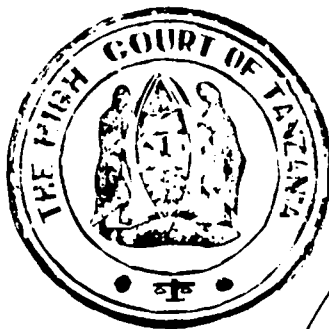
Herein, the damning evidence of PW3, PW4, PW6 and PW7 suffices to prove that the accused is the only one who inflicted deep cut wound on the deceased's skull and thigh using a sharp knife exhibit PE1. To my view, the manner the wounds were inflicted suggest malice aforethought on the part of the accused that he formed an intention to kill the deceased. This can be inferred from the fact that those deep cut wounds were inflicted on dangerous part on the skull, and penetrated deeper on the scalp causing intracranial resulting in haemorrhage which was also attributed by a deep sharp cut wound on the thigh leading to severe and massive blood loss. In the case of **Bakari Rajabu Bakiri v. The Republic**, Criminal Appeal No. 292 of 2021, Court of Appeal of Tanzania at Mtwara, the Court said that,

*'...whether or not he had that intention must be ascertained from various factors including the following; **the type and size of weapon**, if any used in the attack, **the amount of force applied in the assault**, **the party(s) of the body the blow were directed at or inflicted on**, the number of*

*blows although one blow may depend upon the facts of a particular case be sufficient for this purpose, **the kind of injury inflicted**, the attacker utterances if any made before, during or after the killing and the conduct of the attacker before and after the killing'*
[Emphasis mine]

Therefore, the accused's denial and *alibi* is unmerited. Because the circumstantial evidence is watertight against him.

Therefore the accused person is guilty for murder contrary to sections 196 and 197 of the Penal Code Cap 16 R.E. 2019 and is convicted forthwith.



E.B. LUVANDA
JUDGE
21/03/2023