

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF ARUSHA
AT BABATI
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 43 OF 2021**

**THE REPUBLIC
VERSUS**

EDMUND EMMANUEL @ERRO @ EDMUND MCHUNO..... ACCUSED PERSON

JUDGMENT

20th March & 2nd May, 2023

Kahyoza, J.:

On 13th day of June 2020, Theresia Qwaray met her demise at Gocho village within Hanang' District. She was old, paralyzed, thus, bedridden for a long time. It was alleged that she was raped some hours before she met her demise. The post mortem report revealed that death was due to heart attack secondary to physical stress and sexual penetration.

The prosecution arraigned **Edmund Emmanuel @Erro @ Edmund Mchuno** before this Court with an information of murder contrary to sections 196 and 197 of the Penal Code Cap 16 [R.E 2019, now 2022]. The prosecution alleged that **Edmund Emmanuel @Erro @ Edmund Mchuno** did, on 13th June 2020 at Gocho village within Hanang' District in Manyara Region, murder one Theresia Qwaray. **Edmund Emmanuel @Erro @**

Edmund Mchuno (the accused person) pleaded not guilty. To prove the accused person guilty, the prosecution summoned four witnesses and tendered one exhibit, the post mortem report.

There is no eye witness. The prosecution's case is based on circumstantial evidence; that the accused person raped Theresia Qwaray, an old and paralyzed woman causing her to suffer from heart attack which led to her death. The accused person's defence was that he was nowhere near the crime scene. He raised the defence of *alibi*.

Reuben Jeremiah (**Pw2**) a resident of Gocho village told the court under oath that he heard a call for help on 13.6. 2020 at 06:00 pm from Theresia Qwaray's place. Theresia Qwaray was Reuben Jeremiah (**Pw2**)'s great grandmother. He rushed to the place and found her great grandmother in agony. The old woman told him that a thug had attacked her. While still standing in the deceased's house, Edmund, the accused person came from the room pushed Reuben Jeremiah (**Pw2**) and escaped from the deceased's house. Edmund, the accused person locked the door from outside so Reuben Jeremiah (**Pw2**) could not to pursue him. Reuben Jeremiah (**Pw2**) peeped in the window and saw Rehema. He requested her to open the door. She opened the door and went to call people. Reuben Jeremiah (**Pw2**) did not leave the place until other people went to deceased's house.

As time passed by, Theresia Qwaray's health condition changed from bad to worse, from worse to worst worsened, narrated Reuben Jeremiah (**Pw2**). She met her demise at 11:00pm that day. Reuben Jeremiah (**Pw2**) deposed that he knew Edmund, accused person for long time as they grew

up together in the same village. On the fateful date, he recognized him as it was not yet dark. There was still sunrise.

Information that Theresia Qwaray was raped spread until Scandrian Patrice (**Pw4**) got information of the commission of the offence. Scandrian Patrice (**Pw4**) was the hamlet chairman. He got information on 13. 6.2020 at 07:00 that pm Edmund had assaulted Theresia Qwaray. Scandrian Patrice (**Pw4**) went to Theresia Qwaray's house and found her in agony. He took militiamen and searched for Edmund. He managed to arrest him at around 11:00 pm. He found him at his home place. That night he called the village executive officer in vain. The next day morning, that is on 14.6.2020 at 05:00am he called Alphonse Francis (**Pw3**), the village executive officer successfully and notified him on what had happened. Alphonse Francis (**Pw3**) promised to come to the village.

Alphonse Francis (**Pw3**) informed the police officer attached to the ward requesting his assistance. Later, Alphonse Francis (**Pw3**) went to Gocho village where he reached at 08:00 am. After the police arrived at the village office where Edmund, the accused person, was locked, Alphonse Francis (**Pw3**) opened the lock up and asked the accused person why he committed the offence. He deposed that the accused person told him that he committed the offence due to hardship. He narrated to him that he had visited a witchdoctor who told him to have sex with an old and cripple woman so as to become rich. The police attached to the ward informed his senior police who came at the crime scene with a doctor.

The doctor (Dr. Erasto Salutarw Mushi (**Pw1**)) examined the deceased. Alphonse Francis (**Pw3**) deposed further that the deceased had bruises on

her neck and back. He testified that the doctor told them that death was due to stress.

Dr. Erasto Salutarw Mushi (**Pw1**) confirmed on oath to examine the body of an old woman on 14.6.2020 at Gocho village. He found her lying on her bed. He examined her in the presence of a police officer Alexander and Alphonse Francis (**Pw3**). He found lacerations on the deceased's neck and back, and other parts of the deceased's body had signs of being pressed by a blunt object. He examined the deceased private parts (vagina). He found it open with whitish fluid, which he said that they were sperms. Given the injuries Theresia Qwaray sustained and her age, Dr. Erasto Salutarw Mushi (**Pw1**) established that Theresia Qwaray died of heart attack.

Dr. Erasto Salutarw Mushi (**Pw1**) prepared a post mortem report which he tendered and the Court admitted and marked it as Exh.P.1. Dr. Erasto Salutarw Mushi (**Pw1**) deposed that the cause of death was heart attack secondary to physical stress and sexual penetration.

Edmund Emmanuel (**Dw1**), the accused person defended himself on oath raising the defence of *alibi*. He deposed that on 13.6.2020 at 01:30pm he boarded Mtei bus from Dodoma to Katesh via Singida. He arrived at Katesh at around 06:00pm. At 06:50pm he took transport from Katesh to Gitting where he arrived at around 09:00pm. He took motorcycle ride from Gitting to Gocho "B" his home place. He tendered a bus ticket as Exh. D. 1. He added after he reached home that night, he did not go anywhere.

Edmund Emmanuel (**Dw1**) denied to rape Theresia Qwaray. He deposed that Reuben (**Pw2**) fabricated the evidence against him as they had quarreled. He explained that Reuben (**Pw2**) grazed his herds of cattle

to his (Edmund Emmanuel (**Dw1**)) grasses. Edmund Emmanuel (**Dw1**) complained to village office on 22. 4.2020. The village leader ordered Reuben (**Pw2**) to stop grazing to Edmund Emmanuel (**Dw1**)'s grasses. He deposed that from time their relationship gone sour and whenever they met, Reuben (**Pw2**) abused him.

It is from the foregoing evidence, I am called upon to answer basically two issues; **one**, whether Edmund Emmanuel (**Dw1**), the accused person killed Theresia Qwaray; and **two**, if the answer to the first issue is positive whether he did so with malice aforethought.

I will commence with the first issue whether Theresia Qwaray is dead and whether it is the accused person who killed her or caused her death. As the record bears testimony, the defence does not vehemently dispute whether Theresia Qwaray is dead. Even if, the defence had refuted the alleged fact that Theresia Qwaray is dead, still I would have found that the prosecution proved beyond all reasonable doubt that Theresia Qwaray is dead. The prosecution tendered blatant evidence from Dr. Erasto Salutarw Mushi (**Pw1**), the doctor who examined the deceased's body and prepared the post mortem report. Thus, Dr. Erasto Salutarw Mushi (**Pw1**) certified that Theresia Qwaray is dead. Reuben Jeremiah (**Pw2**), the deceased's great grandson deposed that Theresia Qwaray is dead. He told the Court on oath that she met her demise a few hours after she was assaulted.

There is yet the evidence of Alphonse Francis (**Pw3**), the village executive officer who reported the incident to police and witnesses the examination of the deceased's body, deposed that Theresia Qwaray is dead. The last prosecution witness is Scandrian Patrice (**Pw4**), the hamlet

chairman of Gocho. He arrested the accused person and he said he arrested him after Theresia Qwaray met her demise at 11:00pm on 13.6.2020.

I find it proved beyond all reasonable doubt that Theresia Qwaray is dead. The next question is whether Edmund Emmanuel (**Dw1**), the accused person is responsible for Theresia Qwaray's death. Dr. Erasto Salutarw Mushi (**Pw1**) gave an expert opinion that the deceased was raped as he found the deceased's sexual organ open and with whitish fluid. He deposed that the whitish fluid was sperms. He concluded his examination that Theresia Qwaray's death was due to heart attack secondary to physical stress and sexual penetration. To justify his opinion, Dr. Erasto Salutarw Mushi (**Pw1**) deposed that given Theresia Qwaray's old age and the injuries she sustained, she died of heart attack.

It is not disputed that Theresia Qwaray was an old woman and paralyzed, for that reason bedridden. She was bedridden for some time. Reuben Jeremiah (**Pw2**) deposed that he heard his great grandmother calling for help. He arrived at the scene of the crime and found Theresia Qwaray agonizing. Reuben Jeremiah (**Pw2**) deposed that Theresia Qwaray told him that a thug assaulted her. Reuben Jeremiah (**Pw2**) deposed that from the time she told to him that she was assaulted, Theresia Qwaray's health condition worsened as time passed, till she died at 11:00pm. Reuben Jeremiah (**Pw2**) deposed that he did not leave Theresia Qwaray's the place from the time responded to her call for help until she passed on.

Edmund Emmanuel (**Dw1**), the accused person did not contest the allegation that Theresia Qwaray was raped. His defence was that he was not at the crime scene when the offence was committed.

I do not find reason(s) not to heed to the doctor's expert opinion as to the cause of Theresia Qwaray's death. There is no contradictory evidence to weaken it nor did the defence pinch holes to his opinion. In addition, I find it established that Theresia Qwaray was very old, sickly, paralyzed and she was raped, according to Dr. Erasto Salutarw Mushi (**Pw1**)'s evidence. Subjecting such an old woman to physical stress caused by forceful sexual act, she must have been shocked. It was something she did not expect at that age and given her health condition, no wonder she suffered from heart attack.

The above said, I have to determine whether a person who raped Theresia Qwaray is the one who caused her death as deposed by Dr. Erasto Salutarw Mushi (**Pw1**). The evidence on record is that Theresia Qwaray died of heart attack as result of stress and sexual penetration. A person is deemed to cause death of another if he does any of the following as provided by section 203 of the Penal Code-

***203.** A person is deemed to have caused the death of another person, although his act is not the immediate or sole cause of death, in any of the following cases-*

(a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death; in which case it is immaterial whether the treatment was proper or mistaken if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which

was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) if by actual or threatened violence he causes that other person to perform an act which causes the death of that person, the act being a means of avoiding the violence which in the circumstances would appear natural to the person whose death is so caused;

(d) if by any act or omission he hastens the death of a person suffering under any disease or injury which, apart from that act or omission, would have caused death;

(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of another person. (Emphasis is added)

There is no doubt that Theresia Qwaray was bedridden, old, sickly, and paralyzed. A person who raped her according to the doctor hastened her death. He caused her to suffer from heart attack. I therefore, find that a person who raped Theresia Qwaray is the one who caused her death. Reuben Jeremiah (**Pw2**) deposed that respondent to Theresia Qwaray call for help whilst there Edmund Emmanuel (**Dw1**), the accused person emerged from the room where he hid, pushed Reuben Jeremiah (**Pw2**), went out the house and locked the door from outside. Edmund Emmanuel (**Dw1**) denied to have been at the scene of the crime.

Reuben Jeremiah (**Pw2**) knew very well Edmund Emmanuel (**Dw1**) and the offence was committed during day time before it was dark. Thus, Reuben Jeremiah (**Pw2**) recognized Edmund Emmanuel (**Dw1**) very well. Edmund Emmanuel (**Dw1**) deposed that he had quarrels with Reuben Jeremiah (**Pw2**). For that reason, Reuben Jeremiah (**Pw2**)'s evidence was based on hatred. I know an accused person has no duty to establish his innocence but to raise doubt in the prosecution's case. Edmund Emmanuel (**Dw1**)'s account did not raised doubt in the prosecution's case. He neither specified the name or position of the village leader he complained to nor cross-examined village leaders who testified regarding the dispute. To worsen things, Alphonse Francis (**Pw3**), the village executive officer deposed that Edmund Emmanuel (**Dw1**) admitted orally to have had sexual intercourse with the deceased following instructions from his witchdoctor.

Given the evidence analyzed above, I find that Edmund Emmanuel (**Dw1**), the accused person, raped the deceased and caused her death. The last issue is whether he did so with malice aforethought. Malice aforethought is established when the prosecution establishes any of the facts explained under section 200 of the CPA. Section 200 states-

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. (Emphasis is added).

Edmund Emmanuel (**Dw1**), the accused person had intent to rape Theresia Qwaray, the deceased. The offence of rape attracts sentence of thirty years imprisonment. Thus, I find Edmund Emmanuel (**Dw1**) caused Theresia Qwaray's as he had intent to rape, so he had malice aforethought to kill her. I find support under section 200(c) of the Penal Code.

In the upshot, I find Edmund Emmanuel, the accused person guilty of the offence of murder of one Theresia Qwaray's and convict him of that offence contrary to sections 196 & 197 of the Penal Code, [Cap. 16 R. E. 2019 now 2022].

It is so ordered.

Dated at Babati this 2nd day of May, 2023.

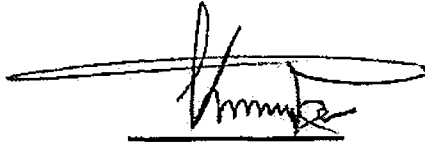


**John R. Kahyoza,
Judge
2/5/2023**

Mr. Utafu S/A: Your Lordship, I pray for sentence as per the law.

Mr. Chami Advocate: Your Lordship, my client is very younger and a first offender. He has been in custody for three years. He committed the offence

in cause of raping the deceased. He was misled that if he raped an old woman, he would become rich and not anything else. He is remorseful. He prays for lenience.

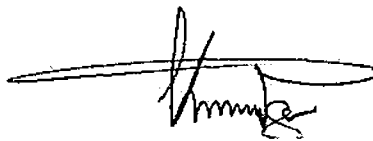


John R. Kahyoza.
Judge.
2/5/2023

SENTENCE

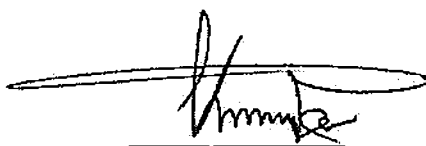
The accused person has been convicted with the offence of murder under sections 196 and 197 of the Penal Code, [Cap. 16 R.E. 2022]. The sentence for offence of murder is that the accused must suffer death by hanging.

I accordingly, sentence **Edmund Emmanuel**, the accused person to suffer death by hanging under sections 196 & 197 of the Penal Code [Cap 16 R.E 2022] read together with S. 322 of the Criminal Procedure Act, [Cap. 20 R. E. 2022].



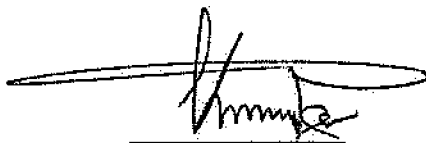
J. R. Kahyoza
JUDGE
2/5/2023

Court: Edmund Emmanuel, the accused person, has a right to appeal against the conviction and sentence upon lodging a notice of appeal within 30 days from today.



John R. Kahyoza.
Judge.
2/5/2023

Court: Judgment and sentence delivered in the presence of Mr. Peter Utafu State Attorney assisted by Ms. Bernadeta and Mr. Ndibalema State Attorneys for the Republic, the accused person, and his advocate Mr. Chami. B/C Ms. Fatina present.



John R. Kahyoza.
Judge.
2/5/2023