

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL SESSION NO. 145 OF 2020

REPUBLIC
VERSUS

AMANI SHABANI

JUDGMENT

Date of last Order: 8th March 2023

Date of Judgment: 5th April, 2023

E.E. KAKOLAKI, J.

Before the Court stands Amani Shabani, who is charged of Murder; Contrary to sections 196 and 197 of the Penal Code; [Cap. 16 R.E 2002 now R.E 2022]. The ordeal allegedly took place on the night of 26th September 2015 at Ilala Mchikichini within Ilala District in Dar es salaam region, whereby the deceased Khalid Abdallah and his wife one Aisha Rashid Mohamed (PW2), on the way home from having dinner and quenching their thirsty at "container bar", met the accused person in a company of a woman, who robbed him of his money and mobile phone before he was stabbed with a knife on the left buttock, the stab which allegedly claimed his life, after being

rushed to Amana hospital by good Samaritans, where he was later on pronounced dead while undergoing treatment.

Following that incident the accused was arrested, taken to Pangani Police post and later on transferred to Msimbazi Police Station, where his statement was recorded and subjected to identification parade before he was arraigned in court for the charge of Murder. When the charge /information was read over to the accused, he entered a plea of not guilty the fact which prompted prosecution to bring seven (7) witnesses namely, Dr. Emmanuela Zebadia Moshi (PW1), Aisha Rashid Mohamed and deceased wife (PW2), Akida Abdallah Mohamed Mongolo (PW3), Juma Abdallah Luwazi and deceased brother (PW4), EX-D 7743 SGT FLOWIN (PW5), PF 19298 Isp. Godfrey (PW6) and F.514 D/Sgt. Saidi (PW7) respectively. They also relied on two (2) exhibits namely Post- Mortem Report (Exh. PE1) and Identification Parade Register (Exh. PE 2) respectively.

On the defence side accused was the sole witness and relied on no documentary exhibit. Throughout the proceedings the Republic proceeded under representation of Mr. Tumaini Mafuru, learned State Attorney while the accused defended by Mr. Fredrick Charles, learned advocate.

From the brief facts adduced above and before summarizing both sides evidence or applying the same to the issues to be disclosed soon hereunder, I find it apposite to point out albeit so briefly the guiding principles in proving criminal cases and more particularly the charge of Murder. Firstly, it is the law under sections 110(1) and (2) and 112 of the Evidence Act, [Cap. 6 R.E 2022] that, he who alleges must prove and the burden of so proving lies on him as such burden never shifts unless the accused is charged of the offence under strict liability. See also the cases of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004, **Nathaniel Alphonse Mapunda and Benjamin Mapunda Vs. R** [2006] TLR 395 and **Zombo Rashid Vs. R**, Criminal Appeal No. 7 of 2012 (CAT-unreported). Secondly, the proof is that of beyond reasonable doubt as per section 3(2) of Evidence Act, though that does not mean beyond the shadow of doubt. See also the cases of **Nathaniel Alphonse Mapunda and Benjamin Mapunda Vs. R** (2006) TLR 395 and **Miller Vs. Minister of Pensions** (1947) All ER 372 - 373, where Lord Denning observed on the degree of proof in criminal cases in the following words:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof of beyond

reasonable doubt does not mean beyond the shadow of doubt....?”

Thirdly, it is trite law that the accused person shall not be convicted on the basis of weaknesses of his defence rather on the strength of the prosecution case and reliability of its witness. The prosecution must therefore strive in proving that, the offence was actually committed and so committed by the accused person. Undisputedly, it is trite law that, in proving the charge of Murder under section 196 of the Penal Code, three elements must be established and evidence led by the prosecution to prove them. **One**, that, the alleged murdered person is actually dead, **second**, that, his/her death was caused by unlawful act or omission of the person (accused person), **third** that, the act or omission was actuated with malice aforethought. Basing on the above elements the issue for determination is whether the prosecution managed to discharge its duty of proving the charge against the accused person beyond reasonable doubt by establishing all three elements above mentioned. In this judgment I am not intending to narrate the whole evidence as adduced by both parties but instead I will be applying the same in the course of answering the issue raised above.

To begin with first element as to whether Khalid Abdallah is dead or not, the prosecution procured deceased brother (PW4), who testified in Court to the effect that, he identified the body to the doctor before performance of post mortem examination and later collected it for burial in their home village at Kibaha District. PW4's evidence is corroborated by PW2, the deceased wife who confirmed that, her husband is dead and passed away while undergoing treatment at Amana Hospital after being stabbed. Further confirmation was made by PW1, a pathologist from Muhimbili National Hospital who conducted post mortem examination of the person identified to her by his relatives as Khalid Abdallah and issued a report (exh. PE1), that he died of Hemorrhagic shock due to penetrating wound injury. On his side the accused never resisted tendering of PMR nor did he doubt whether the said Khalid Abdallah is dead or not, hence proof of the first element that Khalid Abdallah is dead.

Turning to the second element as to whether Khalid Abdallah's death was caused by accused's unlawful act or omission or in other words whether it is the accused person who killed the deceased by his unlawful act or omission.

It is a principle of law as alluded to above that, the burden of proof in criminal cases such as murder lies on the shoulders of prosecution and not the

accused person as it was also held in the case of **Joseph John Makune v. Republic** [1986] TLR 44, where the Court observed that:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence."

The principle was further adumbrated in the case of **Nathaniel Alphonse Mapunda & Benjamin Mapunda Vs. R**, [2006] 395 where it was observed thus:

*'As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of **MOHAMED SAID V R** this Court reiterated the principle by stating that in a murder charge the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt.'*

In proving the above issue, the prosecution relied on the evidence of deceased's wife (PW2), PW3, the person who arrested the accused immediately after the incident, Inspector Godfrey who conducted accused identification parade (PW6) and the doctor who examined the deceased body (PW1), as now there is no dispute that the deceased died a violent death due to stab wound on his left buttock as per PW1 and PW3 and exhibit PE1.

As to who authored that violent death or caused that unlawful act, it was in PW2's evidence that, on the fateful day 26/09/2015 at around 20.00 hours in company of her husband (deceased) while on their way from 'Container bar' after having their evening meal and quenching their thirsty, the two met with one man in company of the woman who had carried with her a child and they greeted each other before that man who had put on jeans trousers and a T-shirt with strips asked her husband to surrender his possessions. She said her husband surrendered to him the remaining balance of Tshs. 33,500/ and his mobile phone make 'Itel' which were kept by the accused in his trousers' pocket before he drew out a knife and stabbed him on the left side and later on took to his heel. This witness told the court that, she raised alarm for help '*mume wangu anakufa nisaidieni*' and some people came to their help including Akida (PW3), Kasidi and God before the victim was taken to Pangani Police station issued with PF3 and rushed to Amana Hospital in her company, whereby together with other fellows were released to go home while the victim undergoing treatment, but later on in the mid night was informed that he had passed away.

PW2 went on testifying that, she managed to identify the accused person whom she did identify too in court, as on that day there was bright light

illuminating from the houses in both sides of the road which had houses. And that, the fracas took almost 15 minutes as her proximity to the accused was one meter. She explained to the Court that, because at first the accused wanted to do something bad to them she was keen to mark his identity. It is this witness who told the Court that, she also identified the accused person at Msimbazi Police station in the identification parade conducted on 28/09/2015. When cross examined as to whether she was drunk on that day and how did she manage to identify the accused, PW2 said, yes she had taken beer but was still in her senses unlike her husband that is why she managed to recognize the accused person. When referred to her statement recorded at police, she said it is true it is written the accused had put on 'singiland' a vest and not T-shirt as testified, but when re-examined said the statement was recorded by the police officer and there was lapse of memory, more than eight (8) years, that is why she even said her husband died on 28/09/2015 instead of 26/09/2015.

Another evidence on identification of the accused person is that of PW3, AKida Abdallah Mohamed Mongolo mentioned by PW2 to be amongst the persons who came to their rescue when raised alarm for help during the attack of her husband. PW3 told the Court that, being involved in community

security (ulinzi shirikishi) on the 26/09/2015 while coming from his work place passed at Ilala quarters road in which in front of him saw four people whom he identified as Amani (accused), TEE and Mgasas as he recognized the fourth one by face only to be of female gender. He said was greeted by Mgasas and responded but as he had advanced like 30 paces heard from back a woman voice calling for help *"nisaidieni unisaidie mume wangu amechomwa kisu"* and decided to offer assistance by going back to the scene. That he found Mgasas there and that unidentified woman running on their direction while the accused (Akida) running on the opposite direction to his home area, before he was told by one Lusajo that, Amani had stabbed the deceased (Khalid) hence decided to give him a chase, until when he stopped only to find him with the knife stained with blood. He said, in the course of arresting him the accused scratched him with the said knife on his hand but was treated and that together with other people managed to take him to Pangani police station and handed him there. This witness identified the accused in court claiming that, was known to him even before the incident date.

When cross examined while referred to his statement made at police, this witness admitted that, he had stated therein that they chased the accused

together with one Lusajo opposite to what he had said in his testimony that, it is the said Lusajo who told him that, Amani had stabbed the deceased. But in his re-examination clarified that, the statement was recorded by the police officer and not himself and that, to his understanding evidence is adduced by a witness before the Court or mjumbe and further that the incident occurred 8 years passed thus possibility of lapse of memory.

Another piece of evidence is that of PW6 (Insp. Godfrey) who was the officer incharge of the identification parade conducted on 28/09/2015. This witness testified to the effect that, on that date identification parade involving the accused was conducted whereby the identifier identified him as the person who had stood in position No. 5 out of 9 participants. And that, after the exercise he filled in the identification parade register (form) which was tendered in court as exhibit PE2. According to this witness all the procedures were followed and he was able to identify the accused person in court. When referred to exhibit PE2, PW6 admitted that there were two different hand writings in both pages in which he clarified during re-examination that, one page bore his hand writings while the other page carries names and signatures participants of the identification parade.

Lastly was the doctor PW1 who examined the deceased body and confirmed that, his death resulted from Hemorrhagic shock due to penetrating wound injury as exhibited in exhibit P2 (PMR). Expounding on this wound during her testimony this witness informed the court that, the same was located on left buttock suggesting to have been caused by sharp object with length of not less than 12 centimeters and width of not more than 4 centimeters. In her opinion the object could be a knife but not a machete.

Recanting the above referred prosecution evidence, the accused in his sole defence evidence stated that, on the 26/09/2015 at 20.00 together with Mgasas after quenching their thirst at Mchikichini went to their sister in law one mama Arafat and the wife to their friend one Adebayo, who started accusing them of keeping secrets of her husband's extra marital relationship with other women, thus promised to teach them a lesson. According to him, at about 22.00 hours were invaded by a group of sungusungu who managed to arrest him as others ran away and took him to Pangani police post and later on shifted to Msimbazi Police station together with his friend Mgasas arrested on the same night, before they were informed of their accusation of killing one Khalid Abdallah, the accusations which they denied. He said on 27/09/2015 was removed from the lock up and found two women outside in

which one of them identified him during the identification parade conducted on the same day, though the procedures were infringed. He said, was asked to choose the position to stand before that woman was asked to identify the person who committed the offence on the alleged night and he was pointed out, and thereafter returned to the lock up before was later on taken to court on 19/10/2015 and charged with murder.

When subjected to cross examination as to whether he cross examined PW6 on that none compliance of identification procedures, said he did not know whether he did or not. He said further that, did not know whether he cross examined PW3 or not on his arrest.

Having recited the evidence of PW2, PW3, PW6 and PW1 and the defence evidence of DW1 as well as documentary exhibits PE1 and PE2, it is now opportune for this Court to determine the issue on the second element as cited above. From the evidence of PW2 and PW3 there is no doubt that the incident took place at night at about 20.00 hours, thus reliance on the evidence of visual identification by the prosecution. The test on reliability of such evidence is well explained in the case of **Waziri Amani Vs. R** (1980) TLR 250, which has been referred and revisited in a number of cases

including the case of **Musa Mbagwa Vs. R**, Criminal Appeal No. 39 of 2013, **Omari Iddi Mbezi and 3 others Vs. R**, Criminal Appeal No. 227 of 2009 and **Hamisi vs Republic**, Criminal Appeal No. 3821 of 2015 CAT-unreported, that a witness must make full disclosure of the source of light and its intensity, explanation of the proximity between him/her and the culprit and the time spent under observation, description of the culprit in terms of body build, complexion, size and attire. Additionally, the witness must mention any peculiar features disclosed at police first as to lend credence to such witness evidence on identification parade and during trial so as to test his/her memory.

In this case the star prosecution witness PW2 and deceased wife, explained on how the accused stabbed her husband by knife, and how she identified the perpetrator of the said offence at the scene of crime. According her, the incidence took place in an open space with enough light illuminating in both sides from electric bulbs of the houses and in addition that, there was moon light which sufficiently illuminated enough light that enabled her to positively identify the accused. Secondly, she stated to be one step from the accused person which allowed her correct and unmistakable identification as she paid close look to that man simply because was prepared to do harmful act to

them. Thirdly, before the accused attacked the deceased, she said had conversation with them and thereafter ordered the deceased to surrender all his properties. Fourthly, they encountered the accused for almost 15 minutes during the fracas, hence clearly identified him. In my view her evidence on identification of the accused person is water tight and free from any possibility of a mistaken identity, the standards which leaves this Court with no doubt that her identification met the conditions set out in **Waziri Amani's case** on virtual identification.

As that is not enough PW2 explained that, she was able to describe the culprit when reported the crime for the first time at police, the fact which was also corroborated by EX-D. 7743 Sgt. Flown (PW5) who received the first report of the injured person (deceased) and also received the accused person when arrested and taken at pangani Police Post. Apart from that PW2 identified him during the identification parade as exhibited in the parade register exhibit PE2 corroborated by evidence of PW6 who conducted the said parade and further able to describe his features in court during her evidence.

PW2's evidence was further corroborated by the evidence of PW3, who arrested the accused soon after the incident and whose evidence was consistent throughout the trial that, accused when arrested was found in possession of a knife with blood stains. It is this PW3 who knew the accused before the date of incident, since 2013, who handed him at police to PW5. In his testimony PW5 confirmed to the Court that, the accused was brought to him at Pangani Police post by Amani (PW3) and one Lusajo on the 26/09/2015.

With the above uncontroverted evidence on the fact that accused was well identified at the crime scene by PW2 and later on during identification parade and the fact that was arrested soon after the incident by PW3 in possession of knife with blood stains, leaves this Court without scintilla of doubt that, it is the accused person who stabbed the deceased with a knife and caused his death, the act which is in contravention of the law as he had no justification whatsoever in so acting.

Accused evidence is unworthy of taking and being considered by any sober legal mind as he gave a story which could not shake prosecution evidence at all. He admitted to have no any grudges with any of the prosecution

witnesses, and further his story does not relate at all with the prosecution case. I so view as he failed to show the relationship between mama Arafat who allegedly vowed to teach him and his friend Mgasa a lesson and any of the prosecution witnesses so as to frame up them with serious charge of murder. Thus, his evidence apart from being a mere afterthought and total lie, did not affect prosecution witnesses' credibility as well as prosecution case at all. All said I find the issue whether Khalid abdallah's death was caused by the accused's unlawful act or omission to be answered in affirmative.

Lastly is an issue as to whether the accused person's act of stabbing the deceased on the left buttock was actuated with malice aforethought. Section 200 of the Penal Code is providing various circumstances upon which malice afore thought can be established or inferred. The provision of section 200 of the Penal Code states thus:

"S. 200: Malice aforethought shall be deemed to be established by evidence proving any one nor 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 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.” (Emphasis supplied)

Normally it is very difficult to establish accused person's ill intent or malice aforethought when committing an offence such as murder in absence of utterances. However there are various factors to be considered as demonstrated in several cases one of which is the case of **Enock Kipela Vs. R**, Criminal Appeal No. 150 of 1994 (CAT-unreported) where the Court of Appeal had this to say:

*".... usually, an attacker will not declare his intention 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 blow 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 attackers utterances, if any, made before, during or after the killing, and (7) the conduct of the attacker before and after the killing. "(Emphasis supplied)

Applying the above referred factors as well as the provision of section 200(a) of the Penal Code to the circumstances of this case, it is apparent that, the accused person's act of being armed with a lethal weapon in public such knife and using the same to stab the deceased on a sensitive party of the body (buttock) while committing robbery, knife's penetration for 12 centimeters deep and fleeing from the scene of crime leaving behind the deceased helpless, is a clear manifestation and proof that, he intended to either cause him death or do him grievous harm as there was no justification whatsoever for stabbing him after he had surrendered his properties to him. Hence the third element is answered in affirmative.

In the event and for the foregoing, I am satisfied that the prosecution has proved its case beyond reasonable doubt. I therefore find the accused person guilty of the offence of Murder, contrary to section 196 of the Penal

Code, [Cap. 16 R.E 2002] now R.E 2022 and proceed to convict him accordingly.

It is so ordered.

DATED at DAR ES SALAAM this 5th day of April, 2023.



E. E. KAKOLAKI
JUDGE
05/04/2023.



Judgment has been delivered today 05/04/2023 in open court in the presence of accused person in person and in the presence of Mr. Paul Kimweri, Senior State Attorney, for the Republic, Mr. Fredrick Charles, advocate for the accused person, and Ms. Tumaini Kisanga, court clerk.

Sgd: E. E. KAKOLAKI
JUDGE
05/04/2023.

SENTENCE

As rightly submitted by Mr. Kimweri (SSA) there is no alternative sentence to the person convicted of Murder offence/charge as Mr. Charles would want

this Court to believe. That being the position the accused is sentenced to death by hanging.

It is so ordered.



E. E. KAKOLAKI
JUDGE
05/04/2023.



Right of appeal explained.