

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB - REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 50 OF 2021

THE REPUBLIC

VERSUS

AYUBU WAZIRI MKOBA @VANDAME

JUDGMENT

POMO, J.

The accused, AYUBU WAZIRI MKOBA @ VANDAME, stands charged with the offence of murder, contrary to section 196 of the Penal Code Cap 16, Revised Edition 2023 (the Penal Code). The allegation asserts that on 12.10.2017, at Kijitonyama Mpakani area within Kinondoni District in Dar es Salaam Region, the accused unlawfully caused the death of one CARLOS S/O MKOLA.

Representing the Republic in this case are Mr. Michael Shindali and Ms. Beatrice Mapunda, both learned State Attorneys, while the accused had legal representation Ms. Ms. Robi Simon Magaigwa, a learned Advocate.

The accused pleaded not guilty to the information of murder as such trial of the commenced. The prosecution, in proving the offence, called seven (7) witnesses and tendered 1 exhibit

Adam Kitwana (PW1), a motorbike (bodaboda) driver, testified that on 12.10.2017, at around 1:00 a.m. midnight, he was stationed at Africa Sana Kona Bar in Sinza, his usual parking spot for business. At that time, his regular client, Hassan Ramadhani, approached him and requested a ride to his home near the KKKT church in Kijitonyama. PW1 agreed and they set off. On their way, they took a shortcut, a rough road that passed by Silver Spring Hotel. Along this route, they encountered a blue Bajaj model TVS King parked on the side of the road, with two individuals outside the vehicle, one in front and one at the rear. Additionally, there were two other individuals on the side road.

PW1 observed one person strangling another by the roadside. He was able to see them clearly due to the illumination from a nearby tube light. He identified one of the perpetrators as Vandame, as he was familiar with him as a chronic criminal. Although he recognized two others based on their body shapes, he couldn't identify the victim. The distance between them was approximately ten steps. Despite witnessing the incident, PW1 and his

passenger didn't intervene due to fear. They paused for only a few minutes before one of the culprits, armed with a machete, approached them menacingly. They quickly departed the scene, but PW1 glanced back and saw Vandame disposing of the victim's body into a roadside canal.

The next day, on 13.10.2017, around 9:00 a.m., while PW1 was back at Africa Sana Kona Bar, Hassan Ramadhani returned and informed him that a deceased body had been discovered at the location they had passed the previous night. PW1 advised him to report the matter to the police, and they subsequently went to Kijitonyama police station to provide their statements.

Said Said Amidu (PW2), a ten-cell leader, gave testimony that on 12.10. 2017, around 6:45 a.m., while he was outside his home brushing his teeth, he was approached by an individual who requested his assistance in locating a deceased body in a roadside canal near Silver Spring Hotel. PW2 agreed to accompany the person and indeed found a male body lying upside down. The deceased was described as wearing a black trouser and black sweater. After discovering the body, PW2 immediately proceeded to Kijitonyama police station to report the incident.

E1030SGT Rashid (PW3) testified that on 28.10.2017, around 6:00 p.m., while conducting patrol duties in Sinza Mapambano, received a call from the head of Kijitonyama police station instructing him to contact a person who would provide information regarding the whereabouts of a murderer suspect. Acting on the directive, PW3 contacted PW1, who directed him to Soka City bar in Sinza Mori, Kinondoni District, Dar es Salaam region. Upon arriving at the bar, PW3 identified the suspect and introduced himself as Rashid, a police officer from Kijitonyama Police Station. Subsequently, he, along with other police officers, apprehended the suspect. During interrogation, the suspect identified himself as Ayoub Waziri Mkoba, also known as Dame or Vandame. PW3 then transported the suspect to Kijitonyama Mabatini police station and notified the head of the station of the arrest.

ASP Abdallah (PW4), an investigator, provided testimony that on 12.10.2017, around 7:00 a.m., he was present at Kijitonyama police station when he received information regarding the discovery of a body in the roadside canal at Mpakani A area of Kijitonyama, within Kinondoni district. This information was conveyed by Said Hamidu, the ten-cell leader. PW4 promptly informed his superiors and led a police team to the scene.

Upon arrival, they found the body of the deceased, whose identity was initially unknown, submerged upside down in the roadside canal. The deceased was clad in black trousers and blue jacket. The police officers at the scene created a sketch map of the crime scene, which was then handed over to Detective Constable Kijangwa. Subsequently, they extracted the body from the water and placed it on the ground. Following standard procedure, they transported the body to Mwananyamala Hospital for confirmation of death.

F3625 D/SGT Eliamin (PW5), an investigator in this case, testified that on October 12, 2017, around 12:10 p.m. noon, while in his office, received a case file for investigation from SP Msanga. The case file pertained to the death of an individual from unknown causes, and he was tasked with continuing the investigation. PW5 examined the file and noted that the information was provided by PW4. He also observed that no arrests had been made in connection with the death.

The deceased's body was discovered on 12.10.2017, at Mpakani A area in Kijitonyama, within the Kinondoni district of Dar es Salaam region. Subsequently, PW5 conducted a re-inspection of the crime scene with fellow officers. He described the scene, noting the presence of a side road canal

and a nearby establishment known as Silver Spring Hotel. Additionally, he collected evidence from various witnesses.

During his investigation, PW5 learned from the deceased's relatives, who came to the police station upon learning of the death, that the deceased's name was Carlos. Further investigation revealed that Carlos worked as a bajaj driver and his last drive occurred on 12.10.2017, transporting a passenger named Vandame from Mlimani City to Mbezi.

PW5 stated that during the course of the investigation, the accused was arrested on 28.10.2017, in connection with the offence by PW3. Additionally, witnesses reported seeing the accused entering the deceased's bajaj at Mlimani City on 12.10.2017. Furthermore, the accused was allegedly observed committing the murder at Mpakani A area in Kijitonyama on the same date.

Dr. Buberwa Lwanga Muchwampaka (PW6), a medical professional, testified that on 14.10.2017, he received a call from the supervisor on duty informing him of a request to perform a postmortem examination. The request, brought by police officer called Sylvester, was to examine the body of the deceased, Carlos. Additionally, relatives of the deceased, Mhagama and Nichodemas, were present during the examination.

As the leader of the examination team, PW6 thoroughly examined the deceased from his head down to the palms of his legs. Following the examination, he compiled a report detailing his findings, which he then handed over to the police.

PW6 submitted the Report on Postmortem Examination, dated 14.10.2017, as evidence, which was admitted and marked as Exhibit PE1. He further explained to the court that the cause of death was determined to be asphyxia resulting from neck strangulation, leading to the blockage of blood circulation to the brain.

Daudi Christopher (PW7), a boda boda driver, provided his testimony recounting events from October 2017. He stated that during that time, his boda boda station was located at Mlimani City in Kinondoni district, Dar es Salaam. On the night of 11.10.2017 to the early hours of 12.10.2017, while returning from Mikocheni with a client, he encountered his colleague, Carlos Mkola, with a passenger, identified as Vandame. As Carlos prepared to depart, PW7 inquired about their destination, to which Carlos replied that they were heading to Mbezi. PW7 noted that Carlos typically switched on his light before departing, and the area was adequately illuminated by street lights and the light from nearby bajajjis.

PW7 emphasized that Vandame was not a stranger, as he frequented their parking area. The following morning, on 13.10.2017, while at Kijiweni, they became concerned when Carlos was not seen, which was unusual for him. Later that day, around 3 p.m., they received information that Carlos was at Mwananyamala Hospital. PW7, along with others, went to the hospital to confirm, only to learn from the doctor that Carlos had passed away and was in the hospital's mortuary.

He testified that the last known sighting of Carlos was with the accused, who had hired Carlos's bajaji. Since then, Carlos had not returned. On 28.10.2017, around 6 p.m. PW7 received a call from a frequent passenger asking him to pick him up at Soka City in the Sinza area. Upon arrival, while heading to the toilet, PW7 spotted the accused. He promptly informed the head of Kijitonyama police station about the sighting and was instructed to wait for the patrol police. PW7 remained in the toilet until the police arrived, at which point he pointed out the accused. The police then surrounded and arrested him.

The accused was found with a case to answer and was addressed under section 293 of the Criminal Procedure Act, Cap 20 Revised Edition 2022. He opted to defend himself with no witnesses.

Ayubu Waziri Mkobo (DW1) affirmed and testified that on 12.3.2016, he was going about his usual routine at Tabata mechanical works, testing a car. Upon reaching Ubungo, he was stopped by a traffic police officer, which puzzled him as the car possessed all necessary documents for road travel. Directed to park the car aside, he noticed through the side mirror a police car pulling up behind him, with officers running towards his vehicle from Mandela Road. Upon their arrival, the traffic officer informed them that they were searching for the car.

DW1 was instructed to step out of his vehicle, to which he complied. He was then ordered to enter their Defender car, a Land Cruiser. DW1 initially hesitated, as there was no one to remain with the car, which belonged to another person. However, the traffic officer understood his concern and instructed them to go together with the truck he was driving. They proceeded to Kijitonyama police station, arriving around 6:30 p.m.

Upon arrival at the police station, without being informed of anything, DW1 was taken into custody for two days until he was taken to the investigation room. In the investigation room, he encountered a police officer named Abdallah Suleiman, who referred to himself as "Mzee wa Mfumo." This officer claimed to have been searching for DW1 for some time and

167.

accused him and his father of being involved in container theft, alleging that DW1 pretended to be a mechanical expert. It was further claimed that he had stolen a consignment belonging to SUCHAKE, a businessman from Mwanza. DW1 was then pressed to disclose the whereabouts of the alleged stolen consignment.

DW1 maintained that he did not possess knowledge of the container's whereabouts but suggested obtaining the container number, which he did not know either. He contested the officer's assertion regarding his deceased father and objected to the notion of being incarcerated until the end of the presidency term. Additionally, DW1 pointed out that if the container had been lost from the harbor, the relevant police station would have been Chang'ombe police station, not Kijitonyama.

In response to his objections, DW1 was subjected to physical violence, being struck on the face with a ruler, before being returned to the lock-up. Subsequently, he remained in detention from March to July 2016, totaling four months.

DW1 proceeded to testify that it became known that Honorable Lugola, the then Minister for Home Affairs, was going to inspect the welfare of the police detainees. Consequently, DW1 was taken to Kinondoni District

Court around 1:00 p.m., where he appeared before Honorable Anipha Mwingira in Criminal Case No. 1672. He was charged with stealing the properties of Suchaki, a businessman from Mwanza, a charge which he vehemently denied.

Following the previous events, DW1 was taken into remand at the court. Shortly thereafter, within five minutes, he was brought back before the same magistrate. This time, he was charged with murder (PI 31) and accused of killing Alphone Daud. Subsequently, he was remanded to Segerea prison. The charge of stealing was withdrawn at this point.

DW1 continued to attend the murder case proceedings until October 2017 when the charge was withdrawn. Subsequently, he was taken to Kijitonyama police station, where he remained for three days before being brought back to Kinondoni District Court, this time appearing before Honorable Bonface Lyamwike. Following the charge of murder, which was designated as PI No. 33 of 2017, DW1 was accused of killing one Carlos. Maintaining his innocence, DW1 informed the court that he had never committed any crime or harmed Carlos, emphasizing his lack of knowledge regarding the alleged offence. He fervently prayed for the court to exonerate

him, asserting that the witnesses presented in court had failed to substantiate the case against him.

Having given due consideration of the adduced evidence from both sides, the main issue I am called upon to determine is whether the republic has managed to prove the instant offence of murder against the accused. Offence of murder is provided under section 196 of the Penal Code, [Cap. 16 R.E.2022]. The same provides: -

"S.196.- Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

The prosecution, therefore, must establish beyond a reasonable doubt, three essential elements: **Firstly**, they must demonstrate the unnatural death of the deceased and the circumstances surrounding it. This includes establishing the cause of death. **Secondly**, they must prove that the accused committed an unlawful act that directly resulted in the death. **And finally**, it must be shown that the accused acted with malice aforethought when committing the unlawful act.

To begin with the first issue, the fact and cause of the deceased's death were confirmed through the postmortem examination, documented in

report on postmortem examination (exhibit PE1). PW6, the pathologist, conducted the autopsy and concluded that the cause of death was asphyxia due to neck strangulation, resulting in the obstruction of blood circulation to the brain.

Regarding the second issue, whether the accused caused the injury to the deceased leading to his demise. Both direct witnesses, starting with PW1, provided explicit testimony. PW1 recounted that while en route with his passenger, he encountered a blue Bajaj model TVS King parked on the road side, with two individuals outside the vehicle—one in front and one at the rear. Additionally, two other individuals were observed on the side road. According to PW2, he positively identified the accused as a person strangling the deceased and subsequently throwing him into the roadside canal.

Acknowledging that the offence occurred at night, I recognize the importance of visual identification evidence being robust and devoid of any potential for mistaken identity, as established in the case of **Waziri Amani v. Republic** [1980] T.L.R. 250. However, PW1 asserted that the accused was no stranger to him; he had prior knowledge of him before the incident in question. Moreover, during cross-examination, PW1 described witnessing

another incident involving the accused at a bus stop in Sinza. Furthermore, he affirmed that there was sufficient light at the scene when he witnessed the altercation between Carlos and the accused, estimating his distance from the accused to be approximately ten steps.

Additionally, the prosecution presented another critical witness, PW7, who testified that the accused was the last person seen with the deceased. Importantly, PW7 was familiar with the accused; he was not a stranger. Furthermore, PW7 provided details about the lighting conditions at the scene of his last seeing the accused with the deceased, of which is Mliman City compound, the evidence I find supportive of reliable identification. Moreover, the timeline aligns with the sequence of events described by both PW1 and PW7. PW7 stated that the encounter occurred at midnight, while PW1 reported seeing the accused in a struggle around 1 a.m. It is implausible, in my assessment, for these two witnesses, stationed at different locations, to independently identify the accused as the perpetrator of the offence.

On the third issue, which on whether the accused acted with malice aforethought while committing the unlawful act? Under section 200 of the Penal Code, Cap. [16 R.E.2022] malice aforethought is 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.

Evidence of malice aforethought can manifest either directly or indirectly, contingent upon the unique circumstances and facts presented during the trial. In the case of **Rex v Tubere s/o Ochen** [1945] 12 EACA 63, the court emphasized that inferring malice aforethought requires scrutiny of various factors, including the nature of the weapon used, the specific part of the victim's body targeted, the manner in which the weapon was

employed, and the conduct exhibited by the accused before, during, and after the incident.

In light of this precedent, I am convinced that the accused was cognizant that his actions—strangling the deceased with his hands—would impede blood circulation to the brain, potentially resulting in the death of the victim or inflicting grievous harm, as stipulated under section 206 (b) of the Penal Code. Therefore, it is evident that malice aforethought can be inferred from the deliberate nature of the accused's actions and the foreseeable consequences thereof.

After carefully considering the defense presented by the accused, I find it lacking in substance. The available evidence unequivocally points him at the scene of the crime. It appears to me that the accused attempted to convey to the court that he was unaware of the charges until the case of theft was withdrawn and the present charge was read to him. However, if such allegations were valid, the accused should have provided evidence to substantiate them. I am persuaded by the testimony of PW1 and PW7, the key witnesses in this case.

From the foregoing, I am satisfied that the prosecution has managed to prove the offence of murder against the accused person for murdering

161

one Carlos S/O Mkola on 12th day of October, 2017 contrary to section 197 of the Penal Code, [Cap.16 Revised Edition 2022], as such I find him guilty. Consequently, I hereby convict him.

It is so ordered

DATED at **MBEYA** this 31st day of MAY 2024.


MUSA K. POMO
JUDGE
31/05/2024

ANTECEDENT

MR. MASUA, S/A: My Lord, accused be punished in accordance to the law.

That is all


MUSA K. POMO
JUDGE
31/05/2024

MR. MOHAMED, ADVOCATE: - My Lord, we leave it to the discretion of the court on the kind of punishment to be imposed


MUSA K. POMO
JUDGE
31/05/2024

SENTENCE

The offence of murder, under our law, calls for only one sentence which is death by hanging as provided under section 197 of the Penal Code, [Cap. 16 Revised Edition, 2022]. Being so, I hereby sentence the accused person, AYUBU WAZIRI MKOBO @ VANDAME to suffer death by hanging for murdering, CARLOS MKOLA, on 12th day of October, 2017 at Kijitonyama Mpakani area within Kinondoni District in Dar es Salaam region




It is so ordered


MUSA K. POMO
JUDGE
31/05/2024

COURT: Judgment and sentence pronounced at Mbeya sub-registry of the High Court via video conference in presence of Mr. Clement Masua, learned state attorney for the republic, the accused person represented by Ms. Robi Saimon Mgaigwa, learned defence counsel and also B/C Zubeda, all appearing before Dar es Salaam sub - registry of the High Court of Tanzania.

Right of appeal fully explained


MUSA K. POMO
JUDGE
31/05/2024