

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

CRIMINAL SESSION NO. 88 OF 2022

REPUBLIC

VERSUS

NASSORO AKILIMALI MULUNGA.....ACCUSED

JUDGMENT:

15th & 21st March 2024.

KIREKIANO, J:

The accused person Nasoro Akilimali Mulungwa is charged with one count of murder contrary to sections 196 and 197 of the Penal Code Cap 16 [RE 2019]. According to the information filed, the allegation is that on 26/12/2021 at Madimkongo village in Mkuranga District, the accused murdered Mwantabu Sultan Nzindu.

The accused pleaded not guilty to the information. In a bid to prove the information, the prosecution side paraded seven witnesses; PW1 Rajabu Juma Tuli, PW2 Yusuph Oneberth Magwai, PW3 F3061 Sgt Peter, PW4, ASP Jonggo, PW5 4229 DSgt Paschal, PW6 Nicodemus Harison Malola and PW7 H 6512 Dcpl Ndaki.

Briefly stated, the facts leading to the accused arrest and trial are as follows; the accused is the son of the deceased. On the fateful date of 26/12/2021 around evening hours. The deceased was found in her son's bedroom seriously wounded and bleeding.

The deceased family was in mayhem wondering what happened to the deceased and in the meantime, they were struggling to ensure that the deceased had medical attention. Before anything useful could be done, the deceased lost her life. The autopsy report suggested that the cause of death was a severe head injury. The prosecution case is that the wound culminating to deceased death was caused by the accused person.

The prosecution was conducted by Miss Elizabeth Ulomi assisted by Mr Clarence Mhoja learned state attorney while the accused was defended by Mr. Gerson Mosha learned advocate.

According to PW1 Rajabu Tuli who was the deceased brother, on 26/12/2021 when a report about the deceased harm reached him, he responded to the scene. He saw the deceased in bad shape with severe wounds unable to say a word. According to him, it appeared the wound was caused by a sharp object. Having informed the police, the police collected the body to Mkuranga Hospital where he (PW1) identified the body to the doctor who conducted the autopsy.

On 27/12/2021 he witnessed the police coming to a deceased residence in the company of the accused Nassoro Akilimali.

The deceased husband Akilimali Nassoro could not appear on reason of death. His statement was tendered by PW6 under section 34B (2) (c) of Tanzania Evidence Act Cap 6 (Exhibit P – 5). In this statement, he stated that on 26/12/2021, when the family wondered where about deceased was, he met the accused who told him that he would find the deceased in his room seriously wounded. He eventually found the deceased unconscious. He was in the company of his daughters; Zueni and Riziki. In mean meantime, he was suspicious about his son Nasoro who by then was not at home.

The next day he led the police to the residence of his son Said, where the police arrested the accused who confessed to having killed his mother. The police through PW4 ASP Jongo visited the scene on 26/12/2021 they found the deceased body with wounds around her head. On 27/12/2021 they arrested the accused at Panone at the house of his brother.

According to him, the accused confessed that he had killed his mother, he then led the police to the axe which he seized.

PW4 testified that he seized an axe at the residence of the deceased this was according to the certificate of seizure. (Exhibit P-3). The said axe

(Exhibit P – 2) was tendered by PW4 F 3061 Sgt Peter an exhibit keeper at Mkuranga police station. He received the exhibit (axe) from ASP Jongo and registered in the exhibit register on 27/12/2021.

The body of the deceased was examined at Mkuranga District Hospital by PW2 Dr. Yusuph Magwai. This was on 27/12/2021 according to his examination of the body the same had cut wounds at the head and near eye with severe bleeding. The wound measured about 5cm and 8cm and the skull fracture. These findings were recorded in post-mortem examination Report exhibit P – 1.

There was also evidence from the accused caution statement recorded by PW6 H 6512 Dcpl Ndaki. According to this statement (Exhibit P – 6) the accused confessed before PW6 that he killed the deceased by cutting her with an axe. It is in the statement that, the attack followed the deceased threats to the accused that if he did not agree to be a witch he would die. As such it was in the statement that having attacked the deceased he kept her in his room.

On 27/12/2021 the accused was also taken to a justice of peace by PW5 Sgt Paschal to record his confession. The said justice of peace Nicodemus Harison Malola, a resident magistrate at Mkuranga primary court. testified as PW6.

His version was that, the accused person confessed to him on 27/12/2021, (Exhibit P – 4). In his confession, he told him that his family had challenges of diseases which they associated with the belief that the deceased was bewitching them. On the momentous date, the deceased was narrating the acts of witchcraft demanding the accused to join the practice. Following the deceases suffered and the deceased demands on him he lost his mind and attacked the deceased by an axe which he was fixing its handle. He then dragged the deceased and kept her in his room.

The accused line of defence was a complete denial of the facts. According to him, DW1 Nassoro Akilimali when he went back home, he found many relatives and other neighbours. He did not know where his mother was. After a while police arrived and the deceased body was taken to hospital.

Supported by evidence from his brother DW2 Said, it was DW1's defence that he was arrested on 26/12/2021 and not 27/012/2021. He said he was beaten by police and tortured till morning. The next day 27/12/2021 he was in bad health following the toucher the police then asked him to sign papers (caution statement) which they tricked him that it would facilitate him to get medical attention. With regards, to the axe (exhibit P – 2) which

was alleged, he said when the police went to the residence of the deceased, they had the same in their vehicle.

He also said, he was taken to the justice of peace (PW6) and was told to sign the confession. DW1 denied having confessed to PW6 (Exhibit P – 4) nor having signed the certificate of seizure (Exhibit P–3.)

DW3 Riziki Akilimali was another accused sibling, according to her, when she went back home from farming on 26/12/2021, she was found deceased in the accused room bleeding seriously. According to her, the deceased told her that the cause of harm was that she had fallen from bed, but the deceased said no more.

That being the substance of evidence I wish at this stage to appreciate the final submissions filed by Mr Clarence Mhoja for republic and Mr. Mosha for the accused, I have read the same, and I will not reproduce the same instead, I will consider the same as I address the contending issues in this case.

The onus of proof in this case, that the accused committed the offence charged rests on the prosecution and not on the accused person. This is the position under Section 110 and Section 112 of the Evidence Act Cap.6 [R.E 2022]. The same also is articulated in the decision by the court of appeal in **Joseph John Makune vs. Republic [1986] TLR 44** on page 49, that;

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."

In this case, to find conviction against the accused person herein all elements of the offence of murder under section 196 of the Penal Code must be proved beyond reasonable doubt. Matters to be proved are; that **first** the accused is dead, **second**, that his death was not natural but caused by an unlawful act. **Third**, it was the accused who did the unlawful act or omission **fourth**, that the death was caused with malice afore-thought that is to say the act was intended to death or grievous bodily harm.

I will start with the first aspect of death, there was evidence from the deceased brother PW1 Rajabu Juma Tuli, but also the statement of the deceased husband (Exhibit P-5) that that they saw the deceased body. PW1 identified the same for post-examination. The doctor who conducted post-examination PW 2 Yusuph Oneberth confirmed the death of the said Mwantabu in his report Exhibit P 1. As such the accused, as were his witnesses DW2 Said and DW3 Riziki did not dispute the death of the deceased. All these witnesses were family members who also testified to the

burial of the deceased. I also agree with Mr Mhoja for republic that during trial within trial in admission of Exhibit P6, the said Riziki Akilimali Mulunga said the deceased is Mwantabu is dead and that in view of provisions of section 35 (1) of the Evidence Act [Cap. 6 R.E. 2022] and decision in **Farid F. Mbaraka & Another vs Domina Kagaruki & Another (Civil Appeal No.293 of 2022) [2023] TZCA 17597 (TanzLII)** at page 25, that this evidence can be used to support a fact. I thus find as a fact that the said Mwantabu Sultan is dead.

The cause of death was explained in the post-mortem cause of death was a severe head injury. This was also the testimony of PW1 who witnessed the deceased before she died. In his defence, the accused witness did not dispute that the deceased sustained a head injury. It is thus settled that the deceased death was not natural but was culminated by a head injury sustained.

The decisive question is who attacked the deceased.

The prosecution rests heavily on the confession statement of the accused Exhibit P-6 but also the extra-judicial statement exhibit. P-4 According to Exhibit P- 6 the accused said,

*"Nikabaki nyumbani mimi na mama yangu mzazi
Mwantabu Sultan Mzindu ndipo alipoanza kinisumulia*

masuala yake ya kishirikina; hapo zamani kuna watu walikataa kuwa wachawi wakaja kufariki. Hivyo baada ya kunieleza masuala hayo na kukumbuka matukio aliyokuwa akinifanyia ya ushirikina nikachukua maamuzi ya kumdhuru kulikuwa na shoka ambalo nilikuwa nabadilisha mpini nikalinyanyua na kumkata nalo kichwani mara moja.

Kisha nilimchukua mama yangu, Mwantabu Sultan Mzindu kwa kumburuza ya familia kwenye chumba nilicholalala na mdogo wangu."

The accused repeated this before the justice of peace (Exhibit P-4)

"Niliongea nae hadi kufikia majira ya saa 11:45 akiwa ananihadithia mambo ya kizamani kuhusu watu waliokufa kishirikina Hivyo Kutokana na hadithi hizo na kutokana na vitendo alivyokuwa akitufanyia vya kishirikina ambavyo alikuwa akitamka mwenyewe akili yangu ilighafilika."

Tulipokuwa tumekaa kulikua na shoka pembeni hivyo nilichukua shoka hilo na kumpiga nalo kichwani alianguka chini nikamburuza na kumpelea ndani.

On his part, the accused denied having confessed to the police and stated that he never made the statement to the police instead he was coerced to sign a 'document' he did not identify (Exhibits P- 6) It is as such noted here that confession before a justice of the peace, (Exhibit P-4) was not objected

by the accused but he made u-turn during his defence and repudiated the same.

I will start with the confession statement. (Exhibits P- **6**). Mr Mosha in his submission attacked the legality of this statement in the first place arguing that, the prosecution did not bring the extract of the detention register into court as evidence that the accused was arrested on 27th December 2021, so that this court could make finding that the statement was made within four hours as couched under section 50, and other 53 and 58 of **Criminal Procedure Act Cap 20 R.E 2019**,

In another angle of argument, he cited the decision in **Mashimba Dotto @Lukubanija versus Republic, Criminal Appeal No. 317 of 2012 CAT-Mwanza at pg 5**. relying on the Caution Statement and Extra Judicial Statement must caution itself for danger to rely on that piece of the evidence unless corroborated by independent evidence.

This court addressed the issue of time recording of the statement when its admission was at issue and was satisfied that the same was recorded in time. As such agree with Mr Mosha that caution must be taken before relying on the caution statement which was retracted by the accused.

This was fortified by the decision in the case of **Hemed Abdallah vs. Republic [1995] TLR 172 (CA)**, it was held that: -

*"Generally it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, **after full consideration of the circumstances, is satisfied that the confession must but be true.**" (Emphasis supplied)*

A similar position was stated by the Court of Appeal in the case of Michael **Luhiye vs. Republic [1994] TLR 181 (€A)**, where the Court held that: -

"It is always desirable to look for corroboration in support of a retracted confession before acting on it but a court may convict on a retracted confession even without corroboration."

There was a piece of evidence from the statement of the deceased husband (Exhibit P5) that the accused told him that if he was looking for the deceased, they could find her in his room (accessed room) and she was seriously injured. PW1 Rajabu Tuli confirmed that the deceased was found in the accused room. The evidence from defence DW3 Riziki as such was to the effect that the deceased was in the accused room. This evidence corroborated the accused confession in Exhibit P-6 that the accused dragged the deceased into his room suggesting that he knew what happened to the deceased.

In the case of **Bushiri Mashaka And 3 Others v Republic, CAT at Dar es Salam Main Registry in Criminal Appeal No. 45/1991** (unreported) the court held that:

"If the accused person confessed while at the police station, the safe way to adopt was to let him repeat his or her confession before the justice of peace.

This was done in this case, I thus bring into consideration the accused confession before Justice of piece PW6 Nicodemus Malola, exhibit P 4 where the accused replicated his confession stating thus;

"Niliingea nae hadi kufikia majira ya saa 11:45 akiwa ananihadithia mambo ya kizamani kuhusu watu waliokufa kishirikina

Hivyo Kutokana na hadithi hizo na kutokana na vitendo alivyokuwa akitufanyia vya kishirikina ambavyo alikuwa akitamka mwenyewe akili yangu ilighafilika

Tulipokuwa tumekaa kulikua na shoka pembeni hivyo nilichukua shoka hilo na kumpiga nalo kichwani alianguka chini nikamburuza na kumpeleka ndani."

As indicated this statement was not objected to during its admission. However, in his defence, the accused, denied having made the same freely. Mr Mhoja cited **Khalifa Ramadhani vs Republic (Criminal Appeal 131**

of 2012) [2013] TZCA 359 (TanzLII) where the appellant challenged the voluntariness of the extra judicial court held;

"Careful perusal of the record shows that the extra judicial statement which was read out aloud was tendered in court without any objection from the appellant. The complaint that it was involuntarily made was considered an afterthought."

I have also considered the accused defence that he was coerced and Mr Mosha's submission that the statement was not freely made with respect I agree with Mr Mhoja and find this to be an afterthought.

I have also considered the piece of evidence from the defence side by DW3 Riziki that the deceased gave her dying declaration explaining the cause of the death specifically wounds sustained. That is she did fall from the bed. This piece of evidence was assessed by this court however, it is also important to note that for a dying declaration to be relied upon its existence, accuracy and truth must be proved. In the case of **Romanus Kabogo vs. Republic, Criminal Appeal No.62 of 1998** but also **Hemsi Nzuunda and two Others vs. Republic, Criminal Appeal No.34 of 1995** the Court of Appeal of Tanzania held to the effect that: -

"As a general rule, a court can act upon a dying declaration if it is satisfied that the declaration was

made if the circumstances in which it was made give assurance to its accuracy and is true."

See also the decision of this court in **Mwiburi Muriro @ Hamis Michael Mg'ururi and Two Others vs Republic, Criminal Session No. 14/2022 at Komba J at page 14.**

Now, in this case at hand, there was evidence from the statement of the deceased husband Exhibit P- 5 that the deceased was really in bad shape and unconscious. In this piece of evidence, it was stated that when he got to the room where they found the deceased in the first place, he was in the company of DW3 Riziki. I find that this evidence contradicts DW3 story.

I have also considered the state in which the deceased was found who lost her life shortly after she was found. All this considered, it is not convincing that the statement that she felt from the bed was in the first place made.

As such considering the nature of the wounds sustained that is, cut wounds on the head the same did not come near the truth. Given the above, I find that the defence evidence from DW3 Riziki on the cause of death is not conceivable.

All said having assessed the evidence of the accused confession statements , also considering the contents of the statement were consistent,

I see no reason to doubt the truth of the confession statements. Guided by the decision in **Michael Mgowole & Another vs Republic (Criminal Appeal 205 of 2017) [2019] TZCA 341 (TanzLII)** on consistency in confession, I am satisfied that the accused confession can safely be relied upon as true. I thus find as a fact that the deceased wounds which culminated in her death were inflicted upon her by the accused person.

The last aspect to be considered is whether the accused had malice aforethought. In this case, there is nothing on record suggesting the pre-existing intent of the accused to kill the deceased or cause her grievous bodily harm. Understandably to infer malice it is not always the case to depend on the wording or conduct of the attacker.

It is also the law that malice can be inferred from many aspects. In this case, I shall consider the relevant scenarios; that is the weapon used. The prosecution relied on the weapon axe and the extent of harm sustained as indicated in the post-mortem examination report. **Exhibit P 2.** In this I am guided by the principle stated in **Enock Kibela Versus Republic Criminal Appeal no 150 OF 1994** which is also cited by Mr Mhoja where the Court of Appeal stated that for courts to establish malice within the context of the Penal Code, they need to assess the following 7 aspects;

"(1) the type and the size of the weapon, if any, used in the attack (2), the amount of force applied in the attack, (3) the part or parts the blow or blows were directed or inflicted on, (4) the number of blows although, one blow may, depending on the facts of a 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, (7) the conduct of the attacker before and after the killing."

About the type of weapon, Mr Mosha questioned the autopsy report arguing that the doctor did not mention the weapon used. The prosecution side tendered an axe (exhibit P 2). The accused disputed that the axe was seized from him denying signing the certificate. I have scanned the evidence on record. There was evidence in the testimony of PW1 that the police seized an axe at the scene. This evidence is also featured in the statement of the accused father who was the owner of the premises.

As such the same as mentioned in the extrajudicial statement (Exhibit P 4 whose admission was not objected to but also the caution statement Exb - 6 My reasoning is fortified by the decision in ***Abdallah Said Mwingereza***

vs Republic (Criminal Appeal 258 of 2013) [2015] TZCA

<https://tanzlii.org/akn/> the court held;

"But even if the seizure certificate were to be ignored still there was sufficient evidence from PW1 and PW2 which proved that the appellant was found with the pistol and seven rounds of ammunition."

I thus find as a fact that the weapon used was an axe. I have also considered the other aspect that the blow landed on the deceased head. This was, with few words a vulnerable part. There was also evidence that the deceased was attacked with one blow. I have taken note of the extent of the harm as indicated in the post-mortem examination report.

On conduct of the accused Mr Mhoja was of the view that the accused decision to go to his brothers house illustrated malice, with respect I am unable to agree because he had already told his father about his mother.

Before making a finding on malice, I have posed here and considered whether the accused had any defence or explanation on this. I say so because having relied on the caution statements, all other relevant facts in the statement as a matter of fairness has to be considered. As indicated the accused line of defence was a complete denial of facts leaving the prosecution to prove the element including malice aforethought.

The angle of evidence relied on by the prosecution narrated facts in which the belief of witchcraft was at the centre of the attack. I have given much thought to the facts surrounding the attack and the accused person. It is in Exhibits P4 and P6 that following the deceased demand on him to practice which craft the accused in the first place decided to stay away from the deceased and went to stay with his brother.

When he came back home, the same threats continued. On the date of the attack, the same threat was installed in to accused mind intimating possibility of death if he did not capitulate. He said, this blew his mind and instantly attacked the deceased. To appreciate this aspect, I find it pertinent to indicate part of excerpt from the extrajudicial statement thus;

"Niliingea nae hadi kufikia majira ya saa 11:45 akiwa ananihadithia mambo ya kizamani kuhusu watu waliokufa kishirikina.

Hivyo Kutokana na hadithi hizo na kutokana na vitendo alivyokuwa akitufanyia vya kishirikina ambavyo alikuwa akitamka mwenyewe akili yangu ilighafilika."

Looking at the evidence in the confessions the same depicts the defence of provocation associated with witchcraft. In a similar case in Kasongi **Yabisa V The Republic [1995] TLR 28 (CA)** the court of appeal

affirmed the decision rejecting the appellant's defence of provocation associated with witchcraft and held;

"Although the appellant killed his sister, the deceased, in the honest belief that she was responsible, because of witchcraft, for the death of his daughter, since there was no sudden shock which might have deprived the appellant of his self-control the killing was murder. (Emphasis supplied)."

I have considered the facts of that case and I am of the view that the facts in **KASONGI YABISA** are distinguishable with the case at hand. In case the case of **KASONGI YABISA** supra the appellant killed the deceased in the honest belief that she was responsible for killing his children who died a year before.

However, in this case, the evidence narrates that the deceased persistently demanded the accused to associate with acts of witchcraft and the attack at the apex of the threat and instantly by using an axe which was near him. The accused was a young man of 18 years, in this state of affairs having scrutinised the evidence particularly the demands and threats by the deceased, having regard to the history he had suffered and the fact that the deceased was his mother who in normal cause of things he would believe, installing in to his mind a new faculty of witchcraft with threats of death in

the way it was done, engulfed the accused and was in my considered assessment a powerful dynamite that blew his mind.

Having believed the other parts of the caution statement and the extrajudicial statement. I see no reason not to believe him in this. In this state of facts, I am not convinced that there was malice aforethought on part of the accused at his stage.

I have in aid the decision in ***Faustine Kunambi vs. Republic, Criminal Appeal No. 32 of 1990*** that;

"Where there is difficult on evidence to say that the accused intended to kill the deceased, he should be given the benefit of doubt and found guilty not of murder but of manslaughter."

All said, I find that the prosecution side have not proved the information of murder in the required standard the accused is thus found not guilty of murder contrary to section 196 and 197 of the Penal Code Cape 16. He is found guilty of manslaughter contrary to sections 195 and 198 of the Penal Code Cap 16 [RE 2019]. He is accordingly convicted.



A. J. KIREKIANO

JUDGE

21.03.2024.

PREVIOUS RECORD AND AGRAVATING FACTORS;

Miss Roida Mwakamele - S/A

No record of the accused, while we agree the accused is a first offender, the deceased was accused mother we pray for severe sentence to detest any violent conduct by youth against their parents.

MITIGATION:

Mr Gerson Mosha- Counsel for accused.

The accused is a first offender, and a young man who committed the offence when he was just 18 years who was still a student and still has dreams to be productive. He is now matured enough looking forward to be a law-abiding person The offender has been in remand for about three years now. He regrets the offence committed. We thus pray for this court consideration of the sentence.

SENTENCE

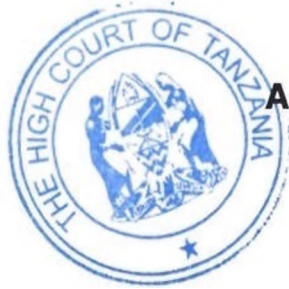
I have considered the circumstance leading to the death of the deceased, death occurred at home the deceased was the accused mother. Being a woman and mother, I have considered the victim as vulnerable. The weapon used was lethal, it is on basis of this I have rated this on the high side.

As such in assessment of the sentence, I have also considered the mitigation factors as submitted by Mr Mosha, the accused personal circumstances as it appeared in the facts of the case, that he was a boy aged 18 when he committed the offence and a student whose dreams was cut short. I have also considered the accused expression of remorse, As such the accused was in remand in prison for about three years all these have been considered in reducing sentence.

I have taken in to consideration that the offence was committed to a parent i. e his mother, this should be detested.

The offence of manslaughter is generally punishable with maximum sentence of life sentence. In this case, the circumstance of this case was rated in the high side, that would attract the maximum of 10 years. In the end, having considered the factors above, I come to the conclusion that

sentence of **three years (3)** term of imprisonment in jail will serve justice in this case. He is accordingly sentenced.



A. J. KIREKIANO

JUDGE

21. 03.2024.

COURT

Judgement and sentence delivered in the presence of Miss Roida Mwakamele learned state attorney for Republic and in the presence of the accused and Mr Gerson Mosha counsel for the accused.

Sgd

A. J. KIREKIANO

JUDGE

21.03.2024.