IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL SESSION NO. 26 OF 2018

(Originating from P.I No. 25 of 2016, the District Court of Arusha)

THE REPUBLIC.....COMPLAINANT

VERSUS

FRANK CHARLES @ FATAKI.....ACCUSED

JUDGMENT

31/03/2021 & 23/04/2021

M. R. GWAE, J

The accused person, **Frank Charles @ Fataki** is charged with an offence of Murder contrary to section 196 of the Penal Code, Cap 16 R.E 2002. He is alleged to have murdered one **Petro Michael Mbise,** his friend (to be referred hereinafter to as 'deceased') between 29th and 31st October 2015 at Ngyani Village within Arumeru District in Arusha Region. When the charge was read over to him, the accused, he patently pleaded not guilty thereto.

Throughout the hearing of this case, the Republic was represented by **Miss. Adelaide Kasala** assisted by **Miss. Janeth Masonu,** both Learned State

Attorneys, the accused person, on the other hand was represented by the learned counsel **Mr. Ombeni Kimaro**.

In proving the case against the accused person, the prosecution paraded a total of six (6) witnesses namely; E.118 D/CPL Amijulai (RTD) **(PW1)**, Eliakunda Elibariki **(PW2)**, Elizabeth Lazaro **(PW3)**, Dr. Felician Francis **(PW4)**, Elieta Emmanuel **(PW5)** and D.3876 D/SSGT George (RTD) **(PW6)**. The prosecution also tendered three (3) documents as exhibits, notably; a sketch map **(PE1)**, Postmortem Report **(PE2)** and a cautioned statement **(PE3)** whereas the defence, had only one witness, the accused who appeared as DW1 did not have any exhibit to support their case.

Brief facts of the case are as follows; that, the accused and the deceased were close friends and according to the evidence of PW2, PW3, and PW5 they were both living in the same house. It was on 29/10/2015 when the accused was last seen with the deceased by PW2 who testified that the accused and the deceased came to her grocery on 29/10/2015 to buy foodstuffs namely; tomatoes and onion and left, however, shortly after, she heard noise from the room of the deceased and there was a serious misunderstanding between the accused and the deceased and the accused was seen armed with an axe. PW2 also testified that the accused used to smoke "Bhangi" and on the material date both the accused and the deceased were drunk.

This piece of evidence is corroborated by that of PW3 who also testified to have last met the deceased and the accused on 29/10/2015 and from that date neither the accused nor the deceased was seen until 1/11/2015 when the deceased body was found dead in his house at the corner of the living room.

An information was furnished to the Police by PW5 and (PW1) E.118 D/CPL Amijulai (RTD) together with PW4 a doctor from Meru Hospital, went to the scene of the crime. Upon arriving at the scene of crime PW4 examined the dead body which at that time had started to decompose and the autopsy (PE2) revealed that the deceased' neck was twisted (straggled) and he had been carnally known against the order of nature (sodomized). The cause of death was lack of oxygen due to strangulation, PW1 then drew a rough sketch map (PE1).

It is further the prosecution evidence that, at all this time the accused person was not around and that neither of the prosecution witnesses who are neighbors to the accused knew his whereabouts. It was until 21/03/2015 when PW6 D.3876 D/SSGT GEORGE (RTD) received an information of the arrest of a suspect of murder through Usa River IR/2919/2016 at Mererani and therefore he was required to go to Mererani to pick up the accused and brought him to Usa River Police Station. On 22/03/2016 the accused was brought to Usa River Police Station and on the same date his cautioned statement (PE3) was recorded. PW6 was the one who recorded the statement of the accused and according to him the

accused confessed to have murdered the deceased in the course of satisfying his sexual desires by unnaturally knowing the accused against the order of nature.

On the part of the defence, the accused defended himself. Essentially, the accused has not denied to be a close friend of the deceased person, the accused further admitted to be the last person to be seen with the deceased as testified by the prosecution witnesses. However, the accused testified that on the material date he was drinking and smoking "Bhangi" together with the deceased to a nearby grocery. According to him, he got so drunk to the extent that he could not remember what transpired with regard to the death of his friend, furthermore the accused could not remember as to whether he had any fight with the deceased as he was excessively intoxicated. He further contended that he did not know what happen with the deceased whom he is up to date not certain if he is alive or dead since he left Ngyani area and went to Mererani on the 30th October 2015 for mining purpose. On cross examination by the learned State Attorney, the accused denied to have been living with the deceased in one house.

From the facts above, it is clearly undisputed that the deceased's death was unnatural, that, the accused and deceased were close friends and that on the 29th October 2015 the accused and deceased were seen together and went to PW2's grocery to buy potatoes and onions. Therefore, in my considered view, issues for

the court's determination which were also made clear to the assessors are as follows: -

1. Whether the accused's defence that he was not living with deceased and that the deceased was aware of his safari to mererani area on 30/10/2015 raises any doubt as to his participation in the deceased's death
2. Whether the circumstantial evidence adduced by the prosecution is sufficient to legally justify this court to hold that it is the accused who caused the deceased's death.
3. Whether the accused's defence of intoxication or influence of alcohol and narcotic drugs is capable of reducing the offence of murder to the offence of Manslaughter

Regarding the **1st issue**, from the outset this court wishes to point out that, out of the six witnesses summoned by the prosecution side none of her witnesses witnessed the killing of the deceased except that there is evidence as to the accused being a last person to be seen with the deceased, the previous conducts of the accused and deceased, namely; being drunk and occurrence of fracas between them. There is also evidence on subsequent conducts on the part of the accused person to wit; the alleged absconding from the deceased's residential house. This suffices to justly hold that the prosecution case against the accused hinges on circumstantial evidence.

The accused is found strongly denying to have been living together with deceased adding that he departed from Ngyan village and straight away went to Mererani area for mining the fact which was known to the deceased. Since none of the prosecution witnesses witnessed the fateful incident. It follows therefore, there is only circumstantial evidence against the accused. It is a well-established practice of our courts that circumstantial evidence has always been considered as the weakest evidence however, the defunct Court of Appeal for Eastern Africa in the case of **Samson Daniel v. Republic** (1934) EACA 134 observed that at times circumstantial evidence might be better evidence to be relied upon to secure a conviction than that of the eye witness. Nevertheless, in considering circumstantial evidence the court must warn itself that the evidence must directly connect the death of the deceased with the act or omissions of an accused and that there are no other co-existing circumstances which could have weaken the inference of a guilt of such accused.

Additionally, our highest court of the land through the case of **Jimmy Runangaza v. Republic,** Criminal Appeal No. 159B of 2017 discussed in details the principles governing reliability of the circumstantial evidence. The same principles were reiterated by the Court of Appeal of Tanzania in the case of **John Shini v. Republic,** Criminal Appeal No. 573 of 2016 and I wish to quote part of the holdings for easy of reference;

"In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (see **Simon Musoke v. Republic**, [1958] EA 715)".

Also, Sarkar on evidence, 15th Ed. 2003 Report Volume 1 at page 63 also emphasized that on cases which rely on circumstantial evidence, according to it, such evidence must satisfy the following three tests which are;

1. The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established.
2. Those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused; and
3. The circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."

Bearing the above principle in mind, the evidence so adduced by both sides establishes that it was the accused who was the last person to be seen with the deceased while both were drunk, the fact which has not been denied by the accused person. It has been a well-established principle that the accused person being the last person to be seen with the deceased person has to give sufficient explanation as to the deceased's death or the deceased's whereabouts for that reason in the absence of reasonable explanation on the part of the accused as to the death of the deceased he cannot therefore absolve or exonerate himself from being the person who killed the deceased. In the case of **Mathayo Mwalimu and**

another v. The Republic, Criminal appeal No. 147 of 2008 (unreported-CAT), the appellants were the last person to be seen with the deceased a day before his death. Applying the doctrine of the last seen person to be seen with deceased, the court stated as follows;

> "In our considered opinion, if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer. In this case, in the absence of an explanation by the appellants to exculpate themselves from the death of HAMISI MNINO, like the court below, we too are satisfied that they are the one who killed him."

In our case, the accused ought to have sufficiently explained as to what caused the deceased's death. Mere assertion that he was not living with the deceased in the residential house owned by the deceased and that the deceased was aware of his safari to Mererani area for mining, to my increasingly view, is nothing but an afterthought since the accused via his advocate did not cross-examine the prosecution witnesses on that vital issue. It is therefore pertinent to look at the position of the law on failure to cross examine a witness on important issue (s). The position of the law has consistently been that, failure to cross examine a witness on vital matter (s) amounts to an acceptance of such fact (s). The Court of Appeal of Tanzania in the case of **Damian Ruhele v. Republic,**

Criminal Appeal No. 501 of 2007 had the following to say on failure to cross examine a witness;

> "it is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence".

Also, the Court of Appeal of Tanzania in the case of **Nyerere Nyangue v. The Republic,** Criminal Appeal No. 67 of 2010 held that;

> "As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

Considering the prosecution evidence and the accused's failure to cross examine the prosecution witnesses (PW2, PW3 and PW5), I am therefore satisfied that the accused's previous conducts namely; being drunk, existence of fracas between the accused and deceased, his being last person to be seen with the deceased and subsequent conducts credibly pointing towards his participation in the killing of the deceased between 29th October 2015 to 1st November 2015. Hence, his assertions that he was not living with the deceased person and that his subsequent conduct of travelling to Mererani area for mining, the fact known by the deceased prior to his departure do not raise any doubt as to his participation in the deceased's death.

As to the **2nd issue above**, whether the circumstantial evidence adduced by the prosecution side credibly establishes that the deceased's death was caused by the accused with malice aforethought. The accused stands charged with murder which requires a commission of killing of another with conscious intent to cause death or grievous bodily harm or predetermination to kill or forming mental state to kill another person.

Malice aforethought is therefore an important ingredient to be ascertained in order to establish whether the accused's acts were with an ill motive as provided under section 200 of the Penal Code, Cap 16 R. E, 2020, being an intention to cause death, or do grievous harm, knowledge that the act or omission would cause death or an intent to commit an offence punishable for a penalty of more than three years jail. This statutory position was judicially emphasized in **Enock Kipela v. Republic,** Criminal Appeal No. 150 of 1994 (unreported-CAT) that:

> "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:
>
> i) the type and size of the weapon, if any used in attack;
> ii) the amount of force applied in assault;
> iii) the part or parts of the body the blow was directed at or inflicted on;
> iv) the number of blows although one blow may, depending upon the facts of the particular case, be sufficient for this purpose;
> v) the kind of injuries inflicted;

vi) the attacker's utterances, if any, made before, during or after the killing; and

vii) the conduct of the attacker before, or after the killing."

As the prosecution has neither testified that the accused formed an intent to murder the deceased nor did testify that there was a motive of killing the deceased on the part of the accused person except hearing of fracas (PW2), to see the accused while armed with an axe and that the expert evidence as to the cause of the deceased's death namely; strangulation and sodomy (PE2, PW4, PE3). However, considering the evidence adduced by the prosecution side that, the accused and deceased were excessively drunk, that there were misunderstandings between the two and since no sperms were diagnosed and no DNA test was conducted on the grounds that the deceased's body was rotten and worse financial status of the deceased's relatives respectively, I am not satisfied if the expert evidence relating to unnatural offence is reliable, in the circumstances. It follows therefore, it is questionable if the accused killed the deceased with malice aforethought to the required standard unless undoubtedly corroborated with the accused's cautioned statement (PE3).

PE3, accused's cautioned statement in which the accused is said to have confessed the offence of murder by strangling the deceased's neck so as to satisfy his sexual wishes. However, I have considered the objection raised by the defence. I am consequently not fully satisfied if the cautioned statement which requires

corroboration can safely corroborate the testimonies of the prosecutions witnesses whose evidence requires corroborative evidence to secure a conviction on the charge of murder against the accused without undue regard to the noted delay (about two months) to bring the accused to the court, thus the 2nd issue is determined not in affirmative.

In the **3rd issue above**, whether the accused's defence of intoxication or influence of alcohol and narcotic drugs is capable of reducing the offence of murder to the offence of Manslaughter, examining the evidence adduced by both sides and on record, the evidence which led to the death of the deceased and taking into account the accused's own admission that on that particular date he was so drunk and that he could not recollect what happened. Also, considering the prosecution evidence that there was a fracas between the deceased and accused on the 29th October 2015 (see **Jackson s/o Mwakatoka and 2 others** (1990) TLR 17), I am of the decided view that, any death emanating from fracas reduces seriousness of the killing with an intent (Malice aforethought). The defence of intoxication raised by both sides is as provided by section 14 of the Penal Code, Cap 16 Revised Edition, 2002

> "14 (1) Save as provided in this section; intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of, he did not understand what he was doing and-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) of that subsection the accused shall be discharged and, in a case, falling under paragraph (b) of that subsection the provisions of this Code and of the Criminal Procedure Act relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section "intoxication" shall be deemed to include a state produced by narcotics or drugs".

Examining the provisions of the law quoted above and the evidence adduced by both sides as depicted herein above, it goes without saying that the accused on the 29th October 2015 was intoxicated through excessive drinking and smoking of cannabis sativa. It follows therefore, that, on the 29th October 2015 the accused person was excessive drunk that he could not know what happened thereafter.

In the light of the evidence adduced by the parties, the accused should benefit from the defence of intoxication. The accused is found to have committed unlawfully killing while under influence of alcohol as well as narcotic drugs commonly known as bhang (See a decision of the Court of Appeal in **Mathias s/o**

Masaka v. Republic Criminal Appeal No. 274 of 2009 (unreported). The defence of intoxication is thus found to be credible taking into account that the same has been sufficiently supported by the prosecution evidence and therefore it reduces the offence of murder which the accused would otherwise be held liable to the less offence of manslaughter c/s 195 of the Penal Code, Cap 2002, Revised Edition, 2002.

The assessors whom I sat with that is Ms. Tabu, Mr. Lembrice and Ms. Joyce unanimously opined that the accused is guilty of the offence of murder on the ground that he formed an intent to commit an unnatural offence and that the accused's relative, PW2 would no incriminate him whereas Ms. Joyce opined that the accused might have unintentionally killed the deceased while committing unnatural offence. I have however differed from their opinion for the reasons that I have explained herein above

Before I conclude, I wish to recommend as to the lapse of time from the time the accused was arrested and the time the accused person was arraigned before the committing court. During trial within trial the defence through DW1 stated that he was arrested on 18/03/2016 at mererani area and he was brought to Usa River Police Station on 22/03/2016 however, he was taken to the committing court on 18/05/2016, almost two months, the fact which is supported by the records of the committing court. I took note of it while composing the ruling

and promised to consider the same in my composition of this judgment. The prosecution on the other hand did not call any witness to explain the allegation and give such explanations as to why the accused was brought to court after the expiration of almost two months. It is a well-established principle that a suspect after his arrest must be taken to court as soon as possible pursuant to section 32 (2) of the Criminal Procedure Act Cap 20 R.E. 2019 which is applicable under the circumstances

In the case of **Martin Manguku v. The Republic,** Criminal Appeal No. 194 of 2004 (unreported) The Court noted that it took six clear days for the appellant to be taken to court. Thus, it said: -

> "There is no explanation from the police why they kept him in police custody for all those six days without taking him to court. Section 32 (2) of the Criminal Procedure Act, 1985 requires that where a person has been taken into custody without a warrant for an offence punishable with death, he shall be brought to court as soon as practicable. It is noted that in the case of other offences, such a person must be taken to court within twenty-four hours. It is appreciated that offences which are punishable with death are more serious and the police may need more time to make basic investigations before taking the suspect to court, hence the leeway that the police will take such a suspect to court within reasonable time. "Reasonable time" will depend on the circumstances of each individual case. In the case under discussion, even in those six days the appellant had not been taken to court. In the absence of

acceptable reasons for keeping the appellant in custody for the six days up to the time he made the statement 21 about the knife it must be taken that the police were holding the appellant unlawfully in custody. It does not need extra-ordinary thinking to know that the appellant has been under very stressful condition."

In our instant criminal case, the accused was evidently not taken to the committing court for about two months' period without any justifiable reasons of doing so despite the fact that he is alleged to have voluntarily confessed the offence. This act by investigation machinery also seriously discredits the weight of the accused's cautioned statement as far as the offence of murder is concern as I have done herein above.

In the upshot, the prosecution is found to have satisfactorily established the accused's guilt on the offence of manslaughter unlike the offence of murder. I consequently convict the accused person of the offence of Manslaughter c/s 195 of the Penal Code, Cap 16 Revised Edition, 2002.

it is so ordered.

M. R. GWAE
JUDGE
23/04/2021

Court: Right of appeal fully explained

M. R. GWAE
JUDGE
23/04/2021