

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 9 OF 2016

THE REPUBLIC.....PROSECUTOR

VERSUS

ASUMIN ^D/o BAKARI.....ACCUSED

27 Feb. & 13 March, 2020

JUDGMENT

DYANSOBERA, J.:

Asumin d/o Bakari Ally, the accused person herein, upon arraignment in court on 23rd day of September, 2016, pleaded not guilty to the charge of murder preferred under section 196 of the Penal Code [Cap.16 R.E.2002]. The particulars of the offence allege that the accused, on 1st day of January, 2015 at Nakachindu village within Masasi District, Mtwara Region, murdered one Simon s/o Simon.

As is with other criminal offences, murder has two elements. One, an actus reus which is unlawful killing of a human being and two, mens rea

which is malice aforethought. Since the burden to prove the case against the accused person beyond reasonable doubt lies on the shoulders of the prosecution, the Republic, in a bid of discharging this burden, called five (5) witnesses, namely: Shaban Adinani (PW 1), May Simon (PW 2), E. 1476 D/Sgt Salvius (PW 3), Domitian Dominic (PW 4) and Sadick Ally Hassan (PW 5). In prosecuting the charge against the accused, the Republic was represented by Mr. Wilbroad Ndunguru, learned senior state attorney while Ms Felister Awasi, learned advocate, stood for the accused.

The prosecution case according to the witnesses was as follows.

PW 1 is the deceased's grandson who was living with her grandmother one Royce Said. In his affirmed evidence, he testified that on 1st day of January, 2015 at about 1900 hrs. Murji Ajal Kanjale went to him and told him that his grandfather, the deceased, was in great need of him. PW 1 went to the deceased and found him foaming at the mouth and nose, was complaining and was alone; the accused who was his lover was absent. When asked why he was in that state, the deceased told PW 1 that he had consumed some soup of goat meat and was not going to recover. PW 1 took a motor cycle, and assisted by Murji Kanjale and Issa Abderehaman, took the deceased to Nanjota Dispensary. By the time the

said deceased was still complaining and was snoring as well. At the Dispensary the deceased, upon being medically examined, was found to be already dead.

PW 1 rode the motor cycle back. At the deceased's home, he entered inside the house, collected the goat meat soup which was in the cooking pot and kept it by hiding it in his house. He then communicated with the deceased's relatives.

On 2nd January, 2015 PW 1 took the meat to the police station at Chiungutwa. PW 1 could not tell how the soup made its way into the deceased's house. When cross examined, PW 1 stated that he did not know who prepared the soup for the deceased. In deed he admitted that the deceased did not tell him who had prepared the soup for him.

Next to testify as a prosecution witness was May Simon (PW 2), the deceased's daughter. She recalled that on 1st January, 2015 at around 1900 hrs. she was at home resting. She saw the accused who told her that she had cooked meat and the deceased was eating it. PW 2 did not inquire of which animal was the meat the accused had cooked. Later, at around 2000 hrs. a person PW 2 could mention told her that her father, the deceased, was in need of her. PW 2 did not suspect anything against the

accused. On arrival at the deceased, PW 2 found there PW 1, Murji Kanjale and the accused. The deceased who was on the motorcycle ready to be taken to the hospital, was speechless and was looking upwards. Later, PW 1 and his fellow were back from the hospital carrying the deceased on the motor cycle but who was already dead.

It was her further evidence that the deceased had eaten meat which was said to be poisoned. She argued that the meat was bought by the deceased but cooked by the accused. In her opinion, it was the accused that was responsible for the death of the deceased given the fact that she is mama mwenye nyumba, was the sole cook and was residing with the deceased. Regarding her mother, Royce Said who is also a resident of Nakachindu, PW 2 informed this court that the deceased and Royce Said were living in separation for a long time. Although PW 1 said that he collected the meat from the house at the time when he came from the dispensary, PW 2 denied to have seen PW 1 collecting the meat from the deceased's house and could not tell if the meat was taken to the police.

Regarding the possibility of another person putting poison in the meat the deceased allegedly consumed, particularly that person who informed her that the deceased was sick, PW 2 asserted that the person

could not put poison into the food because he/she was just sent to call her and was a mere passer-by. It was also her evidence that after the mourning, she stayed in the deceased's house upon the advice.

E. 1476 D/Sgt Salvius, a police officer stationed at Masasi Police station participated in the investigation of this case. On 2nd day of January, 2015, led by Insp. Mrimi, then Ag – OC- CID, PW 2 and his fellow police officers went to Nakachindu where they found the deceased's body lying on a bed inside his home. The deceased had foamed at the mouth and nose. PW 3 inspected the crime scene and upon the directions of Helena d/o Innocent Milanzi, the Nakachindu Village Executive Officer, drew a sketch plan (Exhibit P 2).

On 3rd January, 2015 PW 3 went to the hospital at Mkomaindo where Dr. Kasuluzu took some organs from the body of the deceased which PW 3 and his fellows kept in a special container ready to be taken to the chemist for further examination and analysis. PW 3 informed the court that the remains of the meat allegedly left over by the deceased brought to the police station by PW 1 was taken to the government chemist as well. He admitted to have interrogated the accused but the same denied complicity claiming that she was in a good relationship with the deceased.

As to why the police suspected the accused of causing the death, PW 3 said that the accused prepared the food she did not eat. He told this court that the meat was eaten at two phases. At the first phase that is during lunch time, the accused ate the meat with the deceased but at the second phase that is at dinner time, only the deceased consumed the meat alone while the accused took sweet potato leaves side dish; the accused's conduct unexplained as it were, created suspicion that probably, the accused knew that the meat was poisoned, PW insisted. He, however, admitted that no witness asserted to have seen the accused poisoning the meat. He supported the PW 1's version that the accused had lived together with the deceased for a year and were living in harmony. He also admitted that there was possibility that at the time the accused was away any person could go to the deceased.

It was his evidence that the meat was allegedly taken from the kitchen and then to the police station by the deceased's grandchild, PW 1.

As said before, the organs taken from the deceased's body and the meat allegedly left over by the deceased collected by the police authority were taken to the Government Chemist. In the office of the Government Chemist Laboratory Authority, PW 4 one Dominican Dominic, a chemist, on

6th March, 2015 received exhibits from the office of the OC-CID, Masasi District. According to PW 4, those exhibits had the following identifying labels: "A" a goat meat weighing 20 grammes, "B" as a human liver weighing 225 grammes and "C" stomach contents weighing 20 grammes. PW 4 was required to examine the exhibit and ascertain if it contained poison and if so, the kind of poison and its side effects to a human being. PW 4 explained the stages in which the examination was performed. According to him, the first stage was preparation of the specimen so as to know its weight. The second stage was extraction of poison from the specimen, the third stage was detection of the poison and the fourth and last stage was identification whereby various instruments are used such as F.T.I.R that is Fourier Transform Infrared and GS, short for Gas Chromatography and at the same time in performing the scientific analysis he abided by the standard operating procedures. In his toxicology analysis, PW 4 discovered that exhibit "A" and "B" contained *Organo Sulphur* and *Alkaloid*. However, in exhibit "C" there was no poisonous substance detected. PW 3 then prepared and filled in the Forensic Toxicology Analysis Report (exhibit P.3). In court, the witness identified the exhibit to have been authored and signed by him. PW 4 clarified that the biological

samples are destroyed after six months; this explains why exhibit "A", "B" and "C" were not available for court's view and inspection. In his elaboration, PW 4 told this court that *Organo Sulphur* chemicals are also used as insecticides while Alkaloid are some organic compounds of plant origin which include drugs and poisons. He was firm that the examination of the exhibit taken to him was confined to see if there was poison and not how they were taken in by the deceased. He said that the effects of these chemicals to a human being depends on the type and the amount taken and can be in the form of liquid or powder. PW 4 was emphatic that he did not determine the amount of poison allegedly taken in by the deceased but the kind of poison found in the exhibit and, therefore, he could not prove if the death the deceased succumbed to was caused by the poison he detected.

The last Prosecution witness was Sadick Ally Hassan (PW 5), an Assistant Medical Officer working with Mkomaindo Hospital. He testified that on 15th January, 2016 at 1330 hrs. while at the work place, police officer from Masasi took to him a letter on Forensic Toxicology Analytical Report (exhibit P 3) in respect of the deceased who, it was alleged, had been poisoned through food. He said that a piece of liver and stomach

contents of a human being had been taken as samples for analysis. PW 5 was required to ascertain the cause of death using the said report. In his scientific analysis, PW 5 discovered that the deceased did not get prompt first aid such as water and milk which could slow down the reaction of the toxic substances consumed. PW 5 prepared a report on post mortem examination (exhibit P. 1). According to him, the cause of death was toxicity direct to the vital organs. He supported the evidence of PW 4 that such chemicals could adversely affect a human being or even cause loss of life depending on the type and amount taken by the individual.

At the closure of the prosecution case and after the court, in terms of section 293 (1) of the Criminal Procedure Act [Cap. 20 R.E.2002] ruled that there was evidence that the accused committed the offence charged, put the accused to her defence.

In her sworn evidence, the accused Asumin Bakiri Ally acknowledged that she is charged with having allegedly caused the death of his lover, Simon Simon on 1st January, 2015. She stated that her relationship with the deceased started in July, 2013 and that they had been living together for about a year before the deceased met his demise. She explained that they were yet to get married officially due to religion differences and were

still in the process of negotiating how to settle the difference which was, nevertheless, not adverse to their relationship but strengthened it. She clarified that while she was a Moslem by faith, the deceased was a Christian. It was in her further evidence that the deceased had a grandson (PW 1) and a daughter (PW 2). She said that the deceased had his own house in which he was living and the accused was living at her home but she frequented to the deceased where in most times, was sleeping there and performing domestic some duties such as cooking, etc. The accused also narrated that PW 2 was living alone at her home while PW 1 was living with his grandmother one Royce Said, the deceased's wife. The accused supported the evidence of PW 2 that the deceased and Royce Said were living in separation for quite a long time. She explained further that she was not in good terms with PW 1 as the latter was persuading the deceased to forsake her and join again Royce Said. It was in her further testimony that she was not also in good terms with Royce Said who used to using obscene language on her (*kumchamba*) whenever they met.

Testifying on the occurrence of the tragic event, the accused detailed that on 30th day of December, 2015 she, as usual, went to the deceased and slept there. On the following morning, she begged the deceased to let

her go back to her home but the latter beseeched her to remain there so that she prepared some breakfast for him. The deceased bought goat meat and some cooked "upupu". The deceased, the accused and her child took some breakfast. The accused warmed the meat lest it went bad and thereafter, went back home and prepared "upupu". At 0900 hrs, the accused went back to the deceased and prepared food as lunch which was *ugali* and goat meat. Again, all the three again ate the lunch. The accused washed the utensils, took the remaining meat (which was in four pieces) from the kitchen and kept it in the main house near the jaba and went back to her house. At 1800 hrs. PW 2 approached her and asked her for "upupu". The accused gave her two cupful of upupu. PW 2 asked the accused if she would go to the deceased and the accused replied in the positive telling her that she would go there in the late. PW 2 told the accused that she had cooked some sweet potato leaves (*matembele*) at home and asked her to go and collect the said side dish. The accused secured her house door and went to the deceased, found him sleeping on the bed. They greeted each other and the accused told the deceased that she was going to PW 2 to collect some sweet potato leaves vegetables. She was emphatic that she did not prepare evening meal as there was no

flour. At around 2000 hrs. the accused went to PW 2 to collect the said side dish. She found PW 2 eating but gave the accused the sweet potato leaves vegetables and both started eating. Later, PW 2's mother Royce Said called her daughter, PW 2, informing her that her (PW 2's) father, the deceased, was sick. The accused left the sweet potato leaves and rushed to the deceased leaving behind PW 2 and her mother at PW 2 talking. At the deceased, the accused found Hamis Chipojola, Nsakeli Issa, Murji and his wife and PW 1 and his wife as well. The deceased was seated on the bed. The accused touched him on the shoulder asking him what the matter was but no response was coming. PW 1 then took the motor cycle and, assisted, put the deceased on the said motor cycle and rode to the dispensary. PW 2 then arrived at the deceased and asked her how many cows were in the kraal. At about 2200 hrs. PW 1 and his fellows were back with the deceased. The accused and PW 2, on discovering that the deceased was dead, fell down and burst into tears. The deceased's relatives were called and it was said that the deceased had eaten meat. The accused inquired where the said meat was so that she also ate it but was told that it had been collected away by PW 1. The accused told the court that she was confused as she had cooked the meat and also ate it

but was not affected. There then arrived the Village and Ward Executive Officers who took her to the village office for her safety.

On whether the deceased happened to fall sick on the previous occasions, the accused narrated that in December, 2014 he fell sick and was diagnosed with High Blood Pressure and had much fats in his body and at that time, PW 1 did not take him to the hospital as they were not in good terms; instead, it was Msafiri who took him to the hospital.

Furthermore, the accused said that the deceased was not in good terms with his neighbours but was emphatic that the same deceased was completely in bad terms with his former wife, Royce Said. She, the accused, affirmed that there was no time she came in bad terms with the deceased as they loved well each other, he being her lover and that since she had not any relative, she took the deceased as her sole relative and they were leading a happy life. She informed the court that she had no any motive to kill the deceased.

In her further testimony, the deceased said that she had married thrice but at no time she ever quarrelled with the deceased. The accused maintained that they took lunch together but in the evening no food was cooked. She denied to have told PW 2 that she had cooked meat in the

evening and had left it to the deceased to eat. According to her, the deceased might have bought the meat or consumed the soup elsewhere in that evening, given the fact that there was no flour in the house and he was alone. The accused further denied to have taken the sweet potato leaves to the accused's house.

She was also emphasised that after taking the lunch with the deceased she kept the meat in the house near a big water container commonly known as *jaba* where any person could have had access to.

The accused also informed the court that the deceased's house and that of his former wife were in the neighbourhood. She maintained that it is PW 2 who asked her to go and collect some sweet potato leaves at her and not vice versa.

After the defence closed their case, both learned senior state attorney and learned defence counsel were given an opportunity to give their final submissions.

In his final submission, Mr. Wilbroad Ndunguru, learned senior state attorney, urged the court to find that the prosecution had proved the case against the accused beyond reasonable doubt. He contended that it was proved that the accused died of unnatural death and the death was caused

by the accused that was actuated by malice aforethought. He explained that the Post Mortem Examination Report (exhibit P1) and the Forensic Toxicological Analysis Report (Exhibit P3) are clear that the deceased consumed poison. He said that the question for determination was whether or not it is the accused that caused the death.

According to Mr. Ndunguru, PW1 was clear that the deceased had consumed the goat soup which was toxic. The meet was taken to the police and later to the chemist who opined that the meat had toxic chemicals. Further, PW2 detailed what the accused did. She said that she left the deceased who ate the meat which led to his death. The prosecution was of the view that the evidence leads to the conclusion that the accused being the last person to have served the deceased with the food is in a better position to explain, otherwise, the court should presume that he or she was responsible for the deceased's death. Leaned state attorney supported this argument by citing the case of **Richard Matangule and Elia Richard v.R** [1992] TLR 5 on the last seen theory in which the Court observed that since the accused was the last person to be seen with the deceased, he had to give explanation, otherwise he was responsible.

Submitting on the question of malice aforethought, Mr. Ndunguru contended that there is evidence that the cause of death was poison which means that the perpetrator designed to kill. In his view, the crucial evidence implicating the accused is that of May Simon (PW2). Learned senior state attorney prayed this court to use its powers and arrive at a just verdict.

On her part, Ms Felister Awasi, learned defence counsel strongly contended that there was no evidence which implicated the accused. She submitted that the accused denied to have committed the offence and was certain on her stand. According to learned counsel, the charge of murder is very serious and the prosecution has a duty to prove the allegations and the deciding court has to be careful as the punishment has far reaching effects against the accused. She elaborated her argument that under section 196 of the Penal Code, for the court to find the accused guilty of the offence, there are elements to be proved. She mentioned such elements to include malice aforethought, causation of death and by unlawful act or omission. Learned counsel argued that apart from taking into account these elements, the prosecution has also the duty to prove

that it is the accused who committed the offence and in case of doubt, the accused is entitled to acquittal.

Emphasising on the element of malice aforethought, Ms Felister told this court that the prosecution failed to prove this crucial ingredient. She explained that the accused and deceased were in a good love relationship and no evidence was forthcoming proving that these two people were at bad terms. It was her further argument that PW1 and PW2 were clear that they did not hear any misunderstandings between these lovers.

Learned counsel sought to draw the attention of this court to the evidence of the accused. She said that the defence evidence was clear that on 1.1.2015 the accused performed her household activities whereby the deceased went to buy goat meat. The accused prepared the meat and both ate and the remaining meat was kept by the accused on a conspicuous place. The accused then left and later came back but did not go to see the meat; instead, went to PW2 leaving the deceased lying on the bed. Further, counsel for the accused said that after the accused was told that the deceased was in a bad condition, she rushed to the deceased and assisted the deceased by putting her clothes to prevent him from being harmed by the exhaust.

Counsel also submitted that the accused then mourned the death by crying and told the court that, apart from lack of evidence, the circumstances also showed that the accused was not responsible for poisoning the food. She argued that the accused had ample opportunity to destroy the meat if at all she had put poison in it. According to learned counsel, it was evident that the meat was collected by PW 1 even without the accused's knowledge. Learned counsel made a contrast of the accused's conduct with the one observed by the Court of Appeal in the case of **Elias Paul v.R., Criminal Appeal No. 7 of 2014, (unreported)** sitting at Mwanza.

Ms Felister also attacked the credibility of the prosecution witnesses on account of their being inconsistent. Furthermore, regarding the testimonies of PW4 and PW5, she argued their evidence left some questions unanswered. She contended that PW4 said that he did not measure the extent of the toxic chemical which could cost human life and that it was not established that the meat exhibited in "B" was the same meat the accused had cooked and taken together with the deceased during the lunch time. Further that, the possibility of the deceased mishandling the chemicals was not ruled out. She told this court that both

PW 1 and PW 2 were uncertain on who actually put poison in the food and whether it was the accused. She implored the court not to act on mere suspicion to the detriment of the accused. It was also submitted on part of the accused that PW 1, in his evidence, did not state that the deceased made a reference to the food the accused had prepared nor did he tell PW1 that it is the accused who put poison in that food. Counsel for the accused argued that at the time the accused was not with the deceased, the latter could have collected the food from elsewhere or receive any visitor. Learned counsel was also suspicious of PW 1's conduct of taking the meat in secrecy and hiding it and doubted if the hands in which the meat passed through were genuine (*salama*).

Learned counsel also attacked the way the prosecution conducted their case. She contended that there were important witnesses left out by the prosecution who, if had been called, could have assisted the court to render answers on some questions which were left unanswered. She explained that there were some people who had access to the house and could shed light on the words the deceased had uttered and that under section 143 of the Evidence Act, the prosecution had wider discretion to summon such witnesses. On this failure, learned counsel urged this court

to draw an adverse inference. She also doubted the sincerity of PW 2 in hiding the name of the person who informed her that her father was sick. Ms Felister said that the case against the accused depends mainly on circumstantial evidence and that the circumstances taken cumulatively did not 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 none else. To buttress this argument, learned defence counsel cited the case of **Gabriel Simon Mnyele v. R**, Criminal Appeal No. 437 of 2007 the CAT sitting at Dar es Salaam whereby the Court of Appeal at pp.21 & 22 formulated three tests on a case resting on circumstantial evidence.

In her conclusion, learned defence counsel being of the belief that the prosecution has failed to discharge their legal burden, prayed the court to acquit the accused.

As rightly submitted by learned defence counsel and not controverted by the learned senior state attorney, in order for the court to sustain conviction against the accused person, the prosecution is duty bound to prove beyond reasonable doubt the four ingredients of the offence of murder: one, whether the deceased is dead. Two, whether the death was unlawful. Three, whether the person who caused the death was actuated

by malice aforethought and whether it is the accused that caused the death.

In their oral submissions, both learned senior state attorney and defence counsel were at one that Simon Simon Rafael is dead. Their submissions got support from the evidence of PW 1, PW 2, PW 3, PW 5 and the accused as well. Indeed, this evidence was equally fully supported by the report on post mortem examination prepared and identified by PW 5 and which was admitted in court as exhibit P 1 during the preliminary hearing conducted on 23rd day of September, 2016.

With respect to causation, the prosecution evidence amply demonstrated that the death of the deceased was unnatural. PW 1, PW 2 and PW 3 testified that the deceased died after consuming poisoned goat meat. PW 4 who made toxicological analysis in respect of the deceased's liver and the meat allegedly consumed by the deceased and which he left over told this court that the said items contained toxic chemicals he described to be *Organo Sulphur* and *Alkaloid*. His evidence was supported by his report entitled Forensic Toxicology Analysis Report (exhibit P.3). This leads to the conclusion that the deceased died unnatural death.

It was also the prosecution evidence that the cause of death was toxicity direct to vital organs. This is what PW 5 told this court. He was supported in this by Exhibit P 3 prepared by PW 4 and the Report on Post Mortem Examination, PW 5 prepared and which was admitted in court as exhibit P 1 at the preliminary hearing. The evidence, therefore, established that the deceased died of poison. The question is whether the death was caused with malice aforethought.

Malice aforethought is, as learned defence counsel has rightly submitted, a crucial ingredient in proving the offence of murder under section 196 of the Penal Code [Cap.16 R.E.2002]. The said provisions run as follows:

“Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder”

Section 200 of the Penal Code(Cap 16 R. E. 2002) provides that malice aforethought shall be deemed to be established by evidence proving any one or more of the four circumstances (a –d) enumerated there under but for purposes of the instant case, facts (a) – (b) are relevant:-

- “(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;
- (a) knowledge that the act or omission causing death will probably cause the death of or grievous harm to same person, whether that person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or that it may not be caused;

Indeed, the Black’s Law Dictionary defines malice aforethought as,

“A predetermination to commit an act without legal justification or excuse. Intent, at the time of killing, wilfully to take the life of a human being, or intent wilfully to act in callous and wanton disregard of the consequences to human life: but “malice aforethought” does not necessarily imply any ill will, spite or hatred towards the individual killed.”

In short, according to section 200 of the said Code, the ingredients of malice aforethought are intention to cause death or grievous harm and knowledge that an act or omission will cause death or grievous harm.

Having considered the evidence and the overall circumstances obtaining in this case, we are satisfied and as rightly argued by learned senior state attorney, that whoever administered poison in the food the deceased consumed and which led to his death was actuated by malice. Malice aforethought was sufficiently proved.

The next important issue is who caused the death of Simon Simon Raphael. While the prosecution, on one hand, wants the court to believe that it is the accused, the defence side, on the other hand, is of the view that there is no scintilla of evidence to prove that it is the accused who is responsible to the deceased's death.

In deciding this question, we undertake to be guided by the principle enunciated by the Court of Appeal of Tanzania in its various decisions and echoed in the case of **Mapinduzi Luminaga**

v. R., Criminal Appeal No. 332 of 2010 (unreported) where at p. 11 observed:

“ We take it to be settled law that on a murder charge, the duty has always been on the prosecution to prove beyond reasonable doubt not only the death of the a person but also to link that death with the accused”.

The pertinent question to be resolved at the moment is whether there is enough evidence to link the accused with the death of the late Simon Simon Raphael; or simply put, was there evidence to prove that it was the accused that put poison in the food/soup the deceased consumed?

Although the prosecution called five witnesses to prove their case, nevertheless, as correctly submitted by both learned senior state attorney and the defence counsel, none saw the accused putting poison in the goat meat allegedly consumed by the deceased. Indeed, PW 3 who investigated the case was clear that none told him that he saw the accused putting poison in the food the deceased consumed and which led to his death. The evidence, therefore, which tended to implicate the accused with the death of deceased was merely circumstantial.

But what were the circumstances the prosecution relied on to link the accused with the death of the deceased? Let us start with PW 1. According to him, it is the accused who was living with the deceased as they were lovers. PW 1, however, was candid that he could not tell who prepared the soup the deceased allegedly consumed and which he, (PW 1) collected, kept and took it to the police. PW 2, in her sworn evidence told this court that she suspected the accused to be behind the death because she was *mama mwenye nyumba*, was the sole cook for the deceased, was residing with the deceased and on that day she left the deceased to eat the meat alone while, she, the accused, took sweet potato leaves vegetables as her side dish. In her evidence, the accused said that apart from the fact she took breakfast and lunch with the deceased, in the evening she did not cook as there was no flour. She also denied to have told PW 2 that when she went to PW 2 she left the deceased eating the meat. As to how the accused got the sweet potato leaves side dish, the accused was clear in her evidence that it is PW 2 who invited her to go to her and collect the said side dish. It was PW 2's affirmation that she did not see the said meat allegedly consumed by the deceased before the latter met his demise.

PW3's suspicion against the accused to have been the person who

had poisoned the food the deceased consumed was, according to him, the fact that the accused cooked the meat she did not eat in the evening but ate only sweet potato leaves vegetables, leaving the deceased to take the meat alone as his dinner. The accused, however, denied to have left the meat to the deceased as dinner arguing that there was no flour as such, she did not cook the food.

The evidence of PW 4 and PW 5 did not implicate the accused. PW 4 told this court that the scope of examination and analysis of the exhibit brought to him was confined to see if there was poisonous substance in the samples brought to him and was not concerned with discerning whether or not the deceased consumed the poison. The same PW 4 was also clear in his evidence that he could not prove that the death was caused by the poison he detected in the samples.

Likewise, PW 5 who prepared the report on post mortem examination was clear in his evidence that he could not tell if the deceased consumed the poison.

In her defence, the accused vigorously denied to have put poison in the food the deceased allegedly consumed. She was clear in her evidence that she loved the deceased, her lover and was not only in good terms but

also took him as her relative and had no motive to kill him. Indeed, the accused was emphatic that the moment she was told that the deceased died after consuming the meat she had prepared, she wanted to have the meat and eat it so that she also died.

Having analysed both the prosecution and defence evidence, we have to ask ourselves whether the evidence is sufficient to draw inference of guilty against the accused.

The principles guiding conviction on circumstantial evidence are that in order to justify conviction purely on circumstantial evidence on the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilty. The authorities on these guiding principles abound and include the following:

1. **R.v. Kipkering arap Koske** [1949] EACA 135
2. **Abdul Mganyizi v. R**, [1980] TLR 263
3. **Protaz John Kitogo & another v. R** [1992] TLR 51
4. **Hamidu Mussa Themetheo & another v. R** [1993] TLR 125

Besides, in dealing with circumstantial evidence, each link in the chain must be carefully tested and if in the end it does not lead to the

irresistible conclusion of the accused's guilty, the whole chain must be rejected. This position was echoed in the case of **Samson Daniel v. R**, [1934]1 EACA, 154. Indeed, learned defence counsel was alive to these principles when she referred this court to the decision of the Court of Appeal in the case of **Gabriel Simon Mnyele v. R** (supra).

Taking the circumstances obtaining in this case, three possibilities could hold. One, the deceased could have swallowed the poison accidentally or by design. According to PW 1, the deceased did not say that the soup he consumed was poisoned nor did he mention the accused to have put poison in it. However, PW 1 was clear that the deceased assured him that he was not going to recover. How did he know? Who made him believe that he was going to die?

Two, the accused could have put poison in the meat at the time she took it from the kitchen and kept it to the main house. However, the possibility was minimised because, as rightly pointed out by learned defence counsel, the accused had ample opportunity to destroy it and there is no evidence of any motive she exhibited to kill the deceased.

Three, any other person or group of people could put poison in the meat

the deceased allegedly consumed at the time the accused was away. This could be in order to kill either the deceased or even the accused as well depending on the motive of the perpetrator. The conduct of PW 1 taking the meat secretly and that of PW 2 hiding the identity of the person who had informed her that she was being needed by the deceased coupled with the uncontroverted evidence of the accused that she was not in good terms with PW 1 and her grandmother, the deceased's wife who was living in the neighbourhood, could have much bearing on this assumption.

It was argued on part of the prosecution that the accused was the last person to be seen with the accused and the accused had to give explanation how the deceased died otherwise she has to be held responsible. To buttress this argument, Mr. Wilbroad Ndunguru cited the case of **Richard Matangule and Elia Richard v. R** (supra) on the last seen theory. With respect, the cited case is distinguishable from the present one. In that case, the two appellants were convicted by the High Court of the murder of a girl aged 12 years. The conviction was essentially based on the evidence of PW 1 who testified to have seen the 1st appellant calling the deceased and the 2nd appellant blindfolding her with a handkerchief as both escorted her inside a certain house. PW 1 never saw

the deceased alive again. The Court of Appeal found that PW 1 was reliable, her evidence was partly corroborated and the 1st appellant actively involved in the crime and no evidence showing that he disassociated himself at any time. In the instant case, it was amply demonstrated that the accused, at the time PW 1 found the deceased in that serious state, was at PW 2 taking some food. It was PW 1 who was the last person to be seen with the deceased alive and the accused, by being at PW 2 disassociated herself and her explanation was plausible.

Besides, there was an important issue raised by learned defence counsel on the chain of custody of the goat meat allegedly consumed by the deceased and which, it was stated, contained toxic substances. As far as the proper chain of continuity of the alleged toxic goat meat is concerned, there is no dispute that before being taken to the government chemist, it passed through different hands, including the accused's, PW 1's and of the police. In other words it is doubtful if there was a clearly established link between each stage which assured the avoidance of the dangers of continuity being lost or the very exhibit being tampered with by unscrupulous individuals.

There is also the question of lack of motive on part of the accused in killing the deceased. In her defence, the accused denied to have told PW 2 that the deceased in that evening ate the goat meat. She insisted that no food was cooked in that evening arguing that there was no flour at home. Likewise, she maintained that she had no motive to terminate the life of her beloved lover and explained her lack of motive. This aspect was insisted by the learned defence counsel in her final submissions. Admittedly, motive is not an ingredient of the offence of murder. Its presence, however, tends to strengthen the prosecution case just as its absence tends to weaken it. A case in point is that of **R. v. Stephano Alois** [1972] HCD No. 199. In other words, lack of motive negates malice. The conduct of the local leaders of keeping the accused away for her safety was not without good reason.

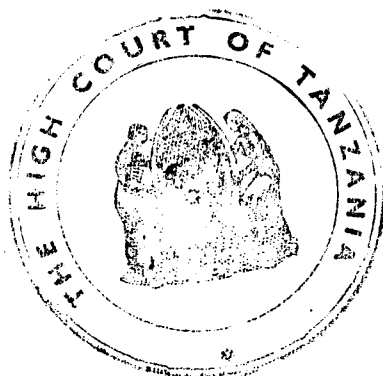
In short, after testing each link in the chain we are satisfied that it does not lead to irresistible conclusion of the accused's guilt. In other words and abiding by the authoritative decision of the Court of Appeal in the case of **Gabriel Simon Mnyele v. R** (supra), there was no chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and which shows

that in all human probability the act must have been done by the accused.

In her defence, . and as rightly pointed out by learned defence counsel, the accused has offered evidence of all the facts and circumstances as they existed and has shown the truth and in our view, the suspicious circumstances have been accounted for consistently with her innocence.

We hold that the prosecution has failed to adduce cogent and acceptable evidence leading to the conclusion that it is the accused who committed the charged offence.

We thus find the accused not guilty of the offence of murder under section 196 of the Penal Code [Cap 16 R.E.2002] and, accordingly, acquit her.




W.P.Dyansobera

JUDGE

13.3.2020

Assessors:

1. Somoe Rajab.....
2. Rukia Mahmoud.....
3. Biabu Mohamed.....

Delivered at Mtwara this 13th March, 2020 in the presence of Mr. Kauli George Makasi, learned senior state attorney for the Republic and Ms Felister Awasi, learned defence counsel representing the accused. The accused is also present.

Ladies assessors are thanked and discharged.



W.P.Dyansobera

JUDGE