

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL SESSIONS CASE NO 83 OF 2022

REPUBLIC

VERSUS

MASUNGA S/O NDILANHA @ KITAMBALA

JUDGMENT

16th February & 6th March 2023

F. H. Mahimbali, J.:

Claude McKay – the ancient poet of the 19th Century in his one of the famous poems headed “If we Must Die” wrote in one of its verses: “*If we must die, let it not be like hogs, Hunted and penned in an inglorious spot. While round us bark the mad and angry dogs...*” closely explains the episode of barbaring killing of one innocent woman in this case by name of **Shida Maduhu** just because she was married, then on refusal of granting extended conjugal right, was exposed to her untimely death by the accused person in this case.

I have a recollection that this Court once dealt with the legal issue on a killing emanating from love affairs “whether *kunyimwa unyumba kwa muda mrefu kunaweza kusababisha ghazabu za kumpiga mwanandoa na kupelekea kifo chake*”. My brother Mtulya, J (in **Republic Vs. Mokiri Wambura @ Makuru**, Criminal Sessions Case No. 70 Of 2022) responded in affirmation as per facts in his case that provocation emanating from “*hamu ya mapenzi*”, disturbs mental health thus the killing emanating from that disturbed mind in denial of conjugal right was considered as killing without constitution of malice aforethought.

In this current matter, the Republic is again testing the mind of this court in facts remotely similar to the case of **Mokiri Wambura @ Makuru**, whether the spousal killing emanating from an alleged denial of conjugal right constitutes malice aforethought. The facts leading to this charged murder case involves a 25yrs old young man who killed his wife in the course of conjugation just after the spouse – deceased (one Shida Maduhu) had denied continuing with conjugation after the first round had been over that she was tired.

The accused and deceased are couples who customarily contracted their marriage in 2014. That in the course of their living at Mpanda,

seemed to have developed some family misunderstandings between them. However, in the course of their living, the husband (accused person) went to Zanzibar for life green pasture, leaving the wife there at Mpanda while running a business firm (minor shop). The wife then made up her mind by selling all the domestic properties at their home (Mpanda) including the shop goods and returned to her parents at Manchimeru village in Bunda without informing her husband who was in Zanzibar by that time. The information regarding the said departure then reached his husband who was at Zanzibar. Upon making communication to his wife, he decided to travel to Bunda (Manchimeru) to meet his wife. While there, the settlement of their marriage seemed not to be fruitful. The husband was separated from sleeping with his wife which act seemed as discomfort to him, considering that he had been away from his wife for such a long time, he expected the opportunity of being there, would have made him being closer to his wife and enjoy his conjugal right he had missed for a long time he had been in Zanzibar. He however kept on demanding the conjugal right now and then while there at his in-laws' home. A day before the killing incident (i.e on 31st October 2020), the wife is alleged to have consented to have a conjugation with him but on condition that he finds

condoms as she was no longer confident with him if he was free from sexual and venereal diseases. That he did, bought three of them but suddenly the wife changed her mind, and denied her husband from associating with him in conjugal right. On the next day, i.e 1st November 2020 (which is the date of the incident), the two went farm digging, about 100 meters from their home. While there, the husband kept on insisting on the conjugal right from his wife as he was so thirsty of it and that what the wife was doing was not fair. Upon a repeated demand on the conjugal right, it is believed that the wife ultimately consented but on condition that they should first finish a portion to dig. Upon finishing it, the wife then was ready for the conjugal act. They went to the bush and started eating the stuff. They did the first round. As the husband was thirsty, needed more for the second round. The wife refused. There then is alleged to have emerged a quarrel between them, and the husband took a knife and eventually stabbed it against the neck of the wife. Seeing this, the husband instantly took the same knife and slashed off his pair of testicles and remained a man with no testicles. The wife then died, but the husband survived after being rushed to hospital. Thus, the basis of this murder case which reads:

The accused person, namely Masunga Ndilanha @ Kitambala is charged before this court for the offence of murder which is based under section 196 and 197 of the Penal Code [Cap 16 RE 2019] (the Penal Code). It was alleged by the prosecution that on 1st November, 2020 at Manchimeru village within Bunda District in Mara Region, Masunga Ndilanha @ Kitambala murdered Shida Maduhu.

The accused person denied the charge levelled against him, however from the beginning of the case, he kept on pleading that he killed the deceased not with malice aforethought but only as a result of fight of his conjugal rights from his wife. The Republic, are of the considered view that what the accused person committed is nothing but homicide with malice aforethought.

In efforts of establishing the said homicide, the prosecution brought a total of three witnesses and tendered three exhibits. The three exhibits tendered are: Post mortem examination report (PE1), sketch map plan of the scene of crime (PE2) and the accused person's cautioned statement (PE3). The PW1 and PW2 witnesses had no more material to offer the Court in regard to this case on the manner the said alleged murder was committed than the fact that the deceased was also known as Shida Sopi who is their sibling and daughter respectively and that was married to the

deceased. Further, that the two had been in matrimonial misunderstandings which compelled the wife to run from her matrimonial home and returned to her parents' home (Manchimeru village). Moreover, that they witnessed the said Shida Maduhu already stabbed on her neck and the husband's testicles slashed off and hanging.

PW3 on the other hand testified how he went to the scene of crime and saw both the deceased and the accused person. Whereas the said deceased had already died, the accused person had his testicles slashed and hanging. They took him to the hospital where he was admitted and examined. On the next day, he had recovered from his conscience and thus recorded his cautioned statement in which he admitted killing the deceased but on a mental anguish of a repeated denial of a conjugal right from his wife.

In his defense, the accused person changed tune of his defense. Though he maintained killing the deceased, but on self defense after being slashed off his testicles by the deceased in the course of conjugation. He explained that, just after the first-round show (following the first conjugal ejaculation), the deceased told him to lay "back down" so as she could clean the accused's genital organs ready for the next round. On

compliance, he suddenly wondered his testicles being cut off by the sharp knife. In revenge, he snatched the said knife from the deceased and instantly stabbed on her neck accidentally as he was in panic and high emotions.

During the hearing of this case, the Republic was represented by Mr. Frank Nchanila whereas the accused person was represented by Mr. Werema, learned advocate on legal aid scheme.

Mr. Werema in his final submissions argued that the prosecution's case as not established beyond reasonable doubt that the accused person committed the alleged offence with malice aforethought. He submitted that in a charge of murder, as per law four things ought to be established: There must be proof that the deceased is dead, that the cause of death is not natural, that the accused person committed the said murder, and that there was malice aforethought (see **Philimon Jumanne Agala @ J4 vs Republic**, Criminal Appeal No 187 of 2015, CAT at Mwanza).

Mr. Werema submitted that as per PW1's testimony, it was the wife who had carried the knife to the scene. The testimony of PW1 and PW2

also don't establish malice aforethought. What they merely testified are the three ingredients.

In a further digest, to the prosecution case, Mr. Werema was of the considered view that the prosecution's case is contradictory. Whereas prosecution witnesses say what was cut from the accused person is his penis and testicles, the testimony of accused person says only testicles.

Another contradiction is on the names of the deceased. The charge sheet names the deceased as Shida Maduhu, but the prosecution witness (PW1) names the deceased as Shida Sopi and not Shida Maduhu.

With the testimony of PW3, the tendered exhibit PE3, (cautioned statement) its recording was not in conformity with section 50 (1) a of CPA. This is because the accused person was arrested on 1/11/2020 and his cautioned statement was recorded on 2/11/2020. The recording of the said statement exceeded the basic hours in compliance under section 51 of CPA. The law is clear that this compliance is mandatory. Thus exhibit PE3 despite its admission, can be ignored its reliance.

In the general circumstances of this case, Mr. Werema is of the view that there has been no proof of any malice by the accused as per

prosecution's evidence in record. Thus, what really transpired at the scene is self-defense. Where there is any quarrel, the killing is not murder (**Daudi Basaya vs Republic**, (1995) TLR (148)). With all this since, there is contradictory evidence which must benefit the accused person, concluded Mr. Werema.

Mr. Frank Nchanila learned state attorney on the other hand for the Republic was of the view that there is no dispute that the said Shida Maduhu @ Shida Sopi is a dead, the deceased died not of natural cause and that the accused person committed the offence. What is disputed is whether there is malice aforethought. The only evidence available is the last person to be seen with the deceased. Therefore, the cautioned statement is valid.

As per nature of this case, stated Mr. Nchanila that there are two versions by the accused person. The first version is valid. Whereas the second version is an afterthought (see **Frank Kinambo vs DPP**, Criminal Appeal No 47 of 2019, CAT at Mbeya at page (7)). Thus, all that stated by the accused person in PE3 is actually what transpired. As per PW1's evidence, the denial of conjugation was due to existing quarrels with the

deceased. Thus, the accused person intended to kill. With exhibit PE3, the accused person's story is stated very well and reliable.

He further submitted that, it is trite law that not every prolonged provocation reduces Capital offence to manslaughter (See the case of **Jacob Asegelile Kakune vs DPP**, Criminal Appeal No 178 of 2017, CAT at Mbeya, (page 17 and 18)). In this case, there was a prolonged quarrel. However, by itself is not a guarantee to amount a defense of provocation. Mr. Nchanila is of the considered view that a denial of the second round of conjugation as per law does not amount to provocation in the circumstances of this case.

On the relevancy of Exhibit PE3 (Cautioned statement of the accused person) he reacted that it cannot be challenged its admission at the final submission. It is cardinal principle of law, that the cautioned statement is not objected at cross examination or final submission but only a challenge. If already admitted, it can only be challenged its contents and not its admissibility. Since exhibit PE3 was recorded after 4 hours, it could be objected during its admission stage (see **Nyerere Nyague V. Republic**, Criminal Appeal No 67 of 2010- CAT at Arusha (page 7 and 13)).

As per facts of this case, by the time the accused had attacked the deceased, he had already pre mediated to kill the accused. On this, he relied support in the case of **Sembuli Musa vs Republic**, Criminal No 236 of 2020, CAT at Kigoma (page 15 and 16), in which made reference of the case **Charles Bide vs Republic**. Therefore, with the facts of this case, it is clear that the accused person committed the offence with malice aforethought.

Lastly, he clarified on contradiction of names of the deceased that according to PW1, she had testified that the deceased is Shida Sopi, but PW2 who is the parent of the deceased (uncle) clarified that the deceased is called Shida Sopi @ Shida Maduhu and that the both names refer to one person. Since there is no dispute that the said Shida Sopi @ Shida Maduhu refer the same person, there is no any confusion as per law, he submitted.

Having heard and summarized the evidence from both sides, submissions for and against this case, I readily agree with both counsel's view on the principle, that where death occurs as a result of a fight the court should convict for a lesser offence of manslaughter, not murder (**Jacob Asegelile Kakune vs DPP, supra**).

I also agree that once an exhibit has been admitted, it can hardly be challenged its admissibility in cross-examination or final submission but only challenged its relevancy in contexts (see Nyerere Nyague's case – supra).

Considering the fact that the said cautioned statement was not controverted during its admission, it cannot be challenged its admissibility now but only its truthfulness. As the latter story appears to be an afterthought from the former, this court can hardly rely on this second thought. It is merely a lie which in law, I associate myself with the holding of the Court of Appeal in the case of **Nkanga Daudi Nkanga V Republic**, Criminal Appeal No.316 of 2013, that, a lie of an Accused person corroborates prosecution case.

I am firm that the defence by the accused person has lend credence to prosecution's story in this case. This is because, the first utterance counts much whereas the second is an afterthought and tries to exonerate from criminal liability. By the way, an accused person is only convicted on the strength of the prosecution case and not on the balance of probability between the prosecution's evidence and that of defense. Therefore, the

accused's story in defense need not be true, but it is sufficient if only reasonably shakes the prosecution's case.

In essence, how the accused person is associated with this murder or charge is mainly based on two reasons. One, the accused person was the last person to be seen with the deceased person (PW1's testimony). Two, the confession of the accused person before PW3 (Exhibit PE3).

The question to ask in this case is one, in the circumstances of this case, was there a fight or quarrel as alleged? None of the prosecution witnesses established that there was a real quarrel or fight. The only evidence is only obtained from the accused's person confession before PW3. What does he say? For a clear picture of what the accused person confessed, part of his statement reads:

"...wakati napalilia nikamwambia mke wangu, jana ulinitelekeza na kondom zangu na ninzo hapa mfukoni. Akaniambia tupalilie tukifikisha eneo tulilopanga kupalilia tunaenda kufanya mapenzi leo usiwe na wasiwasi mme wangu. Tulipomaliza kulima ndipo tuliingia kwenye pori kama bonde la mto kwenye kichaka kikubwa na kuanza kuongea kwanini mke wangu uliuza vitu. Akadai kuwa hivyo vitu hautaviona tena ndipo nikakaa kimya na kumwambia basi tuendelee na tendo la ndoa. Akavua chupi yote akabaki na gauni la juu hakuvua na kutandika khanga yake na mimi nikavua suruali yote na pensi ya

*ndani sikuvua yote na kuvaa kondom na kufanya nae tendo la ndoa mara moja ila kwa kutumia kondom. Ndipo nilipovaa kondom nyingine ili niendeleo kufanya mapenzi ndipo mke wangu alikataa. Alipokataa nilipata hasira ambazo sikuzifahamu zimetokea wapi. Nikawaza ameuza vitu, nime mtumia pesa kwa roho safi leo ananinyanyasa kwa kiasi hiki na ananifanyia matendo haya ndipo **nilichukua kisu na kumkamata mikono yake yote nikambana koo lake na kulegea kabisa. Alipolegea ndipo nilipochukua kisu na kumchinja kabisa shingoni na kufa muda siyo mrefu.** Ndipo nilipoona kuwa sasa nimeua ndipo nilipochukua kisu hicho na kujikata mapumbu yangu kwa lengo la kujiua lakini sikufanikiwa kufa....." [emphasis in bold is mine].*

Can this confession be construed to amount malice aforethought or is just unlawful killing. As stated above where death occurs as a result of a fight, the court should convict for a lesser offence of manslaughter, not murder. The Court of Appeal of Tanzania which is the apex court of the land in various instances has taken that position in a number of previous decisions such as **Moses Mungasiani Laizer Alias Chichi v. Republic** [1994] TLR 222, **Stanley Anthony Mrema v. Republic**, Criminal Appeal No. 180 of 2005 (unreported) and **Aloyce Kitosi v. Republic**, Criminal Appeal No. 284 of 2009 (unreported). In the latter case it was held that: -

"It has been stated by this Court that where death occurs as a result of a fight or on account of

provocation the killing is manslaughter and not murder."

From what has been stated above in the quoted cautioned statement, can it be firmly said that there was any fight between the two? Since a fight is a question of fact, there ought to have been proof that really there was a fight between the two. As per facts of this case, there is nowhere established that there existed any element of fight between them immediately before the killing. This statement clearly tells a hair-raising story of the accused person attacking the deceased, and doing so by cutting her on the neck by using a sharp-edged weapon, until that person died.

Here I should reiterate the principle that an accused person who confesses to a crime is the best witness. See the case of **Ibrahimu Ibrahimu Dawa v. Republic**, Criminal Appeal No. 260 of 2016 (unreported). I have no doubt that what is contained in the confessional statement was freely made by the accused person and is the best evidence. I can have no doubt on what happened as per confession freely made by the accused person. The evidence of PW3 is nothing more than an oral testimony of what the witness heard from the accused person. In

the case that has been cited above, the Court reproduced a paragraph from another unreported case of **Mohamed Haruna Mtupeni and Another v. Republic**, Criminal Appeal No. 259 of 2007, where it was stated: -

*"The very best of witnesses in any criminal trial is
an accused person who freely confesses his guilt"*

In my considered view, if the accused person's main desire was conjugation, the wife being there down and after he had done the first round, it could have been justified in the circumstances of this case had he opted to force conjugation and not kill as he did. The force conjugation in the circumstances of this case would have justified the long sexual desire the accused had and not the killing opted. By the phrase "*Nikawaza ameuza vitu, nime mtumia pesa kwa roho safi leo ananinyanyasa kwa kiasi hiki na ananifanyia matendo haya ndipo nilichukua kisu na kumkamata mikono yake yote **nikambana koo lake na kulegea kabisa. Alipolegea ndipo nilipochukua kisu na kumchinja kabisa** shingoni na kufa muda siyo mrefu"* presupposes an intention to kill and nothing else. As there was no any fight between them but a mere denial of sex as alleged, should any

reasonable man exposed to that situation had reacted to that same degree? Was that intention then malice aforethought?

The next question for consideration is whether the killer had malice aforethought as per law. In the case of **Enock Kipela v Republic**, (Criminal Appeal No 150 of 1994) [1999] Tazanani CA 9 has discussed what entails malice aforethought, when the Court of Appeal held that:-

"Usually an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following:-

- 1) The type and size of the weapon if any used in the attack;*
- 2) **The amount of force applied in the assault;***
- 3) **The part or parts of the body the blows were directed at or inflicted on;***
- 4) The number of blows, although one blow may, depending upon the facts of the particular case be sufficient for this purpose;*
- 5) The kind of injuries inflicted.***
- 6) The attacker's utterances if any; made before, during or after the killing and the conduct of the attacker before and after the killing.*
- 7) The conduct of the attacker before and after the killing.[Emphasis on bold added]*

It is my finding that, since there was no elements of quarrel or fight prior to the said attacking as well stated in PE3 exhibit, contrary to what is suggested by DW1 (accused person), what was done: attacking the deceased person on her neck, engulfing and twisting the same was dangerous and suggests nothing but the culprits' culpable mind of killing the deceased person. That in law is malice aforethought. What constitutes malice aforethought or intention to kill is well defined by laws, literature and decided cases (see section 200 of the Penal Code and the case of **Enock Kapera and Ajili Ajili** (supra). According to the Black's Law Dictionary, malice aforethought is defined as:

"A pre-determination to commit an act without legal justification or excuse.... An intent, at the time of killing, wilfully to take the life of human being, or an 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" (see Criminal Law in Tanzania, A Case Digest, by Dr Fauz Twaib and Daudi Kinywafu at page 335).

In arriving to the conclusion of this case, I have deeply scanned the accused person defense and his cautioned statement (PE3).

In my considered view, the above facts could be considered as the highest degree of manslaughter with voluntariness, i.e. voluntary manslaughter if the alleged fight was established. It is voluntary manslaughter where one kills another in the circumstances that could be convicted of murder but there exist mitigating circumstances present reducing his culpability such as loss of control, diminished responsibility or suicide pact. Such situations cover incidences whereby one acts under provocation. However, for provocation to mount defense in murder cases, two things must be considered: first, subjective test – whether the accused person was provoked to lose his control; and second, the objective test whether a reasonable man exposed to such a situation would have been provoked to lose his self – control as done. By being provoked, it is sufficient if one may not have been able to restrain himself from doing what he did. For provocation to be material and meaningful in the eyes of the law, there must be a sudden and temporary loss of self – control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind. Therefore though there must be history of provocative acts or words, if at the time of the killing, the accused person was not provoked to lose his self-control, one cannot rely

on past provocation. This is because where there is a “cooling-off period” between the last act of provocation and the killing might, in fact, cause the accused to react more strongly.

In the current case, as seen above, the facts suggest that the accused person might have been provoked by his wife’s acts of selling domestic properties there at Mpanda, eating bus fare he sent (from Bunda to Zanzibar) yet denying him conjugal rights. As he confesses to have conjugated her at least one round but he needed more, thirsty as he was, the probable reaction to any reasonable person exposed to that situation is not doing what he did but would have been reaction of quenching his sexual desire may be by a force conjugation but not what he did. As per circumstances of this case, the reaction by the accused person is not justified by any provocative acts or words to justify the killing. Denying a spousal conjugal right cannot mount provocation if there were no accompanying words or acts culpable of causing provocation. In this case therefore, the accused person’s act of killing the deceased was pre-mediated therefore it is homicide with malice aforethought. There was no proof of provocation as said by the court of Appeal in the case of **Saidi**

Kigodi @ Side v. Republic, Criminal Appeal No. 281 of 2009

(unreported) that: -

We are of the firm view that the defence of provocation is available to a suspect who kills at a spur of the moment; in the heat of passion before he has time to cool down".

In this case, what caused the accused being in a heat of passion thus losing his control and killed the deceased is not known. A mere denial of conjugal right in the circumstances of this case could not sufficiently mount provocation justifying killing. I think my brother Hon. Mlyambina, J (in **Republic v. MT.81337 Sgt. Bats in Philip Sanga**, Criminal Sessions Case No.25 of 2020) rightly remarked on love issues that I agree that

love is an intense feeling of deep affection, something unexplainable...it is beautiful, adorable and everlasting no matter the situation...However, love has become perishable good which can rot and stink...when sweets turn bitter to the extent of killing each other .

It can rightly be said that the relationship between spouses though religiously discouraged to part, when things turn sour it is wiser for the said covenant to come to an end for life sake. Love has rightly become a perishable good which can rot and stink. It has affected people across all

spheres of life: Politicians, academicians, religious persons, artists, peasants, pastoralists, fishermen etc. I need not finish the all list, but it suffices to say that love is a perishable good that rots and stinks. If that has to happen, let the evil go for the sake of life.

In the current matter, if all is considered, what the accused person did against the deceased Shida Maduhu is nothing but a revenge to the sale of the domestic properties at Mpanda. If that is the case, then that is pre mediated murder hardly reducible even to a voluntary manslaughter. (high degree of manslaughter).

Having said so and considering the important issues discussed against the purporting provocation allegedly emanating from denial of further conjugal right, I think, in my considered opinion, the accused person in this case did murder the deceased person, with malice aforethought. I thus convict him of murder as charged contrary to section 196 and 197 of the Penal Code [Cap.16R.E.2019].

Ordered accordingly.



F. H. Mahimbali

JUDGE

Considering the punishment for murder is only one known as per law, the accused person is hereby sentenced to suffer death by hanging pursuant to section 197 of the Penal Code, Cap 16 R.E 2019 as read together with section 322 (1) & (2) of the CPA, Cap 20 R.E 2019.




F. H. Mahimbali

JUDGE

Right of Appeal fully explained to any aggrieved party under section 323 of the CPA, Cap 20 R.E 2019.

DATED at MUSOMA this 6th day of March, 2023.


F. H. Mahimbali

JUDGE