

**IN THE HIGH COURT OF TANZANIA**

**AT SONGEA**

**(ORIGINAL JURISDICTION)**

**(SONGEA REGISTRY)**

**CRIMINAL SESSIONS CASE NO. 10 OF 2020**

**THE REPUBLIC**

**VERSUS**

**JAPHET BENJAMINI MILINGA**

**JUDGMENT**

**Date of Last Order: 19/11/2020**

**Date of Ruling: 25/11/2020**

**BEFORE: S.C. MOSHI, J.:**

The accused person **JAPHET BENJAMINI MILINGA** herein referred to as the accused person, stands charged with murder contrary to section **196** and section 197 of the **Penal Code [Cap. 16 Revised Edition 2019]**. The particulars of the offence are that, the accused person on 6<sup>th</sup> day of November 2016 at Lizaboni area within Songea Municipal in Ruvuma Region did murder one Siwema Deusu Mkuwele (The deceased); he denied the charge.

To start with, it is imperative to understand the meaning of murder as provided under the Penal Code. Murder is committed when an accused person kills another with malice afore thought, see section 196 of the Penal Code [Cap.16 R.E. 2002]. Malice aforethought is defined as an intention to cause death or grievous harm to a person whether such person is the person actually killed or not or acting with knowledge that the act or omission causing death will probably cause the death or grievous harm or an intention to commit the offence (see section **200 of the Penal Code** (supra). The onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, see **JONAS NKIZE V REPUBLIC (1992) TLR** page 213-214 (HC).

The main issue is whether the prosecution has proved beyond any reasonable doubt that the accused person murdered the deceased.

There is no dispute that Siwema Deusu Mkuwele is dead; through exhibit P.1, the post mortem examination report, the prosecution established that the deceased is dead. The post mortem examination shows that, the deceased had stab wound to the chest, it was pouring blood at cardio pulmonary cavity. Although the doctor who conducted the post mortem examination did not indicate the actual cause in the report

but he orally testified that, the cause of death was severe bleeding and her lungs were affected so she could not breath.

The conclusion derived from prosecution's evidence leads to a single hypothesis; it is believed that the accused had a motive to kill, it is strongly believed that the accused murdered the deceased due to jealous because the deceased who was his lover had dumped him and moved on with a new boyfriend.

In an endeavor to prove the case the prosecution paraded a total of nine witnesses however PW5 was declared hostile; hence he was disqualified.

PW1 Gati Juma Marwa, deceased's daughter testified on oath among other things that, when the incident happened, she was living at Mji Mwema. She was living with her mother; Siwema Deusi Mkuwele (The deceased).

On 6/11/2016 at 9.30 pm she was at home cooking. While cooking she heard a voice of her younger brother calling her. Her brother told her that the deceased was calling her. She went to the back yard (uani), she saw the deceased bleeding from her chest area. He asked her, who had wounded her. The deceased told her that she was stabbed with a knife by



Japhet. The deceased asked PW1 to take her to her boss. She knows Japhet. They used to refer to him as mjomba. Japhet had sexual relationship with her mother. They took her mother to her boss whose name is Haule. Her mother was a bar attendant. While talking to her mother she was with her younger brother and Paulina who was their tenant. While walking going to deceased's boss, the deceased leaned on one of her hand and she held one hand on her chest, she was holding a shirt on to the chest. The distance from their home to her boss is like one and a half football field's distance. The deceased called her boss/Haule and said, *"Haule Japhet is killing me, he has stabbed me with a knife"*. After saying that the deceased fell down.

The deceased was taken to hospital by her (PW1), Pauline and Paulina's husband. By then the deceased wasn't talking. They took her to Mji Mwema hospital, they refused to attend her, they told them to take her to the police. They took her to police. The police took her with a police car to regional hospital. Upon getting at the hospital she was carried and taken to patient's treatment room. The Doctor examined her and told them that she was already dead.

She identified Japhet to be the accused person in the dock.

During cross examination by defence counsel she inter alia stated that, at the time when the offence was committed, she was 14 years old. When her younger brother called her, She went at the yard (uani). Her mother was with a certain youth who is called Selemani. She had seen Selemani twice. She had seen him once prior to the incident at their home and the second time was on the date of the incident. Selemani came to accompany her mother so they could go together (kumpitia). Her mother told her that Japhet stabbed her. She saw two wounds. She didn't strip off the shirt but she showed her the wounds.

The deceased told her boss that, "*Haule Japhet ananiua kanichoma kisu*". There was no other explanation; she didn't describe the stature of Japhet.

On the date of the incident she issued her statement at the police. She explained how she witnessed the incident she didn't tell the police the number of wounds. She told them that the wound was on the left breast and at the stomach.

Her mother was wearing a T – shirt, a pens (shorts) and blue Kitenge. The distance from Sheraton Bar to their home is about 150 meters. The deceased didn't say why Japhet attacked her.

PW2 Alphonse Paulo Haule, testified on oath that, he lives at Lizabon. He runs a local brew Bar and a hut (shop) for selling various items, like soap, soda, tooth brush, etc. He was working at the shop and he had two bar attendants; their names were yeye and Siwema.

He employed Siwema in 2015, she worked up to 2016 when she died. He knows Japhet Benjamin Millinga as his customer. Later on Japhet developed a relationship with Siwema. They were fiancées (uchumba); like husband and wife (Bibi and Bwana).

On 6/11/2016 at 9.00 pm Siwema (deceased) told him that on that day she did not want to sell beer. He only gave her one plastic container to sell. She was in company of her new fiancé. He did not know the name of her new fiancé, he knew that he was her fiancé because after finishing drinking they hugged and walked together; they left together for home.

At around 10.00 pm Siwema came again with Gati (her daughter) and Pualina and her new fiancée. Siwema stripped off her cloth and showed him a breast. She was wounded, he saw blood, and the wound was at the ribs side. After that the deceased fell down. He asked the people to arrest her new fiancée, the new fiancée fled away. People took her to the hospital; the people were neighbours who were drinking there.



One of them was Zawadi, her tenant. Zawadi was male. He went to inform her parents while Gati and Paulina took the deceased to hospital. Thereafter he went to hospital together with deceased's parents. The doctor informed them that Siwema was already dead.

On 9/11/2016 in the morning; he asked three "*Boda Boda*" youths to go with him to look for accused at his home at Magagula because the deceased said that Japhet ameniua. He knew that the Japhet she referred to or named was Japhet her fiancée.

They decided to look for Japhet's relative. Japhet's brother Alto Millinga was living near his home. Alto told him that Japhet would have gone to Magagula. He said that he could look for him at their relative. After coming from Magagula, police took him so he could issue a statement.

On 13/11/2016 at 2.00 pm police came, they were in a car. They went to Alto Millinga's home. Police entered inside, they were with Japhet. They met Japhet's brother. They interrogated him. He and Japhet were taken by police car. They went to Siwema's home. He didn't see a thing which was taken from Alto's home because he was outside the house.

He last saw Japhet at night, at 9.00 pm. one day before the deceased was attacked. He was standing outside, at the window of the

bar. He was watching through the window. The deceased was inside the bar. Her new fiancée was in the bar. Siwema was conversing with her new fiancé while working.

On cross examination he said that Siwema left the bar with her new fiancée. They were hugging (wamekumbatiana). At the time when they were leaving Japhet was not present. He saw Japhet watching through the window on the last date when deceased left with her new fiancée. He identified him because he knows his face. Japhet did not do anything chaotic but before that date Japhet did used to cause chaos. The deceased came back at 10.00 pm, with Gati, Paulina and her new fiancée. She said, "*Haule Japhet ananiua*". When she showed him the breast, she was outside while he was in the shop. He told her to cover herself up. He saw a wound under the breast. She went away at around 10.00 pm. She left and returned with her new fiancée i.e. Selemani within the same hour. In the circumstances, the new fiancée could have known what happened. He thought that is why the new fiancée fled away as he knew what happened. The new fiancée said nothing. The deceased didn't describe '*Japhet*'. She only said "*Japhet*".



He knew it was Japhet because the deceased said Japhet was mistreating him, that he was abusive (mkorofi).

At police he said it was due to jealous (*wivu wa mapenzi*). He knew that because Siwema dumped him and got herself a new fiancée.

PW3 Dr. Frank Aseri Maeda, a retired medical doctor. In 2016 he was working at Ruvuma Referral hospital. On 7/11/2016 at 11.30 am he was on duty. While on duty he examined a dead body in the mortuary. After examination he prepared a post mortem examination report (Exh.P.1).

The cause of death was severe bleeding and her lungs were affected so she couldn't breathe.

PW4 Paulina Ndunguru, is a neighbour who was living in a rented room at deceased's house, at Mjimwema. She *inter alia* said that, she knows Japhet as he was Siwema's lover. On 6/11/2016 at night while home she heard Siwema crying. She went outside to the yard. She saw Siwema, she was with a young male person (mvulana). Siwema was crying. She asked her why was she crying? Siwema asked her to take to her boss. She went to call deceased's daughter Gati. Gati was at the lounge, inside the house. Gati came to the yard. Gati asked her mother what went wrong? The deceased said that, "*Japhet is killing me.*" Gati was

holding her chest. She tried to remove her hands, whenever she tried to remove the hands blood came out and she was bleeding. There was a lot of blood. She knew that it was Japhet, her lover as she didn't know any other Japhet. The deceased asked to be taken to her boss, Haule. They carried her to her boss. They were three of them; she was with Gati and the young man, she don't know the name of the young man. Her and the young man held the deceased on their shoulders while Gati carried deceased's *'kitenge'*.

They got at the bar. The deceased called out twice, "*Haule Japhet ananiua*". By then Haule was in the shop. After calling Haule she fell down. Haule asked them to go to the hospital. They went to Mji Mwema Hospital. Haule ordered the arrest of the young man who was with the deceased. The young man fled away. She with her male partner Zawadi Majid and Gati went to Mji Mwema. At Mji Mwema the deceased was not attended, they went to the police. They put the deceased in the car and took her to regional hospital. At hospital they put the deceased on the wheel chair and took her to the doctor. They were told that Siwema had passed away.

During cross examination she said that, on 6/11/2016 when Siwema called her, Siwema was with a young man, it was night, she can't

remember the young man's face. The young man had a wound on the back of his head. He had a big wound but she didn't see his face. There was no light, it was dark. From their home to the boss they passed through a narrow path. There was no light the whole way. It is a long path way. She didn't ask the young man what had happened.

At the scene, after seeing the deceased she went to call Gati; deceased's daughter. Gati was cooking at the lounge. She did not know who's telling the truth between her and Gati. The deceased said Japhet, he didn't describe Japhet. She tried to remove her hands but she saw nothing, the deceased was wearing a blouse and a "*masai*" cloth. They did not strip her. They went to her boss. She said, "*Haule Japhet ananiua*", she fell down. She didn't say which Japhet. By then Haule was in the shop while they were at the shop window.

Haule asked his customers to arrest the young man. They failed to arrest him. That young man was at a better position to explain what happened to Siwema. She could not answer whether what Gati said regarding helping her mother to walk to her boss is true. She was wrong; Gati said the truth.



PW5 Alto Milinga Benjamini, was declared hostile witness, so his testimony is disregarded.

PW6 Yasinta Selemani, Uledi, Japhet Benjamin Millinga (accused) is her brother in law. The accused is young brother of her husband. Before accused's arrest her husband had chased him away because he had stolen his maize. However, Japhet didn't go away. The accused left at around 4.00 pm. While eating a sugar cane. The accused took her knife and went away with it. Time passed; he called her husband if he was with Japhet. She told him that the accused had taken a knife. Her husband said that he was not with the accused. She called her husband because her husband had chased him away, she thought that she could harm him.

PW7 NO. F. 5316 D/CPL Gabriel, works with police Criminal Investigation Department (C. I. D) Songea. On 6/11/2016 at 11.00 pm while at Songea central police station he was assigned a file relating to murder of Siwema Deusu Mkuwele. The file was handed to him and G. 37 D/CPL Denisi; they were given the file by the DC – CID. They started to look for the suspect. They arrested the suspect on 8/11/2016. They arrested him at Lizabon area at his sister's home. They took him to the police station. The accused was to be interrogated and his statement was

to be recorded but the accused said he wasn't feeling well. He informed the accused that he was required to be interviewed and that his statement was to be recorded. He took the accused back to the lock – up because he said he wasn't feeling well. The accused said that he had a head ache, he gave him a pain killer, Panadol.

On 9<sup>th</sup> he went on with other duties. He left the duty to interview the suspect to Denis. He went to inspect the scene and to draw a crime scene sketch map. The accused person was directing leading him.

The accused led him to his brother's home, Alto. The accused said that he had taken a knife from his brother's home and returned it there. The knife was important evidence as he said that he used that knife to stab the deceased. At his brother's home they found Alto, his brother. Alto said nothing. The accused said he had kept the knife inside the house. They wanted the accused to show them the knife. The accused saw it was already mixed with other household utensils. He looked at the knife but it had no blood on it or any mark indicating that it was used to stab a person. The accused said that he had washed the knife on the date which he committed the offence. He didn't take the knife, he returned to the police station.

As an investigator, he generally learned that the suspect, Japhet Millinga did kill the deceased because he was deceased's lover. He recorded the statements of Gati, Alphonse and Paulina, all witnesses explained that the deceased and accused were lovers. The accused was jealous of his lover and all witnesses said that Japhet killed the deceased.

On cross examination, he among things said that, he went to Aluto's home with D/CPL Denis, the accused and the accused's brother. They were only four of them. When he was asked who was truthful between him and Alphonse; he said that he is the one stating the truth as Alphonse was not there. They went to the crime scene. They inspected the crime scene. The scene was near deceased's home. There was no indication that murder was committed there. There was no blood at the crime scene. They arrested the accused on 8<sup>th</sup> at 8.00 am at Lizaboni.

PW8 NO. G. 37 D/CPL Denis, is a police investigator who recorded accused person's caution statement. He said that the accused confessed to have committed the crime however the statement was not admitted in court.

PW9, Rehema Yunus Idd was a justice of peace. She said that the accused was brought to her as a justice of peace and had confessed to



have committed; the offence facing him. However, the statement was not admitted hence it does not form part of the evidence.

For defense, DW1 Japhet Benjamin Millinga, stated among other things that, he lives at Magagula. He is a peasant, he does farm activities at Magagula where he lives with his parents. They are 5 (five) children in the family. Some of them lives at town. His sister Bahati lives at Lizabon. Another sibling lives at Matarawe, her name is Oresta. Alto Millinga, he lives at Mji Mwema. Another sister, Colleta Millinga lives at Magagula, he is the last born.

On 6/11/2006 he was at Mji Mwema at his brother's home, at Alto Benjamini Millinga's home. He had gone to visit him. While there, he quarreled, with his brother Alto Benjamini Millinga, his brother chased him away. He left Alto's home at 5.00 pm. He went to Lizabon to his friend's place, at John's place. He spent the night at John. In the morning he boarded a bus to Magagula. He spent a night there, on 8<sup>th</sup> in the morning he boarded a bus and travelled back to Songea town. He went to his sister, Bahati who lives at Lizabon. In the morning at 8.00 am police he was arrested by police, they told him that they suspected that he murdered

Siwema Deus Mkuwele. He knows Siwema Deus Mkuwele (deceased). The deceased was his lover; for about six months, from January to June; 2016.

Their relationship stopped in June. After they separated he went back to Magagula. She also continued with her own life. They arrested him and took him to the police station. While at police on 9<sup>th</sup> the police took him to interrogation room. He told them that he knew nothing about the Murder. They took him back to the lock – up.

The police took him to the Justice of Peace on 14<sup>th</sup>. He went to issue a statement. He told them that he knew nothing about the murder. They again took him to the police station. Then he was arraigned in court for the offence of murder.

Gati testified about her mother's statement, that "*Haule Japhet ananiua amenichoma kisu*". Paulina and Haule said that deceased said, "*Haule Japhet ananiua*". The deceased did not say those words because Gati said, "*Haule ananiua amenichoma kisu*" whereas the others said that she said "*Haule Japhet ananiua*".

All the witnesses didn't say which Japhet was being referred to. He doesn't know why they implicated him, there are many people who are called Japhet.

They indicated one person named Selemani, Selemani who was supposed to have known the culprit. Failure to call Selemani means that they know the responsible person for this incident. He did not confess to the offence, neither at the police nor at the Justice of peace.

He was not jealous, since had passed after their separation for a long period. He couldn't be jealous as they separated.

He did not take the witness to the crime scene. The witness lied in court. He didn't see the sketch map of the crime scene.

He did not lead the police to Alto at Mji Mwema to collect the knife. He hasn't seen the knife here in court.

During cross examination he said that, he quarreled with his brother Alto, the dispute was over the maize which he stole. Siwema was his lover. Siwema is currently a deceased. The police told him that Siwema was deceased after being arrested. He separated from Siwema. He didn't be friend her again. Before separating Siwema did not have other lovers. They quarreled and separated because Siwema was not faithful.

He never saw Siwema with other men. At the Justice of Peace he said that he did not commit the offence. He went to the Justice of Piece because he was taken by the police, he didn't ask the police to take him to



Justice of Peace. The police said that he was required to go to Justice of Peace to issue his statement.

The police forced him to go to the Justice of Peace. The police didn't beat him but he ordered him, he threatened him, he said if he didn't go, he would be punished.

There's difference between "*Japhet umenichoma kisu unaniua*" and "*Japhet umeniua*".

He knew Gati here in court when she was testifying. He was going at deceased's home but he wasn't seeing Gati. She testified here in court that she was deceased's daughter. He didn't go to Sheraton Bar on 6<sup>th</sup>. He didn't go to Sheraton Bar for quite a long time before 6<sup>th</sup>. He doesn't know Selemani.

That was it from both side's evidence.

There is no direct evidence connecting the accused to the murder. The prosecution's case hinges on deceased's oral dying declaration. However, for it to be a basis of conviction has to be collaborated, see **Frank Joseph @ Sengerema Versus the Republic**, Criminal Appeal NO. 378 of 2015, Court of Appeal sitting at Tabora (Unreported).

Upon scrutiny of the whole evidence, there is no other pieces of evidence collaborating the dying declaration but equally important, the evidence which tends to show that the deceased made a dying declaration is wanting in view of the contradictions and inconsistencies as I will show herein.

It is suggested that the accused could have killed the deceased because the deceased had dumped her, however this is a mere suspicion. It is a principle of law that however strong the suspicions may be, cannot be the basis of conviction see, **Aidan Mwamlenga V. R**, Criminal Appeal No. 207 of 2006, Court of Appeal of Tanzania, sitting at Dodoma.

Again the above evidence reveals a lot of contradictions, for instance the evidence between PW1, Gati who is deceased's daughter and Paulina, PW4 is contradictory regarding who between the two went to the crime scene first, as seen PW1 said she was inside cooking, her younger brother called her and told her that her mother was calling her whereas PW4 said she saw the deceased first, she then called PW1. Also, the evidence relating to the way they walked with the deceased to her boss, Mr. Haule, their evidence even differed on the clothes that the deceased was wearing. Again, the evidence of Alphonse Paulo Haule, PW2 and PW7, D/CPL Gabriel

differs greatly, whereas PW2 said he went with police to the accused's brother to search for the knife which was used to attack the deceased, PW7 totally denied this fact, he firmly said that when they went to accused's brother PW2 was not among them.

There is also the issue of credibility of witnesses, there was a lot of inconsistencies in PW4, testimony, she even admitted that what she stated earlier was wrong. Her credibility is wanting.

Again, the credibility of PW7 is questionable, his evidence regarding the crime scene, he said that he visited the crime scene and drew a sketch map of the crime scene; but he neither described the scene nor produced a crime scene sketch map. He even admitted that at the place which he visited, there was no indication that the offence was committed there.

Wherefore, in view of what I have discussed above, I find that the witnesses were not trustworthy, it is doubtful whether the deceased real made a dying declaration. Even the words which were uttered by the deceased differs , there are two versions, PW1 stated, that the deceased said that, *"Haule Japhet ananiua kanichoma kisu"* whereas PW2 and PW4 who were supposingly with PW1 said that the deceased said *"Haule, Japhet ananiua"*.



As said these contradictions and inconsistencies lowers their credibility. The truthfulness of what is said is questionable, in **Mohamed Said Matula VS R 1995 (TLR) 3, Awadhi Ramadhani Waziri VS. R CR.APP 303/2014** at page 6 that,

*"It is a trite law that where evidence is inconsistent or where it contradicted it cannot be relied upon".*

Yet again, interestingly enough a very important witness was not called, if a party fails to call an important witness the court may draw an adverse inference, see the case **of Mashimba Dotto @ Lukubanija V.R,** Criminal Appeal No. 317/2013, Court of Appeal sitting at Mwanza (Unreported). PW1's and PW4's testimony shows that when they got at the crime scene, the deceased was with a young man, Selemani who was her new boyfriend. Also, PW2 testified that on the fateful date, at night the deceased was working at the bar while conversing with Selemani, at 10 pm after work the deceased left together with Selemani. PW2 further said that the deceased came back to the bar wounded within an hour, this time around she was again with Selemani, PW1 and PW4. Therefore, it is obvious that Selemani was the last person to be seen with the deceased. Thus, Selemani was a very important witness. It was therefore very crucial

to have him as part of this case either as a prime suspect or as a principal witness. The prosecution disclosed no reasons for not pursuing Seleman. Actually, failure to call him raises more questions, in other words this makes me believe that there is more to the story.

All in all, the prosecution's evidence leaves a lot to be desired.

It was held in the case of case of **Christian s/o Kaale and Rwekiza s/o Bernard Vs R [1992] TLR 302** that:-

*"an accused ought to be convicted on the strength of the prosecution case."*

That said and done, I find that the prosecution has failed to prove its case beyond a reasonable doubt, as always is, the benefit of doubt goes to the accused person see the case of **Msalo Galime V. R. (1964) E.A. 438**. I concur with all three assessors; I find that the accused person is not guilty of murder. Consequently, he is acquitted accordingly.

Right of Appeal is Explained.



  
**S.C.MOSHI**

**JUDGE**

**25/11/2020**