

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM  
ORIGINAL JURISDICTION  
CRIMINAL SESSIONS CASE NO. 52 OF 2015  
REPUBLIC  
VERSUS**

**YUSUPH AKIDA MWINTANGA @ JASUMA ..... 1<sup>ST</sup> ACCUSED  
JAPHET RMADHANI MWINTANGA @ KOPO..... 2<sup>ND</sup> ACCUSED  
MRISHO LILA MWINYIPEMBE @ JACKCHAIN..... 3<sup>RD</sup> ACCUSED  
MWINYIHAJI HASSAN SALEHE .....5<sup>TH</sup> ACCUSED  
HASSAN ALLY HALFAN @ CHANCHA ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

**MKASIMONGWA, J**

Before the Court **YUSUPH AKIDA MWINTANGA @ JASU, JAPHET RAMADHANI MWINTANGA @ KOPO, MRISHO LILA MWINYIPEMBE @ JACKCHAIN, MWINYI HAJI HASSAN SALEHE @ DEFENDER** and **HASSAN ALLY HALFAN @ CHANCHA** (1<sup>st</sup> , 2<sup>nd</sup> , 3<sup>rd</sup> , 4<sup>th</sup> and 5<sup>th</sup> Accused person respectively) stand charged with Murder Contrary to section 196 of the Penal Code [Cap. 16 R. E 2002]. It is alleged that the Accused persons on 13<sup>th</sup> day of August, 2013 at Shimo la Punda area Magomeni Village within Bagamoyo District in Coast Region did Murder one FURAHA RAJABU @ KITUPWANI. They all pleaded not guilty to the charge.

So that they prove the charges the prosecution called five witnesses to testify to the Court. They are MOKIRI KEMUHE MKENYE (PW1), D. 5655 D/SSgt DIWANI (PW2), DR. ZENA MTAJUKA (PW3), WP. 6993, PC. LEAH, (PW4) and WP. 9608 D/C STANSILA (PW5). Briefly, the prosecution case is as that PW1, PW2, PW4 and PW5 are the Police Officers stationed at Bagamoyo Police Station, and that PW1 is the Officer Commanding the Criminal Investigation Department (OC-CID) for Bagamoyo District, whereas PW3 is the Assistant Medical Officer working at Bagamoyo District Hospital. In the course of their work on 13/8/2013 PW4 and PW5 recorded the witness statement of Rehema Rajabu and Mzee Idd Mzee, which statements were tendered and admitted in evidence in terms of Section 34B (2) (d) of the Evidence Act, [Cap. 6 R. E 2002] and accordingly marked as **Exhibit P4 and P5**. According to **Exhibits P4 and P5** Rehema Rajabu and Mzee Idd Mzee are the residents of Magomeni area within Bagamoyo Township. They are petty business persons. Rehema Rajabu well knows the accused persons whom she mentioned by their common names as being JASU, CHANJA, KOPO, JACKCHAIN and DEFENDER. She knows them as they were customers in her food business. On 13/8/2013 at or about 5.00 was in her way to her business when she saw the accused persons together with their fellow one FURAHA @ KUTUPWANI with a language which they were putting down on the ground quarreling and later there ensued a fight. Rehema Rajabu stopped so that she witnesses what was taking place. She saw all the five young men were assaulting Furaha Kitupwani using sticks

and stones. On seeing that she left the place so that she reports the incidence to various persons and she found on MZEE IDD MZEE to whom she told what she observed. With Mzee Idd Mzee, Rehema Rajabu came back to the place where according to her they found not the young men and the language. They only met Furaha Kitupwani lying on the ground and he was dead. They saw the body to have been seriously wounded on the head and other various parts. On his part, Mzee Rajabu Mzee stated that at the scene he found a human body surrounded by people and upon discovering that the person is dead Mzee Idd Mzee went and reported the incidence to the Hamlet Chairman one HASSAN RAMADHANI who according to MOKIRI KEMUHE MKENYE (PW1) reported the incidence to the Police and the Officer Commanding District (OCD) who relayed the information to PW1, the OC-CID. Together with D/S/SGT DIWANI (PW2), PW1 came to the scene of crime at Shimo la Punda area in Bagamoyo where they found a deceased human body lying on the ground surrounded by many people. Upon examining it PW1 found the same with multiple wounds on the head and other parts of the body and it was bleeding. He (PW1) instructed PW2 to draw a Sketch Map of the Scene Crime which was admitted in evidence and marked as **Exhibit P1**. He also instructed him to collect, as exhibits, stones and sticks found at the scene of crime alleged to have been used in assaulting the deceased and PW2 acted on the instructions and has tendered them in Court as exhibit and were admitted in evidence marked as **Exhibit P3** collectively. At the scene of crime, PW1 also started collecting

further information from some of the people who were there at the scene of crime. It is when he met with Rehema Rajabu who told him that she saw Jackchain, Kopo, Defender, Jasu and Chancha assaulting the deceased one Kitupwani and that beside them there was a language. She knows the suspects for they leave in the same area. Following that information one Japhet and Yusuf Akida (the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons) were arrested and brought to the police station on that same day. Upon being interrogated the two suspects admitted knowing the deceased and other people as they belonged to a group that involved itself in criminal acts. Each denied assaulting the deceased pointing a finger to each other. PW2 said that, the suspects told him that on the material night, they were along Nia Njema Street/area where they committed theft from which they stole various properties including a sum of money. In the cause of dividing the properties among themselves, they found the deceased was hiding the money stolen. It is when they quarreled and the deceased was therefore assaulted to death. The same story had the 3<sup>rd</sup> Accused upon being interrogated when he was arrested sometime on 9/9/2013 suspected of the offence. The 4<sup>th</sup> and 5<sup>th</sup> accused persons were arrested on 19/12/2013 and 14/1/2014 respectively, whereas upon being interrogated by the police the 4<sup>th</sup> accused person denied knowing the fellow accused persons, the 5<sup>th</sup> Accused admitted knowing the deceased and the fellow suspects and that on the material day/night they were together.

The prosecution evidence is further to the effect that ZENA MTAJUKA (PW3) a Medical Officer at Bagamoyo District Hospital was on 13/8/2013 at or about 3.00 pm at her work place when there came two lady Police Officers requesting for a Post Mortem Examination on the deceased's body which they brought. PW3 came to the Hospital's Mortuary where there were also the police officers and she (PW3) required the presence of the deceased's relative at the time of examination. The relatives were present and they identified the deceased. PW3 said the body was of a male person. Physically the body had severe multiple wounds particularly on the head. She was of the view that the wounds were caused by different types of weapons. There were those caused by a blunt heavy object and those caused by sharp objects. The body again had bruises and that it was soaked with blood bleeding from the wounds. She opined that the deceased's death was due to the multiple wounds and severe blood bleeding. PW3 then prepared a Report on Post Mortem Examination which she identified in Court and then tendered as exhibit. The same was admitted in evidence and marked **Exhibit P2**.

From the evidence adduced by the prosecution, the accused persons were found to have a case to answer. They opted to give a sworn defence. They indicated that they had one and same witness to call. They however opted not to call him after they had testified to the Court.

In his defence the 1<sup>st</sup> Accused testified to the effect that he is the Bus Conductor resident of Majengo Area at Bagamoyo. He does not know Rehema Rajabu. On 10/8/2013 he was brought to Bagamoyo Police Station suspected of theft. It was said that he had stolen the properties of the Regional Crime Officer (RCO) at Kibaha, whose name was not mentioned to him. At the police station he was put in the lock up where he stayed to 19/8/2013, the day he was taken to Bagamoyo District Court where for the first time he heard that he was being charged with Murder alleged to have been committed on 13/8/2013 when he was in the police lock up suspected of theft.

Similarly, the 2<sup>nd</sup> Accused lives at Bagamoyo along Majengo Area. He is a businessman selling fruits. On 12/8/2013 he was at his business place when he was arrested and taken alone to Bagamoyo Police Station by a police officer whom he does not know his name. At the time of arrest he was not notified of the offence he was suspected of. At the police station he was locked in the lock up. Sometime later he was taken out of the lock up and asked by a police officer of his name, occupation, residence and the name of his ten cell leader which particulars he provided. A week later on 19/8/2013 he was taken to Bagamoyo District Court charged with murder which offence he does not know. From 12/8/2013 to when he was brought to the court charged with murder he was never released out on bail. He first came to see the 1<sup>st</sup> Accused person in the police lock up and that he does not know Rehema Rajabu and Furaha Rajabu.

As it is for the first two accused persons, the 3<sup>rd</sup> Accused one MRISHO LILA lives along Magomeni area at Bagamoyo since when he was born. Sometime in September, 2013 he was at Magomeni, Bagamoyo when he was arrested without being notified of the offence he was being suspected. He came to know that he was arrested suspected of murder later when was charged in Court. He does not know the deceased one Furaha Rajabu and Rehema. The 3<sup>rd</sup> accused first came to know the fellow accused persons when he met with there in Remand Prison. This is just a cooked case against him.

In his defence MWINYIHAJI HASSAN SALEHE (4<sup>th</sup> Accused) testified to the effect that he is MWINYIHAJI HASSAN SALEHE and that “DEFENDER” is not his name. There was no anytime he had changed his names. Prior to the time of his arrest he was living at Bagamoyo and was a businessman dealing with Freezers/Refrigerators business. He was arrested by the police officers on the date he does not remember suspected of an offence connected to his freezers business. At the police station his statement was never recorded. On 18/12/2013 he was he was brought to the Court charged with murder. This was strange to him. He did not commit the murder and that he knows neither Rehema Rajabu nor Furaha Rajabu Kitupwani.

Again, HASSAN ALLY HALFAN (5<sup>th</sup> Accused) testified to the effect that he lives at Kiwangwa village since when he was born and his name is HASSAN ALLY HALFAN which name was given to him

by his parents and there was no time that he had changed his names to add them. He does not know a person called Chanja or Chancha. In Court there is no one charged named HASSAN ALLY HALFAN CHANCHA. The 5<sup>th</sup> Accused stated further in evidence that he was arrested sometime in January, 2014 and brought to the police station where he stayed for four days. He was arrested at 12.00 and a day later his statement was recorded by the police officer and that he does not know one FURAHA RAJABU. The 5<sup>th</sup> Accused does not remember where, exactly, he was on 13/8/2013.

That is the whole evidence in this case. As shown herein above the Accused person stand jointly and together charged with murder contrary to Section 196 of the Penal code. The offence of murder is composed of the three ingredients which are: **One:** that a person is dead. **Two:** that the deceased was killed by another person (Accused person). **Three:** that the accused person did kill the deceased with malice aforethought. It is the duty of the prosecution to prove each element constituting the offence with which the accused stands charged, the standard of proof being beyond reasonable doubt so that the accused is found guilty of the offence. In the case at hand the court has to decide whether Furaha Rajabu @ Kitupwani is dead? Here we have the statements of Rehema Rajabu and Mzee Idd Mzee produced in Court by PW4 and PW5 in terms of Section 34B (2) (d) of the Evidence Act (Cap. 6 R. E. 2002). Section 34B (1) of the Act provides for the admissibility in evidence, of a written statement by any person who is, or may be, a witness in any criminal proceedings where direct oral evidence of a relevant



fact would be admissible, as proof of the relevant fact contained therein in lieu of direct oral evidence. For easy of reference the Subsection is reproduced hereunder:

“S 34B      *(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.*

Subsection (2) of Section 34B of the Act, provides for conditions under which a witness’s statement can be admitted in evidence in terms of Section 34B. The subsection reads as follows:

(2)            *A written statement may only be admissible under this section–*

*(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;*

- (b) *if the statement is, or purports to be, signed by the person who made it;*
- (c) *if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;*
- (d) *if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;*
- (e) *if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;*
- (f) *if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is*

*accompanied by a declaration by the person who read it to the effect that it was so read”*

It is trite law that all conditions laid down in paragraphs (a) to (f) of Section 34B (2) of the Evidence Act are cumulative and must be met for a witness statement to be admissible under section 34B (1) and (2) of the Evidence Act. See **Joseph Shabani Mohamed Bay and Three Others v R; Criminal Appeal No. 399 of 2015**; Court of Appeal of Tanzania at Dar es Salaam (Unreported). Eventually the statements were admitted in evidence and marked **Exhibit P4** and **P5** respectively. Here therefore, we have the testimony of Rehema Rajabu. She told the court that she well knew Furaha Rajabu as the latter was among the customer to her food business. On 13/8/2013 at 5.00 am she was in her way to her businesses when she saw Furaha Kitupwani being assaulted by the accused persons using sticks and stones. She went and reported this to Mzee Idd mzee. With the later, Rehema Rajabu came to the place where she met Furaha Kitupwani lying dead and was bleeding on his head and other various parts of his body. This evidence was confirmed by that of Mzee Idd Mzee who said at the scene he found Furaha Kitupwani lying on the ground dead. The dead body was picked from the scene of crime by PW1 and PW2, the Police Officers who took the same to Bagamoyo District Hospital where PW3 conducted a post mortem examination on it. According to PW3 she examined the deceased body identified to her by Mzee Idd Mzee and Shamba Shomari in the presence of WP. 9608 D/C Stansila and WP. 8255

D/C Salome to be that of Furaha Rajabu. PW3 certified that Furaha Rajabu is dead and upon finding that the body had multiple wounds all over the body especially on the head, PW3 opined that the death was due to the severe head injury and severe bleeding. This is evidenced by the Report on Post Mortem Examination Report tendered by PW3 in Court and admitted in evidence and marked as **Exhibit P2**. This evidence in my view does not leave any doubt that, and in fact it is not disputed that, Furaha Rajabu @ Kitupwani is dead as the prosecution alleges.

The next issue to be determined is whether the accused persons did kill Furaha Rajabu @ Kitupwani. The available evidence is to the effect that on 13/8/2013 at 5.00 am, Rehema Rajabu was on her way going to her business when she saw JASU, CHANJA, KOPO and DEFENDER together with FURAHA @ KITUPWANI in possession of a certain luggage put on the ground and that they were quarrelling. Latter there came at the scene one JACKCHAIN when she saw them starting fighting. She stopped so that she witnesses the fight in which all were assaulting Furaha Kitupwani using sticks (Marungu) and stones. In their submissions, the learned counsels representing the accused persons submitted that, the evidence adduces shows that the alleged event took place during night time. It is crucial for the Court to consider and determine whether the accused persons were identified at the scene of crime? Relying on the decisions in **Amani Waziri v R (1980) TLR 250** and seconded by fellow learned advocates representing the accused persons Mr. Kleofas Mayenje, stated that the case laid

some guidelines which are to be relied in order to establish whether or not identification evidence is watertight. This is because the Court held inter alia that:

- 1. evidence of visual identification is of the weakest kind and most unreliable,*
- 2. No Court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely watertight”*

In order to establish whether or not identification evidence is watertight, according to the Court in **Amani Waziri Case** which was again referred in the case **Frank Joseph Sengerema v R, Criminal Appeal No. 378 of 2015**, Court of Appeal of Tanzania (Unreported) the following factors must be established:

1. The time the witness had the accused under observation.
2. The distance at which he observed him.
3. The conditions under which such observation occurred, for instance, whether it was day or night time. Whether there was good or poor lighting at the scene.
4. Whether the witness knew or had seen the accused before or not.

The learned advocate added that in the case at hand no evidence was led to establish those facts. As such the identification evidence was not watertight. It is his submission that the accused persons were not identified at the scene of crime. In this respect the Court

has again considered the evidence of Rehema Rajabu. The latter stated to the police and was recorded to have stated that she saw persons familiar to her assaulting the deceased. She mentioned the persons in their commonly known names to be JASU, CHANJA, KOPO, JACKCHAIN and DEFENDER some of whom were customers to her food business. JASU, KOPO, JACKCHAIN, DEFENDER and CHANJA are the nick names of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> accused persons, respectively. Though the accused person deny the names in their defence, that is an afterthought as during the preliminary hearing names of the accused person were recorded as a fact not in dispute. In evidence PW2 one D. 5655 D/S/SGT Diwani, told the Court that the 1<sup>st</sup> and 2<sup>nd</sup> accused were arrested on 13/8/2013 suspected of the murder. Upon interrogation they admitted knowing the deceased and other people as they belong to a group which does criminal acts. The witness is recorded stating in evidence that:-

*“They told me that on the material night they were along Nia njema area so that they commit a crime. In the commission of the crime they stole various properties including cash money. When they were distributing the crime proceeds, it was found that the deceased was hiding the money stolen. It is when they quarreled and the deceased was assaulted to death ... Upon being interrogated the 3<sup>rd</sup> accused had the same story as fellow two accused ... The 4<sup>th</sup> accused was arrested on 19/12/2013 when he arrived back home from Zanzibar ... He denied knowing the fellow suspects ... On*

*14/1/2014 the 5<sup>th</sup> accused was arrested. On being interrogated he admitted knowing the deceased and the fellow accused persons and that on the material night they were together.”*

The defence had an opportunity to cross-examine the witness and did cross examine the witness. I am satisfied that the question put against the witness in cross examination did not harm his evidence. This evidence in my view corroborates that of Rehema Rajabu. As the accused persons admit to have assaulted to death the deceased on the material night they cannot be heard now saying that they were not properly identified by Rehema Rajabu at the scene of crime.

In defence, the 1<sup>st</sup> nd 2<sup>nd</sup> accused person essentially raised the defence of alibi. They all show that on the alleged date they were not at the place the crime was committed as they were under the police custody. As rightly submitted by Miss Bimbinga, learned State attorney, the defence of alibi is governed by Section 194 (4), (5) and (6) of the Criminal Procedure Act [Cap. 20 R.E 2002]. Under the law the two accused persons ought to have first to given to the Court and the Prosecution, the Notice of their intention to rely upon on the defence of alibi before the hearing of the case or furnish the Prosecution with the particulars of the alibi at any time before the case for prosecution is closed. None of these alternative requirements was fulfilled by the accused persons before relying on the defence of alibi. As such, in the circumstances of this case in

which evidence also shows they had admitted to have taken part in assaulting the deceased to death, I accord no weight of any kind to the defence. All in all from the evidence the court is satisfied that the accused person did kill the deceased one Faraja Rajabu @ Kitupwani.

Last is whether the accused persons killed the deceased with malice aforethought. What is “Malice aforethought” is provided for by the Blacks Law Dictionary. The Dictionary defines the term as:

*“A predetermination to commit an act without legal justification or excuse ... An intent, at the time of killing, willfully to take the life of a human being, or an intent to act in callous and wanton disregard of the consequences to human life ...”*

The law that is, Section 200 of the Penal Code reads as follows:

*“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:*

- 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;*
- b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is*



- accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c. an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence”.*

In deciding on the existence or otherwise of malice aforethought there are various factors to guide the Court. The factors were well stated by the Court of Appeal of Tanzania in the case of **Enock Kipela v Republic, Criminal Appeal No. 150 of 1994** (unreported) in which the Court said:

*“... usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (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 blow were directed at or inflicted on; 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 (7) the conduct of the attacker before and after the killing”*

The Court has considered that in the case at hand, the evidence clearly shows that the accused persons and the deceased quarreled over the division of the crime proceeds. This happened because the deceased was hiding some of the proceeds against the accused persons. It is out of that quarrel the accused persons turned up assaulting the deceased by stones and sticks. It is uncertain under the circumstances that the accused’s assault was accompanied by a murderous intent given the possibility that the death occurred in the course of a fight. Where death occurs as a result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder. See **Tunutu s/o Mnyasule v R** (1980) TLR 204; **Stanley Anthon Mrema v R; Criminal Appeal No. 180 of 2005** (CAT – unreported).

Based on what is discussed above, the five accused person in this case are all found guilty of Manslaughter contrary to Section 195 of the Penal Code [Cap. 16 R.E 2002] and they are accordingly convicted.

Dated at Dar es Salaam this 19<sup>th</sup> of June, 2018.



  
E. J. Mkasimongwa

**JUDGE**

**19/6/2018**