IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL SESSION CASE No. 12 OF 2020

THE REPUBLIC
Versus
CHACHA S/O GHATI @ GIBITA

JUDGMENT

12th & 22nd October, 2020

Kahyoza, J.

Mwita s/o Chacha @ Mirumbe met his demise on 15th day of March, 2016 at Mbilikili village within Serengeti District in Mara Region. His death was unnatural one. He was shot by an arrow and died almost instantly. The prosecution arraigned the accused with the offence of murder.

The accused person **Chacha s/o Ghati @ Gibita** was arraigned with an information of murder contrary to section **196 and 197** of the **Penal Code [Cap. 16 R. E. 2019]**. The prosecution alleged that on 15th day of March, 2016 at Mbilikili village within Serengeti District in Mara Region, the accused murdered one **Mwita s/o Chacha @ Mirumbe.** The accused person pleaded not guilty. The prosecution summoned three witnesses and tendered one exhibit the post mortem report to prove the accused guilty. The accused defended himself on oath. He had no witness.

The prosecution's evidence was that on the 15th day of March, 2016 the deceased invited **Pw2 John M. Nyaminyobwe,** to go Mbilikili village

to arrest the accused person. **Pw2 John M. Nyaminyobwe,** deposed that he was a militiaman and in-charge of militiamen of Bonchugu ward. He obeyed. **Pw2 John M. Nyaminyobwe** went to Mbilikili to arrest the accused person who jumped bail in an economic case before Serengeti District Court. **Pw2 John M. Nyaminyobwe** knew the suspect by the name of Chacha Ghati @ Gibita, the accused. He told the Court that he knew him very well before the incident. He knew him from the time the accused was a little boy. He went to the office of Mbilikili village where he reached at 05.00 pm and met the deceased together with one Mseti Motera. The deceased told him that the person they wanted to arrest was at Loise Chacha's house. **Pw2 John M. Nyaminyobwe** deposed that when they accused set eyes on them he escaped. They pursued him in vain. They decided to go back to the village office. On their way back, they met two donkeys. The deceased identified them as being the accused's property. He advised **Pw2 John M. Nyaminyobwe** to drive the donkeys to the office, the act, in anticipation that the accused person will go to the office for his donkeys. If that happened they would arrest him.

Pw2 John M. Nyaminyobwe deposed that they drove the donkeys. No sooner had they started driving the donkeys to the office than, the accused emerged with bow and arrows. **Pw2 John M. Nyaminyobwe** heard the accused uttering the words *"leo lazima niuwe nyani mmoja"* meaning *"I will kill a one monkey today."* **Pw2 John M. Nyaminyobwe** deposed that after uttering those words, the accused shot one arrow which missed target. The accused was not very far away from **Pw2 John M. Nyaminyobwe** and the deceased. The accused shot

a second arrow which barely missed the deceased. The accused shot a third arrow, which hit the deceased on the left thigh. The accused shot the deceased near Loise's house at around 06.00pm. Loise shouted for help.

Pw2 John M. Nyaminyobwe deposed that he assisted the deceased to remove the arrow. They struggled to remove it and at the end they succeeded. People who came at that place assisted **Pw2 John M. Nyaminyobwe** to take the deceased to hospital. **Mwita s/o Chacha @ Mirumbe,** the deceased, succumbed to death on the way to hospital. **Pw2 John M. Nyaminyobwe** returned the dead body to the scene of the crime. He decided to notify **Pw3 Thomas John Kulula**, the village executive officer of Mbilikili village. He could not reach **Pw3 Thomas John Kulula** via his cellular phone. He went to **Pw3 Thomas John Kulula's** home and reported that the accused shot **Mwita s/o Chacha @ Mirumbe** causing his death.

Pw3 Thomas John Kulula, deposed that **Pw2 John M. Nyaminyobwe** went to his home place on the 15/3/2016 and he informed him that the accused shot the village chairman with an arrow. **Pw2 John M. Nyaminyobwe** further told him that chairman died. On being cross-examined, **Pw3 Thomas John Kulula** said **Pw2 John M. Nyaminyobwe** reached to his home place at around 08.00 pm. He went to the scene of the crime and reported the incident to police. Police went to the scene of the crime that night.

On the following day, the police brought a medical doctor, **(Pw1) Dr. Willy E. Mchomvu. (Pw1) Dr. Willy E. Mchomvu** examined and

confirmed that **Mwita s/o Chacha @ Mirumbe** was dead and that his death was unnatural. Dr. Willy E. Mchomvu (Pw1) established that the deceased died due to anaemia (excessive blood loss). He added that the femoral artery was injured causing the deceased to bleed profoundly. He tendered a post mortem examination report (**PMR**) as exh.P.1. The report showed the deceased sustained a cut wound on the hind limb along the femoral artery. Dr. Willy E. Mchomvu (Pw1) read the contents of Exh. P.1 to the accused in Kiswahili.

The accused, **Dw1 Chahcha Ghati @ Gibita**, deposed on oath that on the 15/3/2016 he left his home place at 10.00 am to Lung'abure village market. **He** returned at 10:00 pm when his wife told him that he his donkeys went missing. He took a bow and arrows to trace his missing donkeys. He saw people with donkeys near a maize plantation. They wanted to arrest him as he heard one of them directing another to surround him. In order to save his head, he decided to shoot arrows. He shot two arrows. The first missed the target while a second one hit a person he did not recognize. He flew to a near-by house and reported what had happened. He heard that the chairman was hit with an arrow and that he died. **Dw1 Chahcha Ghati @ Gibita** admitted to shot and causing the death of **Mwita s/o Chacha @ Mirumbe**, during examination in chief and during the cross-examination. He deposed during cross-examination, *"Yes, it is me, who shot an arrow that injured the deceased."*

There is no disputed that the deceased met his demise and the cause of the death was loss of blood due to cut wound inflicted by the

accused person. The accused person admitted to shoot the deceased with an arrow. The accused admitted this fact during his defence. Even if the accused had not admitted that he inflicted a cut wound on the deceased, there was sufficient evidence from the prosecution to establish that fact.

The prosecution's witness **Pw2 John M. Nyaminyobwe** testified that the accused shot the deceased. He narrated how they went to arrest the accused and how he fled on seeing them. They pursued him in vain. They returned on their way they met the deceased's donkeys and decided to drive them to the office. They drove the donkeys in anticipation that the accused person will search for his donkeys, as a result, they will arrest him. No sooner had the deceased and **Pw2 John M. Nyaminyobwe** commenced driving the donkeys than the accused emerged carrying a bow and arrows uttering the words that he will kill on monkey that day.

I find **Pw2 John M. Nyaminyobwe** a credible and reliable witness. He knew the accused very well from the time he was a little boy. He had no personal interest in the matter. He was just militiaman determined to maintain justice and ensure culprits are prosecuted. He deposed that the accused inflicted deadly wound on the deceased at 06:00 pm, darkness had not set in. Thus, there were no possibilities of mistaken identity. **Pw2 John M. Nyaminyobwe** testified that he saw the accused loading and shooting the first arrow before they started running to rescue their life. It was the accused act of shooting the first arrow, which triggered the deceased and **Pw2 John M. Nyaminyobwe** to run in order to rescue themselves. Basing on **Pw2 John M.**

Nyaminyobwe's evidence, I would have held the accused responsible for shooting the deceased with an arrow, even if, he had not admitted.

The accused admitted to kill the deceased by shooting him with an arrow though he did that at 10:00 pm and not at 06:00 pm as stated by the prosecution. Partly, the accused gave evidence which carried forward the prosecution's case. The law permits the court to take into account a defence case that advances the prosecution case. See the case of **David Gamata and Another v. R.**, Criminal Appeal No. 216 of 2014 (CAT unreported) and the recent case of **Robert Andondile Komba V. D.P.P.** Criminal Appeal No. 465/2017 [CAT unreported]. I took that the accused admitted to kill the deceased. That is what is vital and primary, the issue, whether he shot the deceased at 10:00 pm or not at 06:00 pm, is secondary and I will discuss at a later stage.

Given the above finding, the only disputed issue is whether the accused killed the deceased with malice aforethought.

Did accused kill the deceased with malice aforethought?

The prosecution's evidence was that the accused shot at the deceased and **Pw2 John M. Nyaminyobwe** at 06.00 pm. The accused person shot the deceased, after the attempt of the deceased and **Pw2 John M. Nyaminyobwe** to arrest him (the accused) aborted. The prosecution contended that the accused had malice aforethought due to the fact that before the accused threw a first arrow from his bow, he uttered the words *"leo lazima niuwe nyani mmoja"* meaning *"I will kill a one monkey today."* Thus, he shot in retaliation.

The accused admitted to shoot two arrows, one of them hit a person he did not recognize as it was dark. The accused person deposed that he came to learn later that he shot the deceased and that he died. He contended that he shot the deceased at around 10.00 pm. He shot arrows at people he suspected to steal his donkeys. He contended that he had no intention to kill. His intention was to defend his donkeys. The accused added that he shot after hearing one of the people driving his donkeys ordering one of them to arrest him.

The accused's advocate submitted in support of his client's defence that a person cannot be found liable if he commits an offence in the course of protecting his property. The accused found people with his donkeys he called them and they did not respond. He threw arrows injuring one them. The accused's advocate cited sections 18, and 18 A(1) (b) of the Penal Code, which stipulate among other things, that a person has a right to defend his property against seizure. The advocate concluded that deceased and PW2 had no right to seizure his property and the accused had a right to protect his property.

Is the accused person justified to contend that he killed the deceased in self-defence or in defence of his properly (the donkeys)?

It is the position of the law is that a person is entitled to use reasonable force in the circumstance to defend one's self or one's property or others against any unlawful act of seizure, destruction or violence. A person is not guilty if he used reasonable force to defend himself or his property. In case, a person used excessive force in the

course death is occasioned, he will be guilty of manslaughter. See the case of **Muhumba Kamnya v. R** [1884] T.L.R. 325 and sections 18,18A and 18C of the Penal Code. The sections stipulate that-

> *"18. Subject to the provisions of section 18A, a person is not criminally liable for an act done in the exercise of the right of self defence or the defence of another or the defence of property in accordance with the provisions of this Code*
> *18A.-(1) Subject to the provisions of this Code every person has the right-*
> *(a) to defend himself or any other person against any unlawful act or assault or violence to the body; or*
> *(b) to defend his own property or any property in his lawful possession, custody or under his care or the property of any other person against any unlawful act of seizure or destruction or violence.*
> *18C.-(1) The right of self defence or the defence of another or defence of property shall extend to a person who, in exercising that right, causes death or grievous harm to another and the person so acting,* ***acts in good faith and with an honest belief based on reasonable grounds that his act is necessary for the preservation of his own life or limb or the life or limb of another or of property, in the circumstances***
> *where-*
> *(a) the lawful act is of such a nature as may reasonably cause the apprehension that his own death or the death of another person could be the consequence of that act;.*
> *(b) the lawful act is of such a nature as may reasonably cause the apprehension that grievous harm to his own body or the body of another could be the consequence of that unlawful act;*
> *(c) the unlawful act is with the intention of committing rape or defilement or an unnatural offence; (emphasis added)"*

It is obvious from the above quoted sections; that the accused can successfully raise the defence of self-defence or defence to his property if he is able to prove that he acted **in good faith and with an honest belief based on reasonable grounds that his act of shooting at the deceased was necessary for the preservation of his own life or to protect his donkeys**. Given the evidence on record and the circumstances of this case, there is no justification for invoking the defence of self- defence or defence of his donkeys for the following reasons: -

One, there is no iota of evidence that the accused himself or his donkeys were in imminent danger warranting him to retaliate by throwing arrows. The accused deposed that he saw people with his donkeys and suspected them to be thieves. He added, he heard one of them ordering his arrest. Such evidence does not indicate by any standard that the accused's life was in danger. It would have been different, if, the order was for shooting. There is also no evidence that those people possessed lethal weapon(s).

Two, there is ample evidence that the assailant shot the deceased at 06:00 pm and not at 10:00 pm. The accused saw clearly people who were driving his donkeys. One of the was the village chairman. He could not have been a thief. They were the same people who attempted to arrest him in vain. Thus, the accused act to attack them could not have been to defend himself but it was for any other purpose.

Three, to accept the accused killed the deceased in self-defence is to accept his defence of *alibi*, that is he was not at the crime scene at 06:00 pm but not at 10:00 pm. The accused raised a defence of *alibi*,

that on the material date he went to Lung'abure village market from 10:00 am and returned to his home village at 10:00pm. Hence, at 06:00 pm, the time when the prosecution alleged the accused committed the offence, the accused was nowhere near the crime scene. The accused cannot avail himself of the defence of *alibi.*

Why can't the accused avail himself of the defence of *alibi?*

The accused raised a defence of *alibi* during his defence. The law on this subject is well settled. First, the law requires a person who intends to rely on the defence of *alibi* to give notice of that intention before the hearing of the case. See section 194(4) of the CPA. If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with the particulars of the *alibi* at any time before the prosecution closes its case s. 194(5) of CPA. Should the accused person raise the defence of *alibi* much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence (s.194 (6)).

The prosecution was of the view that the accused person is required to call evidence to prove the defence of *alibi.* The prosecution cited the case of **Sijali Juma Kocho V. R** [1994] TLR 2016 in support of its contention. It is also well established that the court will consider the *alibi* even if the accused has not adduced any evidence in support of the *alibi.* It is enough for the accused to raise the *alibi* and to leave it to the prosecution to prove his guilty. Thus, when an accused person puts forward an *alibi* as an answer to the charge or information, he does not

thereby assume a burden of proving the defence throughout on the prosecution. This position of the law was pronounced in the case of **Jumanne Juma Bosco & Mohammed Jumanne v.R**, Criminal Appeal No. 206/2012 CAT (Unreported) and **DPP v. Chibago Mazengo & Another**; Criminal Appeal No. 109 of 2019 (CAT Unreported).

It should be noted that if the accused raises such a defence belatedly it casts doubts on its authenticity. In **Kibale v. U** (1969) Vol. 1 E.A 148, the erstwhile the East African Court held **that a genuine *alibi* is expected to be revealed to the police investigating the case or to the prosecution during trial. When it so given, the prosecution has an opportunity to investigate its genuineness. The defence of alibi given for the first time during the defence, there is a likelihood that it is an afterthought**. In **Masoud Amina v. R** [1989] TLR 25 the Court denied the accused's defence of *alibi* on account that the accused did not issue a notice and that he did not call the witness who was with him. I find his defence of *alibi* an afterthought. I accord it no weight.

The above notwithstanding, if one considers the prosecution's recognition evidence of **Pw2 John M. Nyaminyobwe,** and the evidence of both **Pw3 Thomas John Kulula**, and **Pw2 John M. Nyaminyobwe** that the deceased died before 08:00 pm**,** the accused's defence of *alibi* is weightless. It is impossible, by any imagination, that the accused shot the deceased at 10:00pm and the deceased died before 08:00pm **the same day**. I have already determined, that **Pw2 John M. Nyaminyobwe** is a credibility witness, for that reason his testimony that the deceased died

before 08:00 pm. The testimony of **Pw3 Thomas John Kulula**, corrugated the evidence of **Pw2 John M. Nyaminyobwe. Pw3 Thomas John Kulula**, deposed that **Pw2 John M. Nyaminyobwe** arrived at his home place at around 08:00 pm to report that the accused shot the deceased with an arrow. **Pw2 John M. Nyaminyobwe** and **Pw3 Thomas John Kulula** gave evidence before they knew that the accused will raise the defence that he shot the deceased at 10:00 pm. The prosecution's account is more credible than that of the accused. The accused's defence was fabricated in response to the prosecution's evidence. Thus, I find it a fact, which cannot be controverted, that the accused shot the deceased at 06:00pm.

In the upshot, I find that the accused person cannot avail himself of the defence of *alibi*, that is, he was not at the scene of the crime at 06:00pm but at 10:00pm. On that ground, the accused's defence that he killed the deceased in self-defence or defence of his donkeys at 10:00pm flops.

Did the prosecution prove that the accused killed the deceased with malice aforethought?

The issue for determination is whether the accused killed the deceased with malice aforethought or otherwise. Determine that issue I passionately considered the prosecution's evidence that the accused shot the deceased at around 06.00 pm when it was still day time, after the attempt to arrest him failed. There is also evidence that as per **Pw2 John M. Nyaminyobwe,** the accused uttered the words "leo *lazima niue nyani mmoja*" meaning "I will kill one monkey today". **Pw2 John M.**

Nyaminyobwe deposed that the accused said those words while loading an arrow in the bow. Immediately thereafter the accused aimed and shot at the deceased and **Pw2 John M. Nyaminyobwe.**

The accused admitted to shot the deceased causing his death. He did not admit to have uttered the words "I will kill one monkey today".

The cause of death is not seriously contested. It is not seriously contested due to the fact the PMR exhibit was admitted without objection. However, the defence counsel submitted that the prosecution did not clear doubts as to the cause of death. The eye witness **Pw2 John M. Nyaminyobwe** stated that the deceased did not bleed profoundly and that he died of poison smeared on the arrow. The medical doctor **Pw1 Dr. Willy E. Mchomvu** stated that the deceased died of anaemia. I agree with the state attorney that it is **Pw1 Dr. Willy E. Mchomvu** who established the cause of death. It is unfair to give similar consideration to the evidence of the medical doctor, **Pw1 Dr. Willy E. Mchomvu** and the evidence of a layperson, **Pw2 John M. Nyaminyobwe**, when the cause of death is in question. I find the cause of death to be severe loss of blood as deposed by **Pw1 Dr. Willy E. Mchomvu**.

The issue is whether this Court may infer malice aforethought from the above facts. Malice aforethought is defined under section 200 of the **Penal Code**, *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.* Section 200 of the Penal Code, further provides as follows.

"Malice aforethought shall be deemed to be established by evidence proving any one nor 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. (emphasis is added)

The prosecution proved the accused's intention to kill or cause grievous harm to the deceased or **Pw2 John M. Nyaminyobwe.** The accused person vividly demonstrated his intention by the words he uttered that "leo *lazima niue nyani mmoja*" meaning "I will kill one monkey today". The accused's intention was not without a reason. **Pw2 John M. Nyaminyobwe** deposed that the accused jumped bail in an economic case he was facing before the district court of Serengeti. The deceased and **Pw2 John M. Nyaminyobwe** set to arrest him. The accused managed to escape and emerged with a bow and arrows. He attacked the deceased and **Pw2 John M. Nyaminyobwe**. He shot at the deceased with an arrow and caused his death.

In the case of **Enock Kipela v Republic**, Criminal Appeal No. 150 of 1994 (unreported) Court of Appeal had an occasion to consider a situation like the one at hand, where the appellant also pleaded not to have caused death with malice aforethought. It stated 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 added)

I agree with the prosecution's submission that factors establishing malice aforethought stated in **Enock Kipela v Republic** (supra) exist in the case at hand. I find that weapon used was dangerous or fatal weapon. An arrow shot from bow is a deadly weapon it may cause death, like what happened in the case at hand. The force used was excessive. The place where the arrow hit, the upper part of the limb, is a very sensitive part of the body with a main artery. The words uttered by the accused depict that the accused had malice aforethought. As shown

above he uttered the words, that "I will kill one monkey today". The accused had intended to kill.

Lastly, the state attorney submitted that the accused's conduct shows that he had malice. After the accused shot the deceased, he disappeared for quite some time. I totally I agree with the state attorney. The accused's act of disappearing immediately after committing the offence is inconsistent with innocence.

I find that the prosecution proved beyond doubt that the accused person killed the deceased with malice aforethought.

At the end of the summing-up, the Ladies and Gentleman assessors opined unanimously that the accused was guilty of the of the offence of murder. The first assessor opined that the accused person took the law into his own hands and shot at the deceased instead of complaining to the authority that his donkeys were seized. She added that the accused uttered the words *"leo lazima niue nyani mmoja"* meaning "I will kill one monkey today" before he shot at the deceased. Thus, the accused had malice aforethought to kill the deceased.

The second assessor opined that the accused's act of shooting three arrows at the deceased proved that the accused killed the deceased with malice aforethought. The last assessor opined that the defence case did not weaken prosecution case. The prosecution proved the accused's guilt beyond all reasonable doubt. He opined that the accused person was guilty of the offence of murder.

I am in total agreement with the Ladies and gentleman assessors that the accused person killed the deceased with malice aforethought.

I, therefore, find the accused person, **Chacha s/o Ghati @ Gibita** murdered **Mwita s/o Chacha @ Mirumbe.** Consequently, I find **Chacha s/o Ghati @ Gibita** guilty and convict him of that offence of murder u/s 196 and 197 of the Penal Code [Cap. 16 R.E. 2002, now Cap. 16 R.E. 2019].

It is ordered accordingly.

J.R. Kahyoza
JUDGE
22/10/2020

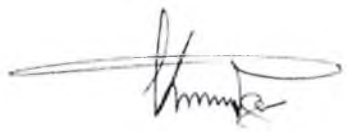
Mr. Temba, S/A: Your Lordship, the only sentence available is death bu hanging. I pray to remind the Court Accordingly.

J.R. Kahyoza
JUDGE
22/10/2020

SENTENCE: The accused having been convicted with the offence of murder c/s 196 the Penal Code [Cap. 16. R.E. 2019]. Section 197 of the Penal Code [Cap. 16 R. E. 2019] read together with section 322 of the Criminal Procedure Act, [Cap. 20 R.E. 2019], provide death by hanging as a sentence for a person convicted of the offence of murder. However, section 26(2) of the same Penal Code states that;

*"The sentence of death shall not be pronounced on or recorded against any person, who at the time of the commission of the offence was **under eighteen years of age**, but in, lie of the sentence of death, the Court shall sentence the person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under conditions as the Minister ..."*

It was agreed during the preliminary hearing that the accused committed the offence when he was 18 years old. He therefore, committed the offence not **under 18 years of age** but he was 18 years old. Hence, the provisions of section 26 of the Penal Code do not apply in the case under consideration. For that reason, I sentence the accused to suffer death by hanging under section 197 of the Penal Code [Cap. 16 R.E. 2002, now Cap. 16 R.E. 2019].



J.R. Kahyoza

JUDGE

22/10/2020

Court: Judgment delivered and sentence passed in the presence of the of Mr. Temba, State Attorney for the Republic and the accused and his advocate Ms. Rebecca. The Ladies and gentleman Assessors, Ms. Ester Nyigega, Mrs. Khadija Haji and Mr. Laurent Ochieko. B/C Ms. C. Tenga present.

Right of appeal after lodging a notice of intention to appeal within 30 days explained.

J.R. Kahyoza

JUDGE

22/10/2020

Court: The Ladies and Gentleman Assessors, thanked and discharged.

THE HIGH COURT OF TANZANIA
MUSOMA

J.R. Kahyoza

JUDGE

At Tarime

22/10/2020