

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**AT THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL SESSIONS CASE NO. 79 OF 2017**

(Originating from Resident Magistrates' Court of Manyara P.I. No. 17 of 2016)

**REPUBLIC**

**VERSUS**

**YOTHAM S/O YONA**

**JUDGMENT**

**ROBERT, J:-**

The accused person Yotham s/o Yona stands charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E 2002. The prosecution alleged that on 26<sup>th</sup> day of July, 2016 at Qedang'onyi area in Katesh within the District of Hanang in Manyara region the accused person murdered Elia s/o Amii. The accused person pleaded not guilty to the charge of murder.

A brief factual background of this matter reveals that the accused person was the hamlet Chairman of Qedang'onyi area in Katesh township within the District of Hanang whereas the deceased was a resident of Kitwai Madunga, Babati District in Manyara region.

On 26/7/2016 from around 06:00 hours at a football field commonly known as "uwanja wa polisi" located by the road side at Qedang'onyi area, the accused person was seen by one Elias Gilgis and Rahel Emmanuel in a group of people surrounding a man, later identified as the deceased Elia s/o Amii. The man was accused of stealing a phone and the accused was asking the man to tell them where he kept the phone he was alleged to have stolen. The man who at the time was in possession of a package of a red folded sheet traditionally known as mgolore insisted that he did not steal the phone. The accused instructed him to unfold the red mgolore in order to find out if the said phone was hidden in it, the man complied and the said phone was not found. The accused continued to insist that the man should tell them where he kept the phone and he started to beat him. He punched him with his fists and when the man fell down he started kicking him on the head.

One of the people in the gathering, who was identified as the wife of Mr. Gwarudaa asked the accused to stop kicking the man on the head as he

might kill him but he simply said "dawa ya wezi ni kuwaua au kuwachoma moto" literally meaning the cure for thieves is to kill them or set them on fire. He was later joined by one militiaman known by the name of Lulia Ingii in beating the deceased while the rest of the gathering stood by watching. The accused continued to beat the man on his head, his mouth, and legs with a rubber strap used to fasten luggage to a bicycle. Eventually, the accused person asked the gathering to leave the place.

Later on the same day at about 22.00 hours a passerby, one Hamis Bakari while carrying a passenger in his motorcycle saw an unconscious man lying by the road side next to the football field. He reported the incident at Katesh police station. The police arrived at the scene and took the injured man to Tumaini Hospital where he died the following day. The Autopsy examination report revealed cause of death to be severe bleeding due to head injury. The accused person was arrested and charged with murder. He denied to have killed the deceased.

When the case came up for hearing the prosecution was represented by Mr. Lameck Mugeta, assisted by Mr. Petro Ngassa, State Attorneys whereas the accused person was represented by Dennis Sanka, learned counsel.

The prosecution called six witnesses to establish the offence charged against the accused person. PW1, Elias Gilgis, recounted that on 26/07/2016 at around 3.00 hours while standing outside a local bar he saw two young men in a motorcycle. He recognized one of them to be Mr. Shulu but he didn't recognize the other man. The two men asked him if he saw a person passing at the area where he was standing. He replied that he did not see anyone. Then the two men saw the man they were looking for from a distance, they rode towards the man and took him in their motorcycle.

At 6.00 hours in the evening of the same day, PW1 met a group of 8 to 10 people on his way from home to town. He went closer to those people and saw the accused person Yotham Yona asking one young man about the phone which he allegedly stole. The young man was pleading with them to let him explain what happened but Yotham Yona insisted that he didn't want explanations. He started to beat the young man. He punched him with fists on his head. When the man fell on the ground, he started to kick him on his head and legs. The witness stated that Gwarudaa's wife, who was at the scene, asked the accused person to stop kicking him, but the accused said "dawa ya wezi ni kuwaua au kuwachoma moto". He continued to kick him on the head several times.

Later, while the accused was still beating the deceased a man by the name of Lulia Ingii, a militiaman, came to the scene and asked what was happening. Mrs Gwarudaa asked the young man who was being beaten to explain himself to Lulia Ingii because he is a militiaman. Lulia also started to beat the young man who was accused of stealing the phone. He was kicking him with his legs.

The witness decided to leave while the accused person and the militiaman continued to beat the deceased.

On 27/07/2016 at about 11.00 hrs one woman (Mama Rahabu) informed him that she was informed by the councilor of their area one Deo Duncan that there was a person who was found dead at the football field. She asked him to go to the mortuary and see if he can identify the person.

PW2, Raheli Emmanuel, testified that on 26/07/2016 at around 6.45 hours while heading home from tuition, she saw the accused person in a gathering of approximately 15 people at the football field in Qedang'onyi. The accused was beating a man accused of stealing a phone with a rubber strap used to fasten luggage in a bicycle. He was beating him on the head, mouth, on the back and on the legs. He was telling the man that if he refuses

to say where the stolen phone was he was going to take him to a place where they would set him on fire. The man was spitting a lot of blood. On the ground next to the man there was a red sheet known as mgolore. There was another man in the gathering who was helping accused person to beat the man. She left and went home when the people in the gathering were required to leave. When she reached home she informed her mother what she saw on the way. The following morning her mother told her that the man she saw beaten by the accused person was dead.

PW3, Hamisi Bakari, informed the court that on 26/07/2016 at 22:00hrs he was at Katesh, he got a customer who hired him to take him to Qedang'onyi with his motorcycle. On their way there, he saw a man lying down covered with a red sheet. He went closer to the man and using the lights from his motorcycle he discovered that the man had injuries on his head. He went to report the matter at Katesh Police station.

PW4, ASP Modestus Ngonyani, testified that on 26/07/2016 at 23:00 hours, while in patrol at Katesh he received a call from ASP Siame to go to the police station. ASP Siame told him that there was a person lying at the football field who seems to have been beaten. He went to the scene together with ASP Siame, PC Aboud and Coplo Emmanuel who was driving the police

car. They saw one person lying down, he was not speaking, he had injuries on his head, his mouth was tied with barks of trees. There was a read Mgolore next to him. They took the man to Tumaini District Hospital for treatment. They seached him and found him with an identity card showing his name to be Elias Ami.

In the morning of 27<sup>th</sup> day of July, 2016, the police received a call from the Doctor informing them that the man they took to the hospital was dead. He drew a sketch map of the scene of crime which was admitted by the court and as exhibit P1.

On 29/07/2016 he went to Tumaini hospital to witness the post-mortem examination of the deceased's body together with Dr. Msangi, S/sgt Hassan and the deceased's relatives who helped in identifying the deceased's body.

PW5, Charokiwa Rajabu Msangi, Assistant Medical Officer at Tumaini hospital, informed the court that on 29/07/2016 at 16.00hrs two police officers, Ngonyani and Hassan, asked him to conduct Post-mortem examination of the deceased whose body was identified to him by the deceased relatives and the two Police officers. He examined the body and discovered that death was caused by severe bleeding and head injury. The

post-mortem examination report was received by the court and marked exhibit P2.

PW6, D2324 D/Sgt Hassan, testified that on 27/07/2016 in morning hours he was at Katesh Police Station. He received information from Dr. Charokiwa Rajabu Msangi of Tumaini District Hospital informing him that the person who was brought to hospital for treatment is dead. He announced the said death to the Public and asked members of the Public who had not seen their relatives to identify the body of the deceased at the mortuary. He then received intelligence information that the deceased was living in the family on one Joachim Gwarudaa. He communicated with Gwarudaa and made arrangements to go to the hospital in order to identify the deceased's body.

On 29/07/2016 he went together with Insp. Modestus Ngonyani, Mr. Joachim Gwarudaa and other relatives of the deceased to the mortuary to identify the deceased's body. There were also other relatives of the deceased. He was also joined by Insp. Modestus Ngonyani from Katesh Police station. The deceased's relatives and Mr. Gwarudaa identified the deceased's body as that of Elia Amii. They also found an identity card in the deceased persons clothes indicating his name to be Elia Amii.



On 25/08/2016 he was given the case file to complete investigation of the case after the transfer of Insp. Modestus Ngonyani's. He looked for the chairman of Qedangonyi Mr. Yotham Yona who was mentioned in the statements of two witnesses who recorded their statements as the person responsible with the killing of the deceased.

After examining the evidence tendered by the prosecution the court ruled that the accused Yotham Yona had a case to answer upon which he was given a chance to tender evidence in his defence. In his defence, the accused person was the only witness who testified as DW1 and denied allegations made against him.

He informed the court that he is the hamlet chairman of Qedang'onyi and stated that on 26/07/2016 at 6.00 hours, he was at Autrigar Hotel where he went for recreation. While there, he received a call from a person he described as the wife of Mr. Gwarudaa informing him that they had caught a thief. He hired a motorcycle and headed to the area. Having reached there he saw a group of about five people. He identified them as wife of Gwarudaa, Mr. Shuluu, Mr. Shuluu's friend, the deceased and the other person he did not know. Some other people kept on coming there including the militiaman Lulia Ingii and his sister Kididi.

He stated that he was informed by the wife of Mr. Gwarudaa that the deceased had stolen a phone from Shuluu. She showed him the deceased's package of clothes suspected to contain the stolen phone. When it was unfolded they discovered that it was a "mgolore" which was folded and there was nothing in it. He stated further that since people continued to arrive at the scene he instructed the Militiaman Mr. Lilia Ingii to take the deceased to Police Station. The militiaman left together with the deceased, Mr. Shuluu and Shuluu's friend. They left towards, the police station, when they reached at a nearby football ground he asked the people who were gathered there to disperse then he went back to Autrigar hotel at about 06.45. At 20:30 hours he went to Katesh police station to find out if the militiaman had taken the deceased to the Police station. He was told that the person was brought to Police station but the people who brought him had discussed amongst themselves that there was no need of pressing charges because of a phone which is worth Tshs 20,000/= hence they were allowed to leave. Having been so informed, he left and went back home. He received information about the deceased's death on 27/07/2016.

After the defence case was closed, the prosecution requested to make final submissions which the court granted. Submitting on behalf of the

Republic, Mr. Lameck Mgeta, learned state attorney stated that in order to prove the offence of murder under section 196 of the Penal Code the Republic is required to prove three elements. The first element is cause of death, the second element is whether the accused person is the one responsible for the alleged death and thirdly, whether the accused person had malice aforethought in committing the offence.

Expounding on the first element, the Learned State Attorney submitted that there is no dispute that the deceased Elia s/o Ami died unnatural death. The testimony of PW5, Dr. Charokiwa Rajab Msangi, proved the deceased's death as indicated in the post-mortem report, which was admitted as exhibit P1, and corroborated by the testimony of PW1, Elias Gilgis and that of PW2, Rahel Emmanuel who witnessed what happened on 26<sup>th</sup> day of July, 2016.

On the second element whether the accused person is responsible for the alleged death, the learned counsel submitted that the testimony of PW1 and PW2 who witnessed what happened at the scene of crime on 26/7/2016 responds to this question. He submitted that PW2 saw the accused person beating the deceased on the head, mouth, feet and his back by using a rubber strap used to fasten luggage in a bicycle. She also heard the accused person saying "tumpeleke kule juu kwenye yale mapango tumchome moto".

Similarly, PW1 testified to have seen the accused person beating the deceased. He saw the accused person kicking the deceased on the head and when Mrs. Gwarudaa pleaded with him to stop kicking the deceased on the head he said the cure for thieves is to kill them. He concluded that the testimony of the two witnesses and that of PW5 who conducted post-mortem examination is enough evidence that the accused person is responsible for the death of the deceased.

Clarifying on the third element, the learned state attorney submitted that section 200 of the Penal Code as explicated in the case of **Charles Bode vs Republic, Criminal Appeal No. 505 of 2016, Court of Appeal of Tanzania (unreported)** which provides that an intention to cause death or grievous harm should be deduced from seven factors. He listed the factors as: The type and size of weapon used in the attack, the amount of force used by the attacker, the parts of the body aimed by the attacker, the number of blows, the kind of injuries inflicted, utterances made by the attacker before or after the attack and lastly the conduct of the attacker before or after the incident.

He submitted further that in the present case the accused aimed at the deceased's head, mouth and back using a rubber strap used to fasten

luggage to the bicycle which inflicted head injuries to the deceased as shown in the postmortem report. He submitted that the other thing is the utterances made by the accused such as "dawa ya mwizi ni kumuua tu" and "tumpeleke kule juu kwenye yale mapango tumchome moto". The other thing is the conduct of the accused person, he attacked the deceased for a long time from 6.00hours to 7.50 hours and after the attack he did not bring the deceased to the police station instead he went back to the hotel. The learned counsel submitted further that the accused person knew the deceased would not live to see the other day that is why he chased people from the scene so that he could get an opportunity to leave the deceased there. He concluded that what happened indicates that the accused person had malice and it was not accidental.

On his part, counsel for the accused person opted to make no final submissions.

In this case the court was assisted by three assessors namely Ramadhan Kassim, Amina Massay and Aziz Idd. After summing up to the Assessors, two of the assessors were of the views that the accused person is guilty of killing the deceased. The first gentleman assessor found that there was no evidence to indicate that the accused person cooperated handled properly

the alleged issue of theft of phone which resulted to the deceased's death. The third assessor concurred with the first assessor but also took into account the fact that the evidence of PW1 and PW2 did not leave any doubt in connecting the accused person with the alleged killing. The second Assessor stated that the accused person is not guilty of the offence charged and gave her reasons as to why she thinks the accused is not guilty.

In a charge of murder like this one, in order to convict the accused person the court needs to examine the evidence brought by the prosecution to determine if the accused person caused death of the deceased by committing unlawful act or omission with intent to cause death.

On the cause of death, the testimony of PW5 and the post-mortem examination report (exhibit P2) indicates that the deceased's body was found with multiple wounds at his head which were of different sizes and a fractured skull. The report established cause of death to be severe bleeding due to head injury. The testimony of PW1 and PW2 who testified to have seen the accused person beating a man who was later established to be the deceased Elia s/o Ami corroborates the testimony of PW5 and the findings of exhibit P2. PW1 informed the court that he saw the accused person beating the man with fists on his head and when the man fell on the ground

he started to kick him on the head. PW2 who arrived at the scene later testified to have seen the accused beating a man accused of stealing a phone with a rubber strap used to fasten luggage in a bicycle. He was beating him on the head, mouth, on the back and on the legs and the man was spitting a lot of blood.

I have also considered whether the man found unconscious at the "kiwanja cha polisi" on the night of 26/7/2016 was the same man allegedly beaten by the accused person on the evening of the same day. DW1 informed this court that the person accused to steal a phone was a stranger in the area. He was related to Mr. Gwarudaa's wife since he was Mr. Gwarudaa's uncle. Both PW1 and PW2 as well as the accused person (DW1) testified that the man accused of stealing the phone had a red "mgolore" which was folded like a package. Both PW3, Hamis Bakari who found the deceased unconscious at the scene and PW4, Ass/Insp. Ngonyani who took the body to hospital, found a red mgolore next to the deceased. DW1 informed this court that when he got information about the death of a man found unconscious at the football field he went to the mortuary to see the deceased's body where he saw the red mgolore in the items collected from the deceased. He also contacted Mr. Gwarudaa who he knew was related to

the deceased and asked him to go to the mortuary to confirm if the deceased is the one related to him which he did. It is therefore obvious that the deceased Elia s/o Ami was the same person accused to have stolen a phone and beaten by the accused person on the fateful day.

On the second element whether the accused had malice aforethought in killing the deceased, I have called in aid the case of **Charles Bode v. Republic, Criminal Appeal No. 505 of 2016 (unreported)** cited by Mr. Mgeta, learned state attorney which made reference to the court's decision in the case of **Enock Kipela vs Republic Criminal Appeal No. 150 of 1994 (unreported)** in which the Court of Appeal of Tanzania in ascertaining as to whether the killing committed by the accused person was done with malice aforethought held that:

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

- (i) The type and size of the weapon which was used in the attack leading to the death of the deceased;*
- (ii) The amount of force which was used by the attacker in assaulting the deceased;*




- (iii) *The part of parts of the body of the deceased where the blow/s of the attacker were directed at or inflicted;*
- (iv) *The number of blows which were made by the attacker, although one blow may be enough depending on the nature and circumstances of each particular case;*
- (v) *The kind of injuries inflicted on the deceased's body;*
- (vi) *The utterances made by the attacker, if any, during, before or after the attack;*
- (vii) *The conduct of the attacker before or after the incident of attack”.*

Applying the listed factors in the circumstances of this case, it is obvious from the evidence of PW1 and PW2 that the accused person assaulted the deceased with a rubber strap used to fasten luggage, punched and kicked the deceased on the head after the deceased had fallen down; the blows were directed to the deceased's head which inflicted head injuries to the deceased as shown in the postmortem report; the blows were inflicted for a long time while bystanders stood by and watching; the autopsy report (exhibit P2) shows that the deceased's body was found with multiple wound at his head head which was of different sizes and a fractured skull; the utterances made by the accused such as “*dawa ya mwizi ni kumuua au kumchoma moto*” literally meaning the cure for thieves is to kill them or set

them on fire. All these factors speak to the accused person's intention in committing the alleged offence which proves that the accused person had malice aforethought in killing the deceased. Section 200 of the Penal Code provides that malice aforethought is not only proved when the accused forms an intent to kill but also when he intended to cause grievous harm.

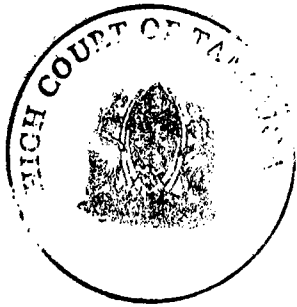
The accused person admitted to have been at the scene of crime but denied to have either beaten or seen the deceased beaten by any person at the scene of crime. The evidence on record does not support the accused person's narration.


In the circumstances of this case, the court is satisfied that both elements of murder have been proved beyond reasonable doubt. The court join hands with the two assessors that the accused person is guilty of the offence of murder. As a result, I convict the accused person of the offence of murder contrary to section 196 of the Penal Code, Cap. 16 Revised Edition 2002.

  
K.N. ROBERT  
JUDGE  
23/10/2020

SENTENCE

Pursuant to section 197 of the Penal Code, Cap. 16 R.E 2002 read together with section 322 of the Criminal Procedure Act, Cap.20 Revised Edition 2002 the accused person is hereby sentenced to death and shall suffer death by hanging.



  
K.M.ROBERT  
JUDGE  
23/10/2020