

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA**

**AT TARIME**

**CRIMINAL SESSION CASE No 47 OF 2019**

**THE REPUBLIC**

**Versus**

**CHACHA S/O MATAHE @ CHACHA @CHACHA S/O MATAHE**

**JUDGMENT**

*16<sup>th</sup> & 26<sup>nd</sup> October, 2020*

***Kahyoza, J.***

**Ghat Mwita @ Ilonga**, the deceased owned a bar. On the fateful night, she sold drinks to her customers including the accused person. Later that night, she died a violent death. Her death was due to brain damage and severe haemorrhage. The doctor described that the deceased had a crushed injury at the left *parietal bone* and cut wound on the right *periauricular* or *preauricular* area.

The prosecution arraigned **Chacha s/o Matahe @ Chacha @Chacha s/o Matahe**, the accused person with the offence of murder c/s **196 and 197** of the **Penal Code [Cap. 16 R. E. 2019] (the Penal Code)**. The prosecution alleged that on 17<sup>th</sup> day of July, 2015 at Nyakunguru village within Serengeti District in Mara Region, the accused person murdered one **Ghat Mwita @ Ilonga**. The accused person pleaded not guilty to the information of murder and hence, this trial.

**The** prosecution summoned two witnesses to establish that the accused person murdered **Ghat Mwita @ Ilonga**. The defence

summoned one witness, the accused. There are facts not disputed that **Ghat Mwita @ Ilonga** is dead and that her death was due to brain damage and severe haemorrhage. Exh. P.1, the post mortem examination report depicted that the deceased had a crushed injury at the left *parietal bone* and cut wound on the right *periauricular* or *preauricular* area. It was not in dispute that the deceased pushed the accused person against the wall to the extent that the accused person entertained injuries.

It is on record that although, the accused person pleaded not guilty to the information of murder. He admitted however, to have killed the deceased without malice aforethought while giving his defence. The accused had prior to the trial offered a plea of guilty to the offence of manslaughter during the preliminary hearing. The Republic turned down the offer.

Given the state of affairs, the issue is whether the accused person killed the deceased with malice aforethought or otherwise.

The prosecution evidence was that on the 17<sup>th</sup> day of July, 2015 at around 09:00 pm **Pw1 Mary Ghat** heard heated arguments or noise outside. She went out and found Julius Mwita, her neighbor beseeching Chacha Matahe, the accused not to enter **Ghat Mwita @ Ilonga's** house and beat her (the deceased). **Pw1 Mary Ghat** heard the accused person telling Julius Mwita that he will not give up until he entered into the house and beat the deceased. **Pw1 Mary Ghat** deposed further that she saw the accused person thrashing the door twice to force it open with a hammer. The accused person entered into the house and hit the deceased twice with a hammer in the head. She testified that the hammer was very big.

**Pw1 Mary Ghat** deposed that she saw all that by help light from the of the motor cycle's lights. **Pw1 Mary Ghat** deposed that the accused arrived at that scene of the crime with a motor cycle, stopped it, leaving its lights on. **Pw1 Mary Ghat** raised alarm and called **Pw2 Merengo Issay** to come to the scene and assist his sister, **Ghat Mwita @ Ilonga** against the attacker, the accused person.

**Pw1 Mary Ghat** deposed during cross- examination, that after the accused person hit the door the deceased got out and the accused person hit her when she was just at the door of the house. She stated that she saw the accused hitting the deceased with a hammer. She deposed that there was light from the motor cycle's light and moonlights was shining.

**Pw2 Merengo Issay** deposed that while resting in his house on the 17<sup>th</sup> July, 2015, heard a person calling him. That person told him and his sister, **Ghat Mwita @ Ilonga** was killed. He got out and met **Pw1 Mary Ghat**, Danny and another person. He inquired from them who killed his sister. They told him that it was Chacha Matahe, the accused person. He went to the scene of the crime and found the accused. The accused person told him that his sister, the deceased had injured him. The accused person showed **Pw2 Merengo Issay** the injury the deceased inflicted to him.

**Pw2 Merengo Issay** deposed that he told him that the injury was too small he ought to have let it go. **Pw2 Merengo Issay** examined the accused person's head and told him that he did not see any injury. **Pw2 Merengo Issay** deposed that used light from two torches his torch and the accused person's torch, to lit the accused person's head, he could not see the injury the accused person referred to. Then, **Pw1 Mary Ghat** pointed to **Pw2 Merengo Issay** where his sister, **Ghat Mwita @ Ilonga**

was lying. **Pw2 Merengo Issay** saw her sister, the deceased, lying down unconscious, her head badly injured. **Pw2 Merengo Issay** deposed that her sister's head was smashed.

**Pw2 Merengo Issay** went to the accused person and asked him "why have you killed? He deposed after questioning the accused person, the accused person left the place leaving behind his motor cycle. **Pw2 Merengo Issay** ordered **Pw1 Mary Ghat** to raise alarm. She obeyed. People arrived at the crime scene. He concluded his testimony that the accused person's elder brother came at that place with a machete, took the motor cycle and left with the accused person. He deposed that he saw another person with bruises.

The accused person gave his defence on oath. He admitted to kill the deceased. He deposed that he was drinking with his friends in the deceased's bar. He quarreled with the deceased after he called her "**Msagani**" meaning "**young lady**". He teased the deceased. The deceased became angry, rebuked him saying "go away with your drunkenness". She pushed him. He fell down and got an injury in his head. He retaliated by pushing her. She fell down and bled. He left the bar. On the following day, he woke up and went to his farm. The accused deposed further that he heard that the deceased was taken to hospital and she died on the 19/7/2015. **Dw1 Chacha Matahe Chacha**, the accused person, deposed further that he heard that the deceased's death resulted from fighting.

**Dw1 Chacha Matahe Chacha**, deposed further that before his arrested on 20/6/ 2018 he was at his home place. **Dw1 Chacha Matahe Chacha**, denied to killed the deceased with malice aforethought.

I pointed out above that the pertinent issue is whether the accused person killed the deceased with malice aforethought. The Penal Code does not define the term malice aforethought. It simply provides for circumstances, which establish that person killed another with malice aforethought. I dare say malice aforethought is a predetermination to commit an unlawful act without just cause or provocation. I would also add that malice aforethought is an intention to cause the death of or to do grievous harm to any person. Section 200 of the **Penal Code** 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.*

The courts have established principles, which either prove the existence of malice aforethought or rebut it. It is a settled position of the law that *"where there is evidence of a fight, the appellant should be found guilty on a lesser offence of manslaughter"*. See the decision in the case of **Sospeter Karoli v Republic**, Criminal Appeal No. 122 of 2007 (CAT unreported) and **Discile Ng'onja, Olipang'onja, Epimark Mwegoma, Gloria Ngo'nja and Rehehel Ngo'onja v. Republic** [1998] T. L. R 111. In latter, the Court held that-

*"As the injuries leading to the death of the deceased were inflicted in the course of a squabble at the end of a day's drinking session with no lethal weapon used, malice aforethought cannot be said to have been established beyond reasonable doubt"*.

In the case of **Moses Michael Tall V R. (1994) TLR 195** the Court laid circumstances from which malice aforethought may be inferred. It stated that-

- i. *Malice aforethought may be inferred from the amount of force which an offender employs in inflicting fatal injury;*
- ii. *The conduct of the accused may be indicative of malice aforethought as it was in this case where the appellant was persistent in beating the deceased for a long time and prevented intervention by persons who wanted to help the deceased.*

There is yet another decision of the erstwhile Court of Appeal for East Africa in **Hyman v DPP**. [1975] EA 55, which another principle of establishing malice aforethought that-

*"Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert homicide into a crime of murder."*

It is clear from the above quoted section and court decisions that to establish malice aforethought, the Court must first determine circumstances leading the deceased's death. In the case under consideration, it is not clear how did the deceased sustain injuries. The only established fact is that the deceased sustained crushed injury at the left *parietal bone* and cut wound on the right *periauricular* or *preauricular* area. The injuries resulted into brain damage and severe haemorrhage and finally led to the deceased's death.

There are two different accounts explaining how the deceased sustained injuries. One is the prosecution's account and another one in the defence's account. The prosecution's account, is that **Pw1 Mary Ghat** heard heated arguments or noise outside. She went out and found Julius Mwita, her neighbor beseeching Chacha Matahe, the accused person not to enter **Ghat Mwita @ Ilonga's** house and beat her (the deceased). The accused told Julius that he would not hold up until he entered into the house and beat the deceased. **Pw1 Mary Ghat** saw the accused thrashing

the door twice to force it open with a hammer. The accused person entered into the house and hit the deceased twice with a hammer in the head. She testified that the hammer was very big.

**Pw1 Mary Ghat** deposed that she saw all that by help light from the of the motor cycle's lights. **Pw2 Merengo Issay** got information from **Pw1 Mary Ghat** that the accused person assaulted his sister, **Ghat Mwita @ Ilonga**. **Pw2 Merengo Issay** went to the scene of the crime, found the accused person with a hammer. He deposed that the hammer was very big. It is the hammer used crash stones. **Pw2 Merengo Issay** deposed that he knew the accused very well. They were friends and both were small scale miners (artisanal miners). **Pw2 Merengo Issay** deposed that he once stayed at the accused person's home place. **Pw1 Mary Ghat** pointed out to **Pw2 Merengo Issay** the deceased was lying. He examined the deceased and found her head in bad shape. It was smashed.

The accused person's account is that he annoyed the deceased by calling her "*msagani*" which meant "*younger lady*" according to the translation given by the accused person. The deceased pushed the accused person against the wall. He sustained injuries. The accused person retaliated by pushing her. She fell down. The accused person deposed that the deceased fell down hitting on a number of things, such as empty containers, empty bottles, and steps. The accused person went home where he got first aid.

I passionately considered the explanations of both sides. I find the prosecution's account more plausible than the defence's explanation. There is no dispute that the deceased sustained a crushed injury on the left *parietal bone* and cut wound on the right *periauricular* or *preauricular*

area. A crushed injury of the parietal bone most like was caused by heavy objected. The prosecution said it was a heavy hammer. **Pw2 Merengo Issay** deposed that the head was smashed. The contents of exhibit P.1 match with **Pw2 Merengo Issay's** testimony.

In addition, **Pw1 Mary Ghat** deposed that she saw the accused hitting the deceased twice with the hammer, a very big hammer. **Pw2 Merengo Issay** found the deceased with the hammer and saw the deceased's head smashed, the fact which corroborates **Pw1 Mary Ghat's** evidence. Further still, I find the prosecution's evidence more plausible on the ground that **Pw1 Mary Ghat** deposed that the accused hit the deceased twice in the head and Exh. P.1 depicted that the deceased had two injuries, a crushed injury on the left *parietal bone* and cut wound on the right *periauricular* or *preauricular* area.

The accused person's explanation that he pushed the deceased who dropped on empty containers, empty bottles, and steps. Had that been true she would have sustained injuries on one side only, the side that torched the ground. To the contrary, Exh. P.1, which the defence did not object its admission, showed that the deceased sustained injuries on the left and right parts her head.

Given the above narrated circumstances, I am unable to buy the accused person's account on the how the deceased sustained injuries. I would have accepted the accused person's explanation if he expounded how he got a hammer. There is strong evidence that the accused person was found with a hammer and a big hammer. The accused person's account partly supports **Pw1 Mary Ghat's** evidence that One Julius Mwita entreated the accused person not to enter the deceased' house and beat

her. The accused person was adamant. He broke the door and smashed the deceased twice in the head.

The defence counsel submitted that the deceased's death was sparked by fighting. Thus, no malice aforethought on the strength of the decisions in **Sospeter Karoli v Republic**, (supra) and **Discile Ng'onja, Olipang'onja, Epimark Mwegoma, Gloria Ngo'nja and Rehehel Ngo'onja v. Republic** (supra). I am unable, like the Ladies and Gentleman assessors to buy that submission. There is no dispute that the deceased and accused person had squabbles. The accused person deposed that he called the deceased "msagani". The deceased pushed him against the wall as a result the accused person sustained injuries. The accused person deposed that he pushed her and she dropped down. I refused that account in favour of **Pw1 Mary Ghat's** that she saw her neighbour requesting the accused person earnestly not to enter the deceased's house and beat the deceased. The deceased refused, trashed the door forcing it open and hammered the deceased twice in the head.

I find that the accused person hammered the deceased when quarrels had ended and the deceased closed the door. It is also not likely that the accused person went to the bar with a hammer. He must have fetched it somewhere after the misunderstanding with the deceased.

I find the fact that the accused person fetched a hammer, thrashed the door open and hammered the deceased twice in the head is inconsistent with the submission that the accused person had no malice aforethought to kill or cause grievous harm.

I confidently state that I was unable to find any reason to discredit the **Pw1 Mary Ghat's** and **Pw2 Merengo Issay's** evidence. They were witnesses of truth. Their evidence matched the medical examination report (Exh. P1.) **Pw2 Merengo Issay** was the accused person's friend. He had no reason to tell lies against him. He found him with a big hammer used to crash stones. In **Moses Michael Tall V R.** (supra) the Court stated that malice aforethought may be inferred *from the amount of force which an offender employs in inflicting fatal injury*. The accused in this case used a big hammer to crash the deceased's head. He must have malice aforethought to kill or cause a fatal and grievous harm.

The section 200(a) of **the Penal Code** is in fours with the decision in **Moses Michael Tall V R.** (supra). It stipulates that-

*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;*

There would be no any other intention of person hammering another twice in the head with a big hammer apart from an intention to kill him or cause grievous harm. There was no fighting or say the fight had ended and the accused person left the bar. The accused person was already outside. He went and fetched the hammer and went back to the scene of the crime to kill or harm the deceased. Not only that but also the accused person's conduct proves of breaking the door open and utterance he made that he was determined to injure the deceased, establish that the accused person

had an intention to kill or cause grievous harm. **Pw1 Mary Ghat** testified that one Julius Mwita entreated the accused not to enter the house and beat the deceased. The accused refused, insisting that he will not stop until he hit the deceased. To ensure he attains his intention he forced open the door.

At the end of the summing up, the Ladies and Gentleman Assessors gave their opinion. The first Lady assessor opined that the accused committed a lesser offence of murder. The second Lady and the third Gentleman Assessors opined that the accused was guilty of murder. The second assessor opined that the Pw1[**Mary Ghat**] deposed that she saw accused person with a hammer, the evidence, which Pw2 [**Merengo Issay**] corroborated. Pw1[**Mary Ghat**] also saw the accused person using the hammer to break the door and to hit the deceased twice. She opined that the accused killed the deceased with malice aforethought. The third assessor opined that the prosecution witnesses, **Mary Ghat** and **Merengo Issay** proved the prosecution's case beyond all reasonable doubt.

I totally agree with two Gentlee Assessors that the accused person killed the deceased with malice aforethought. The accused person had no reason to fetch a big hammer and used it to break the door open, enter the house, and hammer the deceased twice in the head. If the accused had no intention to kill or cause grievous harm after he was entreated, he ought to have desisted from entering the house and beat the deceased. It is the for above grounds, I differ with the first assessor who opined that the accused person is guilty of manslaughter.

I, therefore, find the accused person, **Chacha s/o Matahe @ Chacha @Chacha s/o Matahe** murdered **Ghat Mwita @ Ilonga**. Consequently, I find **Chacha s/o Matahe @ Chacha @Chacha s/o Matahe** guilty and convict him of the 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**  
**26/10/2020**

**Mr. Temba, S/A:** There is only one sentence for a person convicted of the offence of murder. That is death by hanging.

**Defence:** Nil



**J.R. Kahyoza**  
**JUDGE**  
**26/10/2020**

**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. 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**  
**26/10/2020**

**Court:** Judgment delivered and sentence passed in the presence of Mr. Temba, the State Attorney for the Republic, the accused person, and his advocate Ms. Rebecca. The Ladies and gentleman Assessors, Ms. Ester Nyigega, Mrs. Khadija Haji and Mr. Laurent Ochieko were also present. 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**  
**26/10/2020**

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



**At Tarime**  
**26/10/2020**



**J.R. Kahyoza**  
**JUDGE**