

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT URAMBO**

(Tabora Registry)

**CRIMINAL SESSION CASE NO. 88 OF 2019**

**THE REPUBLIC**

**VERSUS**

**KALISTO S/O MPANGWE @SAKALI**

**JUDGMENT**

*Date: 8<sup>th</sup> & 16<sup>th</sup> December, 2021*

**BAHATI, J:**

The accused person, Kalisto s/o Mpangwe Sakali is charged with a count of murder contrary to section 196 of the Penal Code, Cap. 16 [R.E 2019]. It was alleged that on 4th July, 2019 during morning hours at Imalampaka village within Kaliua District, Tabora killed one Mpangwe Sakali Malema.

In this case, the prosecution side was represented by Ms. Jayness Kihwelo, learned State Attorney while the defence case was represented by Kanisuis Ndunguru, learned counsel.

It is not in dispute that **MPANGWE S/O SAKALI** is dead and that he met a violent death. This was confirmed by the evidence of all the

prosecution witnesses, who told the court that the deceased body had multiple injuries on his head. This was further confirmed by the report on the post mortem examination (Exhibit "P1"), which revealed that the cause of death was a severe head injury (traumatic) with excessive blood loss.

When the information about the murder was read over and explained to the accused persons in Kiswahili a language that he understands, he pleaded guilty. Since the offence of murder attracts the most severe punishment, the court opted to go for a full trial to make sure all the ingredients constituting the offence of murder are proven through evidence.

The issue for determination, therefore, in this court is whether it was the accused person in the dock who, with malice, caused the death of Mpangwe s/o Sakali. A total of four witnesses and three (3) exhibits were also admitted by the court and marked accordingly to prove that it was the accused person who maliciously killed the deceased.

The prosecution witness, Dr. Barnabas Mboya Mayunga who featured as **PW1**, testified that on 04/07/2019 the OCD came to his office wanting his company to the crime scene at Imalampaka village where the murder incident occurred; at the scene, he examined the body of the deceased, which had wounds on its head. He filled out a

postmortem report and submitted it to the OCD. He added further that, the deceased was Mpangwe Kasali.

**PW2**, Mkumbi Ferdinandi, a Village Executive Officer, testified that on 04/07/2019 he received information on a murder incident from one George Majengo that the deceased Mpangwe Sakali had been killed by his son, Kalisto Mpangwe. He informed the police, and they went to the scene. At the scene, the body of the deceased was lying on the ground outside his house.

Then, he interviewed members of the deceased's family who told him that the deceased's son had killed his father and was yet to be arrested. Later, they arrested him. Upon interrogation at the crime scene, he never spoke a word.

**PW3**, Detective Sergeant Rogers went on testifying that he works at Kaliua Police Station in the Investigation Department. On 04/07/2019 he received instructions from his boss to go to Imalampaka village, where one Mr. Mpangwe was murdered. They went to the village with a doctor and the Village Executive Officer. At the scene, they found the body of the deceased, which had a wound on its head; he was told by people that the deceased had been killed by his son, Kalisto Mpangwe who left with the weapon that he used to kill, but he was later arrested by police.

He added that he was assisted by village chairman Sadick in drawing a sketch map of the scene of the crime. The sketch map was admitted as prosecution exhibit P2. Upon arrival at Kaliua Police Station with the accused, he was instructed to record his caution statement, the statement wherein the accused confessed to having killed his father. The statement was also admitted as prosecution exhibit P3.

The last prosecution witness was Flora Mpangwe who featured as **PW4**. She testified that the accused person is his blood brother. On 04/07/2019 he was informed by one Ruhumbika that his brother had killed their father. She went home to find her father dead. When the accused was arrested, he said he killed his father because he was tired of his advice on quitting smoking.

That marked the end of the prosecution.

Upon closure of the prosecution case, the Court ruled out that, the prosecution has established a prima facie case sufficient to require the accused person to give his defence.

**DW1** Kalisto Mpangwe testified that it is true that he killed Mpangwe Sakali on 04/07/2019. He went to his place at 8 o'clock in the morning. His father was at the rear of his house near the well, putting ropes in the bucket. His father took a Panga and started to attack him

while saying to him that he wanted to kill him because of smoking tobacco. To defend himself, he took an axe and hit him once, then ran away. The accused prayed to this court for lenience because he had learned. That marked the end of the defence evidence.

Both counsels did not wish to make the final submissions after closing their cases but prayed to the court to proceed with the summing up to assessors. After the said summing up the case to Hon assessors, all were of the unanimous opinion that the accused person should enter a conviction and accordingly sentence the accused person.

There are established principles in criminal trials that are meant to secure a fair and impartial administration of justice between the parties. Under those principles, the accused person's duty is only to raise doubts about the prosecution's evidence, not otherwise.

The offence of murder, as provided for under Section 196 of the Penal Code Cap 16 [R.E. 2019], has mainly four (4) ingredients that must be proved beyond reasonable doubt.

- 1. There must be a person who is dead.*
- 2. The death of such a person must be caused by an unlawful act or omission of the accused person.*

3. *The act causing the death of the deceased was accompanied by malice aforethought.*
4. *That it is the accused person who caused the death of the deceased.*

The main issue for determination by this court in the case at hand is whether the prosecution evidence adduced has proved the above listed elements beyond reasonable doubt.

In determining whether the prosecution proved the case against the accused to the required standard, I would like to analyze the above ingredients of murder in relation to the available evidence.

For the first ingredient, there is no doubt that Mpangwe Sakali Petro is dead. The Post-Mortem Examination Report admitted as an exhibit during the hearing confirms that the deceased's death was occasioned by a hit wound on his head.

The second ingredient, the death of Mpangwe Sakali was unnatural. Mpangwe Kalisto died as a result of a cut wound on his head. The confirmation by the Post-Mortem Examination Report, which was not objected to by the defence clearly shows that the deceased's life was terminated by the accused's unlawful act. There is no other evidence to suggest that the deceased was suffering from any illness

before being injured. The accused also does not object to the fact that he attacked the deceased with a small axe while he was fighting with the deceased at home.

On the third ingredient, there is clear evidence to support that the accused's unlawful act killed the deceased. According to the prosecution evidence, the accused attacked the deceased by beating him with an axe and hitting him on the head. As a result, the deceased sustained injuries that led to his death. Therefore, one clear fact: the accused's unlawful application of the weapon to the sensitive party of the deceased's body was a deadly act.

On the fourth ingredient, it may not be easy to establish malice aforethought because it involves the accused's mental intent. However, section 200 of the Penal Code, Cap. 16 provides for some indicators of malice aforethought. The section provides that:

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

- 1. An intention to cause the death of or to do grievous harm to any person, whether that person is the person killed or not.*
- 2. The knowledge that the act or omission causing death will probably cause the death of or grievous harm – to the same*

*person, whether that person is the person 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 counsel;*

- 3. An intention to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
- 4. 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.*

Under the law and as narrated above, it may be difficult to establish that the accused intended to cause the death of the deceased. In my view and under the circumstances of the case at hand, it is not difficult to ascertain whether the accused knew that his actions would lead to the fatal injury of the deceased. I believe the accused intended to kill the deceased because, even if it was the deceased who started to assault him, the accused could have escaped from the scene, but in this case, the accused followed the deceased while putting ropes on the bucket, hit him with an axe, and he, therefore, ran away to hide in the forest for a while before he was arrested. Also, the prosecution witnesses PW3 and PW4 have established that there was a dispute between the accused and his father in respect of smoking bhang. Being



tired of advice from his father, the intention to kill could easily be established. In my view, the instant case may directly fit into the provisions of section 200 of the Penal Code, Cap.16.

To bolster this ground, the Court of Appeal in the case of **Enock Kipela V Republic**, Criminal Appeal No.150 of 1994 CAT (Unreported) at page 6 held 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 may depend 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".*

In the instant case, the accused used a weapon in killing the deceased, and it can fairly be established that the accused used a huge amount of force to kill the deceased. The fact that there was a quarrel between him and his father indicates that the accused intentionally wounded the deceased in a sensitive part of his body. It is also evident that the accused stabbed the deceased twice, which ended the deceased's life. The blow to the deceased suggests that the accused intended to terminate the deceased's life.

Furthermore, **the accused's conduct** before and after the killing suggests that he had evil intentions against the deceased. After the killing, the accused ran to the forest for a while before being arrested, which suggests that he was possibly feeling guilty about his unlawful acts.

Besides, it is an established principle that the burden of proof in criminal cases is on the prosecution's side. To **prove the case beyond reasonable doubt**, the prosecution paraded five witnesses to prove the case to the required **standard which is beyond reasonable doubt** and this duty does not shift to the accused. The position of the law on the burden of proof has been explained in the case of **Mohamed Said Matula Versus R [1995] TLR 3**.

The evidence which the prosecution has relied on to connect the accused with the offence greatly rests on PW1, PW3, and PW4 and the postmortem report and caution statement admitted by the accused himself as exhibits P1 and P2 respectively. The prosecution witnesses testified to the court that the accused confessed to the police. The evidence of PW1, PW2 and PW4 has been corroborated and found to have probative value.

In the case **Magendo Paul and Another Versus the Republic [1993] T.L.R 219 (CAT)**, it was held inter alia that;

*"..For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed"*

By the evidence presented, it has been proved beyond reasonable doubt that, the deceased was killed by the accused, by hitting his head thereby causing massive bleeding which caused his death. Given the circumstances and the manner which includes, the weapons used, the force applied, the part of the body of the deceased where the blows were directed, the frequency of hitting and the extent of injuries as well as the utterance made by the accused before the incident and his conduct after the attack. I find without any scintilla of doubt that it has

been proved beyond reasonable doubt that the accused killed the deceased with requisite malice aforethought and he desired the deceased to die.

On the other hand, by looking at the evidence given, accused defence he made; there is no doubt that the motive behind the accused committing the offence was to revenge as he has himself confessed in his cautioned statement. In the case of **Mohamed Haruna Mtupeni and Another Versus Republic, Criminal Appeal No.259 of 2007 CAT (unreported)** it was held:-

*“Apart from the evidence the prosecution witnesses adduced against the accused person, the evidence which is credible, the accused himself has confessed to have slaughtered the deceased to his death.”*

As I have demonstrated above the accused killed with malice aforethought. The court Assessors who participated in the trial of this case unanimously gave opinion that the accused is guilty of murder, I entirely agree with them. Therefore I find the accused guilty of murder and convict him forthwith. The very best witness in any criminal trial is an accused person who freely confesses his guilty.

Considering the circumstances of the case, the evidence aggravated by the prosecution and defence, and the analysis alluded to above, I am convinced, that the accused killed the deceased with malice aforethought. I am of the view that it casts no doubt on the prosecution evidence, which I consider to be watertight. From the foregoing, I find that the accused person has not raised a reasonable doubt in his defence. I, therefore convict the accused, Kalisto Mpangwe for the murder of the late Mpangwe s/o Sakali. Contrary to Section 196 of the Penal Code, Cap. 16[R.E 2019].

**A. A. BAHATI**  
**JUDGE**  
**16/12/2021**

**SENTENCE**

In our country, the only punishment for murder is a death sentence. That is what the laws say. I am aware that the capital sentence is a subject of criticism by many people, including lawyers, human rights activists, and groups. However, as far as this case is concerned now, my hands are tied by my oath of office to uphold the Constitution and respect the laws of the country. From the premises of the conviction entered, I sentence the accused, Kalisto s/o Mpangwe to death, which shall be suffered by hanging.

Order accordingly.



A handwritten signature in blue ink, appearing to read "Bahati".

**A. A. BAHATI**

**JUDGE**

**16/12/2021**

**Court:** Judgment delivered in the open court on this 16<sup>th</sup> December, 2021 in the presence of Kanisius Ndunguru, Learned Counsel and State Attorney, Jaines Kihwelo for the Republic.

A handwritten signature in blue ink, appearing to read "Bahati".

**A.A. BAHATI**

**JUDGE**

**16/12/2021**

**Court:** Right of Appeal Explained.



A handwritten signature in blue ink, appearing to read "Bahati".

**A.A. BAHATI**

**JUDGE**

**16/12/2021**