

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT BABATI**

CRIMINAL SESSION NO. 78 OF 2014

(Originating from Manyara Resident Magistrates' Court P.I No. 09 of 2012)

THE REPUBLIC

Versus

WILLIAM SAFARI

JUDGMENT

4th & 12th March, 2021

MZUNA, J.

The accused person **William Safari** stands charged with the offence of Murder contrary to section 196 of the Penal Code, Cap 16, R.E 2002. He is alleged to have murdered one **Petro Safari**, his blood brother, on 7th day of August, 2012 at about 17:45hrs, in Wareta Village within Hanang District in Manyara Region. He pleaded not guilty to the charge.

This case has a chequered history. This being the second trial, following an appeal by the accused. The Court of Appeal vide Criminal Appeal No. 95 of 2018, directed for a retrial with a new set of assessors hence the instant proceedings.

Brief facts being that on the material date 7th August, 2012, the accused was notified by his son that the deceased 'Baba mdogo' or uncle, was cutting sisal poles at their late parents' home where the accused resided. The accused moved from inside his house armed with two spears and a panga. He went to face the deceased. He threw a spear on him which hit him at the stomach (close to the navel). The deceased fell down and pleaded for help. Elihuruma Michael (PW1) was the first to witness right from the cutting of sisal to the stabbing of the deceased. He raised an alarm. Rogati Paul (PW2) was the first to respond to the alarm. They all witnessed the stabbing on various parts of the deceased body. They attempted to offer an assistance. The accused threatened them with a spear. They ran away but went close to the scene about 10 to 20 paces observing what was taking place.

The accused's neighbour Magdalena Samwel (PW3) respondent to the alarm raised by PW1 and PW2. All three witnessed when the accused continued to stab him on other parts of the body using two spears at the back, chest and then cut his throat using the sharpened part of the spear at the time when the deceased had fallen down and unconscious. His last words were "*nisaidieni nakufa.*" The deceased died instantly.

The accused ran away to the "korongo". He was arrested by some villagers who responded to the alarm and then reported him to the police station. No. D.2364 D/SSGT Hassan Mgaza (PW4) is among the policemen who visited the scene together with the Doctor who conducted post mortem examination report (exhibit P1). He noted that the deceased had cut wound at the back, head, throat and near his private parts (testicles). He collected the exhibits (two spears and two pangas). He drafted the sketch map of the scene of crime.

According to the post mortem examination report (exhibit P1), cause of death was due to "***excessive bleeding***". The motive to the murder according to the evidence of PW4 was the dispute on inheritance of a small piece of land. That marked the end of prosecution case which summoned four witnesses. The Doctor was not summoned because the accused and his advocate opted he should not be summoned.

The defence story by the only defence witness William Safari (DW1) is that on 7/8/2012 at 1700hrs, he was at his home while his son was grazing cattle close to the 'boma'. His son approached and notified him that the deceased was cutting sisal poles. DW1 went there to inquire, whereupon the deceased told him '*nilikuwa nakutafuta*'. The deceased started to chase the

accused away with a spear. The accused decided to defend himself by running away, but he was tired as the deceased was close to him. They battled in an attempt to dispossess each other the spear leading to the spear handle being broken down in the process.

According to DW1, the deceased threw the spear to the accused, but he escaped and fell down. While still trying to get hold of the spear, it cut the deceased at his knee and his left hand. The deceased left the spear and went to take panga thereafter ran after accused again. While running, he fell down and the deceased fell on top of him. The deceased was cut by the panga when both fell down in a hole, which the deceased followed leaving a spear. DW1 upon seeing blood oozing, he ran away and went to the Police Station to surrender himself. He was taken to the lockup, severely beaten as the Police officers told him that they had information that the accused had killed someone.

In essence the line of defence of the accused is that he did not intend to kill the deceased due to the fact that he was not armed. He raised self-defence and that he acted out of anger.

This court is now invited to determine on one issue, that is whether *the accused killed the said Petro Safari with malice aforethought?* Before I determine that crucial issue, there is one question which should not detain me. During submissions Mr. Mugetta, the learned State Attorney for the Republic, took much of his time to submit that death can be proved by evidence in the absence of a post mortem report. This argument was made without being aware that in fact the post-mortem examination report was admitted as exhibit P1 without objection during preliminary hearing. The same is in the court file and is part of the record. This is proof as it was so held in the case of **Hamis Juma Chaupepo @ Chau vs. The Republic**, Criminal Appeal No. 95 of 2018, CAT (unreported) that indeed "*the prosecution proved to the hilt that a death of a person (in our case Petro Safari) occurred and such death was due to unnatural cause.*"

In the first place, I rule out, just like the Honourable Assessors did find, that it is not true as alleged by the accused that the cut wounds were the deceased own stabbing. This is due to the fact that the deceased fell down right from when he stabbed him with a spear. The prosecution witnesses never saw the alleged struggle to dispossess each other a spear.

Now, back to the question, was the killing premeditated with malice aforethought?

Murder is provided under Section 196 of the Penal code, Cap 16 RE 2019. It reads:-

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

In order to prove malice aforethought as provided for under section 200 (a) of the Penal code, there must be *"an intention to cause the death of or to do grievous harm to any person."*

The Republic which was ably represented by Mr. Lameck Mugetta and Petro Ngassa the learned State Attorneys, insisted in their oral submissions, that indeed the accused formed intention to kill and executed that motive.

To the contrary, the defence through Mr. Joseph Masanja, learned advocate, insisted that the charge had not been proved. The accused says, at best he should be found guilty with manslaughter. The Honourable Assessors, unanimously advised me to find that the accused intentionally killed the deceased.

The prosecution case, as above noted, is built on the evidence of PW1, PW2 and PW3 who witnessed when the accused stabbed the deceased with two spears and later slaughtered him. This court was referred to the case of **Ajili Ajili @ Ismail vs. Republic**, Criminal Appeal No. 305/2016 CAT (unreported) which lays a checklist for matters to consider in order to prove whether there is malice aforethought. That case just like the case **Nicholaus Mgonja @ Makaa vs. Republic**, Criminal Appeal No. 85 of 2020 (unreported) cited with approval the decision in **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 (unreported), among others. Briefly put in view of the said case of **Nicholaus Mgonja @ Makaa vs. Republic** (supra), the court has to consider:

*"...intended to kill ...or cause her grievous harm. **From the type of the weapon he used, the machete, to the parts of the body he attacked being on the head, the nature of the injury caused and the number of blows, three blows**, there cannot be room for saying he had no guilty intent as defined under section 200 of the Penal Code. It is not in the ordinary cause of things and human behaviour for a man who attacks another to declare that his intention was to kill even if such was his intention."* (Underscoring mine).

I would say, such factors are not exhaustive as Mr. Masanja the learned counsel wanted to impress court that merely because the accused

never uttered words when he was stabbing the deceased, then no malice had been formed. Suffice to say, each case is judged depending on its peculiar facts and normally the murderer does not express his intention. It can only be inferred in some cases.

Defence by the accused, as above noted, he suggested that the deceased stabbed and cut himself in the course of dispossessing him a spear and panga. This is only a manufactured story, without any supporting evidence. Such big wounds even at the neck, must have been done by someone else, he is none other than the accused.

The accused purport to say acted out of provocation. He is quoted to have said the following when he was examined by the 2nd Assessor that:-

"I failed to know why he came to cut the sisal poles while there were many poles at his home. Then he said was after me. I had no time to call the neighbours (meaning had no time to cool down)."

I addressed the Honourable Assessors on essential factors to consider where provocation is raised as a defence. The third Honourable Assessor said on issue of provocation that:-

"The accused never acted out of control or anger because after the alleged act of cutting sisal poles he ought to have left."

The Honourable Assessors are the best judges. The case of **Damian Ferdinand Kiula & Another vs. Republic** [1992] TLR 16, page 18-19 (CA) lays a test in a defence of provocation that:-

"...it must pass the objective test of whether an ordinary man in the community to which the accused belongs would have been provoked in the circumstances."

The answer as above noted, is that the cutting of their sisal poles and the alleged uttered words "*nilikuwa nakutafuta*" could not make an ordinary man in the community to which the accused belongs, lose control. The deceased never followed him inside the house. He did not even stab the accused with a panga he possessed. So he had time to cool, and if possible run away.

The Honourable Assessors ruled out as well a defence of self defence such that the offence could be reduced to one of manslaughter. Section 18 and 18A (1) (a) and (b) of the Penal code, says self defence must be:-

"(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."

There must be proof that the accused sustained injuries in the process of defending himself as it was stated by the Court of Appeal in the case of **Bukulukulu Ndoma vs. Republic** [1981] TLR 353, at page 354, 355, where it was held:

*"It seems to us that the plain meaning of this provision is this where self-defence is pleaded, **it has to be shown that the deceased committed an unlawful act of assault or violence to the body, and as a result of such conduct the prisoner inflicted the fatal blow on the deceased.** In other words, the conduct which induces the fatal injury must have come from the deceased"*

(Underscoring mine)

In our case, the accused testified that he was in the process of defending himself against the deceased who had spear, ran after him and throw it on him in an attempt to harm him. He added that the deceased went to collect panga and again ran after him intending to assault him, but in the process of trying to dispossess him the spear and later the panga, the deceased cut himself on the knee, left hand and had the panga cut him on the head. Further he seems to say was defending his property, sisal poles.

However, all the prosecution witnesses who testified in court (including PW2 who took part in arresting the accused) never said to have seen the

accused was wounded or injured by the deceased. Even if he had such wound at the knee as alleged, for argument sake, it must have been not from the deceased on that day. Again there could not have been defence to property because it was not resolved that it was his property as alleged. He admitted, the matter was awaiting to be resolved by elders. When he was cross examined by Mr. Mugetta, the learned State Attorney, he is quoted to have said:- *"There was a land dispute but had not been determined by elders..."*

So the allegation that the deceased was dissatisfied simply because he had a bigger plot while he admits the dispute had not been resolved is a contradiction from one and same mouth. He failed to cast doubt on the prosecution case. It was a family boma, no right of defence to his property under the circumstances.

Matters which no doubt shows the accused formed intention to 'cause death or do grievous harm' to Petro, the deceased in view of the above cited case of **Ajili Ajili @ Ismail vs. Republic** (supra) are:- First he went there armed with a panga and two spears. Second, he hit the deceased at the most sensitive parts of the body, head, neck, stomach (at the navel) and at the back using a spear, a lethal weapon. He continued to stab and slaughter

him when the deceased was no longer a threat because he was lying down helpless (according to PW2). Exhibit P1, the post mortem report shows at the summary of report:-

"..the body with a huge cut wound Neck zone all big arteries and veins were cut off also trachea and throat were involved and a big cut wound abdominal region. Some intestinal were visible."

The Doctor certified that cause of death was due to "Severe Bleeding" and that "sharp object" was involved. The said post mortem report is corroborated by the evidence of PW1, PW2, PW3 and PW4. The eye witnesses, PW1, PW2 and PW3 said that the deceased was attacked by the accused who stabbed him with spear at various parts of his body like back, stomach and later cut him on the neck and that the deceased died instantly, in their presence. Their evidence is worth believing.

I addressed the Honourable Ladies Assessors on the need to prove malice aforethought. Their answer was that:-

First Assessor Sophia Joseph said :-

*"...the nature of injuries shows there was intentional killing. I would have thought otherwise if it was a single blow. **Marehemu alikufa kifo kibaya sana cha uchungu mkubwa.** It is unimaginable that one can separate a head of his blood brother at the expense of sisal poles which*

is only valued Tshs 200/- which in the first place were not planted by the accused. The boma and sisal poles belonged to their late father...He should be found guilty of murder."

The Second Assessor Aziza Iddi said:-

*The accused intentionally killed the deceased. He even slaughtered and separated the body from the neck...After being told "**nilikuwa nakutafuta**" he ought to have reported to the cell leader or village chairman instead of taking the law into his own hands. He should be found guilty of Murder i.e he intended to kill him. He could have slashed him with a panga at the hand not stabbing him even at the private parts (i.e at the testicles 'pumbu' according to PW4).*

Third Assessor Farida Diagwa highlighted on the following points:-

"The allegation that they fell down and then the deceased cut himself is not true because it is unimaginable that a panga could even be directed to the throat and slaughter him. If it was not intentional killing, upon seeing blood oozing he ought to have offered assistance. Even the allegation that "nakutafuta kwa muda mrefu" is an innovation of the accused because no witness who heard such words. ...The witness PW1 said saw the accused went there with spears to stab the deceased. The allegation that the spears belonged to the deceased is not true. He had a panga only."

The above summation clearly shows as indeed PW1, PW2, PW3 and PW4 said in line with the post-mortem report (exhibit P1), it was a chilling

murder so to speak. PW1 was categorical when he was cross examined by Mr. Masanja that there was no quarrel and that it was their family sisal. It was therefore a cold blood murder. The accused in his defence said:-

"The source of the dispute is that we are five sons in the family. Each son had his plot allocated to him by our late father. He allocated to us fairly. Petro the deceased alleged that I was given a bigger share than others. I never intended to kill the deceased because he came at my home..."

When he was cross examined by Mr. Mugetta, the learned State Attorney he said that:- *"I never went there armed"* which is a lie based on what PW1 said, saw him going there armed.

Due to the above stated factors, I have no doubt to hold that the accused intended to kill his brother or at the least, cause him grievous harm. PW4 added that at the time they went to collect the body, the head was separated from the body by a sharp object.

This court agrees entirely with the submission of Mr. Petro Ngassa, the learned State Attorney that the accused had malice aforethought as he went there armed with two spears and one panga. He stabbed the deceased on various sensitive "vulnerable" parts of the body with intention to kill him.

That, while stabbing and cutting the neck, the accused applied excessive force. All the above facts, shows the accused formed malice aforethought.

If I may hasten to add, the evidence of PW1, after witnessing the accused stabbing the deceased with spear at various parts of his body, he tried to offer assistance but the accused attempted to stab him with the spear.

"I tried to go there to offer an assistance but William attempted to stab me with a spear. I decided to run away...I continued to observe what was going on. By then the deceased had fallen down. The accused continued to stab him at various parties like chest, stomach at the back I was raising an alarm...Then the accused slashed/cut the deceased with a sharpened part of the spear at his neck. After slashing him the accused ran away and went to the Korongoni which was about 200-300 meters away".

Malice aforethought can also be inferred by the cruel act of the accused who threatened to stab the rescuers including PW1, PW2 and PW3. All, this was done ignoring the agony the deceased was facing when he said, according to PW3, their neighbour, *"nisaidieni, nakufa"*. The accused remained silent while continuing to execute his ill motive. It was held in the

case of **Mosses Michael Alias Tall v. Republic** [1994] TLR 195 at page 196 (CA) that:-

"To subject the deceased to persistent beating over a long period when she continued to cry in pain, and to prevent any intervention by persons who had come to the rescue of the suffering victim were acts which were intended to end the life of the deceased or at least to cause her grievous harm."

Surely his conduct to threaten rescuers is a clear proof of malice aforethought. The motive to the killing was to inherit the shamba and *boma* of their late father (according to PW4). Even PW3 said was aware of the shamba dispute between the two brothers.

Much as I appreciate the well researched submission by both parties, all the same and with due respect, the argument by Mr. Masanja, the learned advocate that the charge was not proved as the prosecution evidence was full of inconsistencies and contradictions which shows that there was rehearsal is unfounded. Both witnesses who witnessed the crime scene were thorough and consistent. Their demeanour was unquestionably good. The mere fact that the spears and pangas were not tendered during this session while PW4 said collected them from the scene and then tendered them in the first session, does not in my view weaken the strong case for the

prosecution. The cited case of **Robinson Mwanjisi & 3 others vs. Republic** [2003] TLR 218 at P. 220, that the accused had neither been linked with the said weapons cannot overrule the fact that the witness (PW1) said saw the accused going there armed with two spears and a panga. He used them in furtherance of murder.

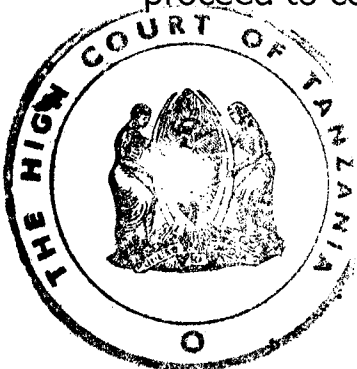
Even the cited case of **Republic vs. Shigela Malinganya**, Cr. Session No. 61/2017, High court of Mwanza, at Geita P 15 – 16 (unreported) which emphasizes need to tender the sketch map is with due respect inapplicable. The accused does not deny to have been with the deceased. The court underscored the need to tender a sketch map which could have showed the distance the witnesses stood to witness the incident because identification in that case was under very unfavourable condition. That is not the case here. The eye witnesses identified the accused, at a broad day light. Issue of non tendering of exhibits (above referred) for reasons beyond the prosecution control, cannot weaken their strong case.

The accused's defences of provocation and self defence is only a pretext. He ensured that he had terminated his life after brutal murder, then ran away. Jealous over property not even from the accused's own sweat,

has costed Petro, his blood brother to death! A big shame! **"Tamaa ya mali."**

In the final analysis, I find and hold that the prosecution which was well marshalled by Mr. Petro Ngassa and Mr. Lameck Mugetta, the learned State Attorneys', has successfully proved the charge of Murder against the accused person beyond all reasonable doubt. They proved that the accused in furtherance of the murder, had formed malice aforethought against the deceased person based on a lethal weapon he used "*spears*", inflicted the deceased at the sensitive parts, *stomach, back, head* and then slaughtered him at the *neck*. The number of cut wounds (more than three) further supports such intention which was either to cause death and or grievous harm. More seriously, he applied force. PW1, PW2 and PW3 testified that the he died after the accused cut his neck using the sharpened part of the spear. He even threatened the rescuers. Motive was to possess land alone.

I find the accused **William Petro** guilty of murder as charged. I proceed to convict him accordingly.



**M. G. MZUNA,
JUDGE.**

12th March, 2021