

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA
CRIMINAL SESSIONS CASE NO. 24 OF 2020**

**REPUBLIC
VERSUS**

JULIUS MABIZI @ MASWI.....ACCUSED

JUDGMENT

17th & 23rd March, 2021

Kahyoza, J.

Meko s/o John @ Mega was severely incapacitated on the 27th day of June, 2019 at around 05:30 pm. Later, he died a violent death. The police arraigned **Julius s/o Mabizi @ Maswi** for murdering **Meko s/o John @ Mega**. **Julius s/o Mabizi @ Maswi** alleged that he was not at the scene of the crime when the offence was committed.

The police charged Julius s/o Mabizi @ Maswi with the offence of murder contrary to **Section 196 and 197 of the Penal Code, [Cap. 16 R.E. 2019]**. It is alleged that on the 27th day of June, 2019 at Irimba-Songora village within Butiama District in Mara Region, murdered one **Meko s/o John @ Mega**. The accused person pleaded not guilty.

In a criminal case of murder, the prosecution has to prove that a person alleged dead is actually dead, that it is the accused person(s) who killed the deceased and **finally**, that the accused killed the deceased with malice aforethought. In the case at hand there is no dispute that **Meko**

John Mega is dead. The prosecution and the defence do agree that **Meko John Mega** is dead. According to the post-mortem examination report Exh. P2, the deceased's death was due to severe traumatic brain injury. The deceased's body had multiple deep cut wounds especially on the scalp, neck, chest back and upper limbs.

There is also no dispute that the deceased mentioned the persons who injured him in the dying declaration tendered as exhibit P1 during the preliminary hearing. The only issue is whether it is **Julius s/o Mabizi @ Maswi** who murdered **Meko s/o John @ Mega**.

The deceased person's wife **PW2 Joyce Zabron** testified that on 27/06/2019 at around 05:30 pm, while washing clothes at well, three younger boys approached her and told her that they were her visitors. They directed her to accompany him to her home place. She told them that she had no information. The young boys became angry. She decided to comply with their directions. She went with the younger boys up to her home place.

She found Julius Mabizi, the accused at her home place with a machete on his right hand and a stick on his left hand. She found other people with machetes and spears. The accused person ordered her to take out the utensils. She disobeyed. **PW2 Joyce Zabron's** denial aggrieved the accused person. He wanted to hurt her but people stopped him.

Later, a group of people brought her husband. The group of people surrounded them. The accused person cut the deceased person with machete on his neck, face and on his legs while uttering the words "**ngoja nimuuwe mimi mwenyewe sababu amenibebwa mke wangu na**

vyombo vyangu kwani mimi ni mwanaume niliyekamilika” meaning let me kill him myself as he stole my utensils and he has love affairs with my wife. After administering several blows and beating the accused and his group of people took the accused up to the way. The accused collected woods and fetched kerosene from his house in order to set the deceased on fire. People prevented him telling him that the deceased was already dead.

The accused person told **PW2 Joyce Zabron** to take her husband’s dead body and bury him. The accused entered into the deceased’s house and took the utensils alleged the deceased stole from him and went to his home place. **PW2 Joyce Zabron** deposed further that the accused person cut her husband during daytime and that she stood two or three paces from where the accused person inflicted cut wounds onto the deceased person.

After the accused person left, the deceased person’s relatives took the victim, now deceased, into his house and reported the incident to the police officers. The police arrived at that place.

PW1 G. 7536 D/C Denis deposed that on 27th July, 2019 in the evening at around 6:00 pm while patrolling with other police officers, received information that there was a person injured at Irimba village. They went to the scene of the crime and confirmed the information. The villagers assisted them to trace the person who injured the deceased. They found the accused hiding in his farm. They arrested and interrogated him. The accused told them that the victim (now deceased) stole his utensils.

They took the deceased person to hospital and the accused person to the police post.

The accused person, **Dw1 Julius Mabizi Maswe** a resident of Irimba Village at Buruma testified on oath that he was living alone. On 27/06/2019 he was at Bunda attending treatment of his dislocated knee. He went to Bunda on 14/06/2019 and his sister, Tabu Mabizi took him to the hospital. The hospital took X-rays procedures. He deposed that he returned and stayed to his sister's home. He left Nyange, his sister taking care of his house. He added that he came to learn that Meko Mega died on the 26/6/2019 while in prison. He got information that Meko Mega died because he stole utensils from his house.

He deposed further that, he got information from Nyange that Mega stole his utensils and she arrested him. He went to Butiama police station on the 28/6/2019 to report the matter. Police arrested him. He deposed that he had no quarrels with Mega. Mega was the accused's neighbor. He testified that he knew Mega's wife. Dw1 Denis tendered the x-ray picture.

Dw1 Denis, deposed during cross-examination that he took a motorcycle different his sister Tabu Mabizi to and from hospital.

A second defence witness **Dw2 Tabu Mabizi**, the accused's sister testified that on 14/06/2019 DW1 Denis went to her home place complaining of a knee injury. He went by a motorcycle. She took him to Bunda DDH. He stayed at her home place from 14/6/2019 to 28/6/2019. On the 28/6/2019, he left going to Irimba village where he was staying.

During cross-examination, **Dw2 Tabu Mabizi** deposed that they took one motorcycle to hospital as they had no money to pay for two

motorcycles. The accused sat in the middle and Dw2 Tabu Mabizi sat behind the accused.

Given the evidence above it is not disputed that Meko John Mega is dead. He died a violent death. According to the post-mortem examination report Exh. P2, the deceased's death was due to severe traumatic brain injury. The deceased's body had multiple deep cut wounds especially on the scalp, neck, chest, back and upper limbs. Based on the number of blows, part of the deceased's body the attacker targeted, I have no scintilla of doubt that a person who killed the deceased did so with malice aforethought. That the killer intended to kill or cause him grievous harm to **Meko John Mega**, the deceased. Section 200 of the **Penal Code**, provides circumstances under which malice aforethought is deemed to exist. It stipulates-

200. 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 added)

The Courts have also held that malice aforethought may be proved from circumstances surrounding the commission of the offence. The Court of Appeal in **Enock Kipela v Republic**, Criminal Appeal No. 150 of 1994 (unreported) discussed circumstances from which intent to kill may be inferred, it stated thus: -

"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.*

The issue is whether the prosecution proved that the accused is the one who killed the deceased. **Pw2 Joyce** deposed that although, she did not know the accused before she identified the accused person as the person who inflicted blows which resulted to her husband's death. The person raised the defence of *alibi*, the defence of *alibi* means that the accused person did not commit the offence because at that time, he was at his sister's place attending treatment at Bunda District Hospital. The law is well settled that where an accused person puts forward an *alibi* as an

answer to a charge or information, he does not thereby assume a burden of proving the defence and the burden of proving his guilt beyond reasonable doubt remains throughout on the prosecution (See, **Sekitoleko V Uganda** (1967) E.A. 531 at 533; **Leornard Aniseth V.R.** (1963) EA 206; **Saidi s/o Mwakawanga VR** (1963) E.A 6). It is sufficient that an *alibi* raises a reasonable doubt (See, **Ali Salehe Msutu V.R.** (1980) T.L.R.1).

The task of this Court is to determine whether the accused was or was not at the crime scene. That is whether the prosecution's witness positively identified the accused person. The uncontradicted evidence showed that assailant committed the offence during the daytime. Pw2 Joyce, the deceased's wife deposed that three younger boys ordered her to go home from the well. She found the accused at her home place. The accused person ordered her to take utensils out of her home. She deposed that the accused person threatened her hurt. She deposed that she witnesses the accused person inflicting several wounds to the deceased, one at a time. There is evidence that the accused person collected woods intending to set deceased on fire. She witnesses the accused person collecting utensils from their house. The accused person talked with the Pw2 Joyce.

Pw2 Joyce had enough time to identify her husband's assailant. It is true that **Pw2 Joyce** did not know the accused before. She deposed that she consulted one of the deceased's relatives present who told her the accused's name. She also identified the accused person's home place at

the time the accused person collected kerosene from his house and at the time he took utensils from the deceased's house to his house.

The accused person's defence was that he was not at the scene of the crime. He summoned **Dw2 Tabu Mabizi**. The accused person and **Dw2 Tabu Mabizi** deposed that the accused person went to Bunda for treatment from 14/6/2019 to 28/6/2019. The accused person tendered the X-ray picture as exhibit D. 1.

The prosecution objected to the tendering of exhibit. The law is clear after the exhibit is admitted the court has a duty to determine the weight to attach to that exhibit. In **Japan International Cooperation Agency (JICA) v. Khaki Complex Ltd** [2006] TLR. 343 the Court of Appeal held that-

"There is a distinction between admissibility and value or weight of evidence. While unchallenged admission of evidence may estop a party from subsequently objecting to its inclusion in the record or proceedings, it is no guarantee that it has equally great probative value. The courts must therefore not take the unchallenged exhibit for granted; but must go further and assess and accord weight and probative value they deserve."

The above principle although pronounced in a civil matter it applies in criminal cases. The accused tendered Exhibit D.1, the x-ray picture to prove that he attended Bunda Hospital for treatment on the 14/6/2019. The accused did not tender any document to prove that he attended the hospital. He replied to the prosecution that he was not given any document. To obtain services from the government hospital, the accused person must have paid for services either directly or through his health

insurance. In any case the accused person must have been given document. There is likelihood, as submitted by the prosecution, that the Exhibit D.1 was not authentic. Not only that but also the accused person and his witness **Dw2 Tabu Mabizi** deposed without tendering evidence that the accused was attending hospital for treatment after the first day of treatment. They had no document to support that. I find exhibit D.1 to have no weight at all.

The accused person and his witness **Dw2 Tabu Mabizi** gave contradicting piece of evidence which render the defence of *alibi* lame. The accused person deposed that they took two different motorcycles while going to and from hospital on the 14/6/2019, while the accused person's witness **Dw2 Tabu Mabizi** deposed that they mounted one motorcycle due to meagre resources. The contradiction proves that the accused person did not go hospital, thus exhibit D.1 was manufactured.

I find that the accused person's defence of *alibi* did not raise doubt in the prosecution's evidence of identification. The prosecution's identification evidence tendered by one witness, **Pw2 Joyce** was watertight. The offence was committed during the daytime. **Pw2 Joyce** spent enough time with the accused person. She had an opportunity to find out what was the accused's name from the deceased's relative. There was evidence from **PW1 G. 7536 D/C Denis** that they found the accused hiding in his farmland and arrested him. I did not find any reason to doubt the credibility of the prosecution witnesses. They are credible witnesses.

There is another piece of evidence that deceased identified his assailants. The prosecution tendered exhibit P.1, the dying declaration. Mr

Wambura, the accused person's advocate submitted that the Exh. P.1 was not worthy the dying declaration. He submitted that the deceased was in a very poor condition to make a dying declaration. He submitted that the deceased was badly injured and he became unconscious. The added that the evidence shows that he made the statement two hours after he regained consciousness. He cited the case of **Romanus Kaboko v R.** Cr. Appeal No 62/1998 CAT (unreported) where it was held that-

"It is general rule that a court can act upon a dying declaration if it is satisfied that the declaration was made, if the circumstances in which it was made give assurance to its accuracy and if it is fact true."

The defence advocate submitted further that, a dying declaration should not be acted upon unless it is corroborated. He cited the case of **Onael Dauson Macha v. R.**, Cr. Appeal No 214/2007 CAT (unreported) citing the case of **Jasum S/o Akumu v R.**, (EACA) 331 where it was held that-

"We have examined decisions of this court on the subject of dying declarations since 1935 and we have been unable to find single case where a conviction was upheld which was based upon a dying declaration without satisfactory corroboration."

The prosecuting Attorney Mr. Nchanilla submitted that Exp. P1 was properly prepared and admitted. He cited the case of **Mohamed Warsaw v R.**, (1956) 23 E.A.C.A 576 where the Court stated conditions to be considered before a dying declaration could be relied upon.

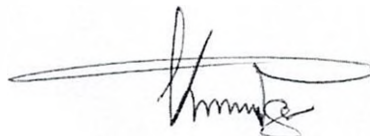
I concur with the defence advocate that a dying declaration must be corroborated before a court can act on it and that the circumstances under which it was made must be considered.

The declaration in the current case was made by the accused person in a critical state. It was not witnessed by any person not even the nurses who attended the deceased. I attach very little probative value to Exh.P. 1. It must be corroborated. I find **Pw2 Joyce's** to have corroborative value.

At the end of the summing up, the Ladies and Gentleman Assessors unanimously opined that the accused person was properly identified as the person who murdered the Mega John Meko. They opined that the offence was committed during the daytime. The first assessors added that the accused person's defence of *alibi* had no value. They finally opined that the accused person is guilty of the offence of murder.

I have no reason to differ with the opinion of Lady and Gentleman assessors. I, therefore, find the accused person, **Julius s/o Mabizi** murdered **Meko s/o John @Mega**. Consequently, I find **Julius s/o Mabizi** 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.



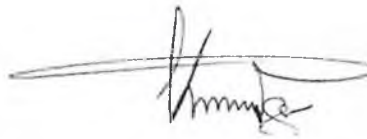
J.R. Kahyoza

JUDGE

23/03/2021

Mr. Isihaka: I have no previous record. I pray the accused to be sentenced accordingly.

Mr. Wambura Advocate: Your Lordship the offence of murder has no alternative sentence.




J. R. KAHYOZA

JUDGE

23/3/2021

SENTENCE

Court: The accused persons is sentenced to be hanged to death contrary to section 196 and 197 of the **Penal Code**, [Cap 16 R.E. 2019] read together with section 322 of the **Criminal Procedure Code**, [Cap. 20 R.E 2019].

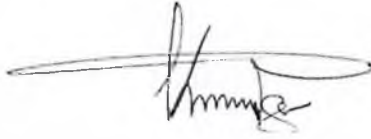


J. R. KAHYOZA

JUDGE

23/3/2021

Court: Right of appeal after lodging a notice of appeal 30 days from today explained.

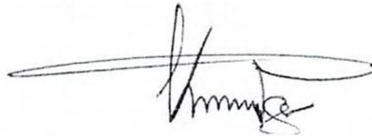


J. R. KAHYOZA

JUDGE

23/3/2021

Court: Right of appeal after lodging a notice of appeal within 30 days from today explained.

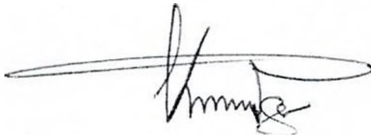


J. R. KAHYOZA

JUDGE

23/3/2021

Court: Judgment delivered and sentence passed in the presence of **Mr. Isahaka** State Attorney for Republic, the accused person, and his advocate Mr. Wambura. Ladies and gentleman assessors, Mr. Palemo Peter, Mrs. Bahati Ntalima and Mrs. Fatuma Juma. B/C Tenga present.



J. R. KAHYOZA

JUDGE

23/3/2021

Court: Ladies and Gentleman assessors thanked and discharged.



J. R. KAHYOZA

JUDGE

23/3/2021