IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT TARIME

CRIMINAL SESSIONS CASE NO 02 OF 2021

THE REPUBLIC

VERSUS

CHACHA S/O KAWA @ MWITA

JUDGMENT

15TH Oct & 25th October, 2021.

BEFORE F. H. MAHIMBALI, J.

The accused person, namely Chacha Kawa @ Mwita is arraigned before this court for the offence of murder which is based under section 196 and 197 of the Penal Code [Cap 16 RE 2019] (the Penal Code). It has been alleged by the prosecution that on the 17th day of July, 2018 at Mbilikiri village in Mara region, Chacha Kawa @ Mwita murdered Marwa Moroga @ Lusana.

The accused person pleaded not guilty to the charge, thus compelling prosecution to summon a total of five witnesses in discharge of their novel task of proving the case beyond reasonable doubt.

For the prosecution, Mr. Chuwa learned state attorney, took active role as far as the Republic's affairs are concerned, whereas Miss Pilly Otaigo played a vital vibrant role for defense. In totality I am thankful to the learned advocate and state attorney for their useful role played in the prosecution and conduct of this case.

Furthermore the trial has been under the aid of two lady assessors and one gentleman assessor: Miss. Hadija, Miss. Ester and Mr. Laurent. The assessors' opinion though not binding, have been considerably discussed, condensed and taken into board in shaping this judgment as well.

In this case, Marwa Moroga @ Lusana is dead and it is alleged that he was killed with malice aforethought by the accused person. The prosecution called **5 witnesses** and tendered **one exhibit.** The prosecution's witnesses were Julius Mwita Moroga (PW1) the eye witness; Ikwabi Mwita Moroga (PW2) informed of the death of the deceased by PW1; Nyambeya Bhoke (PW3) responded to the alarm raised from the river side by PW2; Dr. Willy Elias Mchumvu (PW4) the doctor who examined the deceased's body and prepared a post mortem report (exhibit PE1) and D/C Yunus (PW5) a police officer who investigated this case. For defense,

accused person fended for himself giving his testimony on oath while relying on defense of alibi and he had no witnesses to call.

Julius Mwita Moroga (PW1 17 years) who is the only eye witness of the incident, a student at Machicha Secondary School stated that on the 17/7/2018 he had taken cattle to graze and at 18:00 hours he returned from grazing and he found no one at home and he left the cattle outside the cowshed as unable to lead them to the cowshed. As he was waiting, he decided to sit on a rock (a big stone near their home). As he was seated, he saw Chacha Kawa, Elia Chacha and Gongi Chacha passing by. Elia Chacha was armed and he had a panga and Gongi was also armed and he had a spear. These people were heading to the river where local brew is manufactured in big containers (pipa) .

He saw these three people approaching the deceased and they attacked him by beating him using their fists and legs on various parts of his body. They overpowered the deceased and they put him down. Chacha Kawa held the abdominal area of the deceased while Gongi Chacha held the legs of the deceased. Then, Elia Chacha took a knife and chopped the neck of the deceased. He stated that he could see a lot of blood ooze from

the deceased's neck. He also saw Kibandiko but he ran away to unknown destination after seeing the incident.

PW1 told this court that he knew the accused person together with his two sons as they were his neighbours at the village and he knows them from his childhood. He also identified them because there was enough light as it was not yet sunset. He testified that he was 30 to 50 paces distance from where he was to the scene of the crime.

After witnessing the murder, he called for help but it was in vain, therefore he decided to go back at home and locked himself inside the house leaving outside the cattle as he was terrified. When his brother (PW2) returned home, he informed him of what had happened and that Chacha Kawa together with his two sons (Elia Chacha and Gongi Chacha) are the assassins. His brother took a torch and went to Bonchugu river / valley (crime scene) where he saw the deceased's body.

When crossed examined, PW1 stated that his testimony was the truth and he does not think there was any material difference between his statement at the police and his testimony in court. He submitted that regarding the difference in distance (50 pace and 100 meters) is a minor

difference. During re- examination he stated that the 50 paces was just an estimation. He has testified that while testifying in court he was more free and relaxed than when he was at the police station.

Ikwabi Mwita Moroga (PW2) corroborated the evidence of PW1, that PW1 is the one who told him about the murder when he returned at home at 19:00 hours. He stated that on the material date he had gone in search of medicine for his wife. When he returned at home, he knocked the door and called, where PW1 responded by opening the door and he was crying. When he inquired what was wrong, PW1 told him that he saw his uncle (the deceased) being murdered by Chacha Kawa, Elia Chacha and Gongi Chacha. He took his torch and went to the crime scene as directed by PW1 where he managed to see the deceased's body. He raised an alarm and people gathered. Amongst them, Nyambeya Bhoke (PW3) was the first person to show up. PW2 was advised to call the local leaders (VEO and Ward councilor) . They were advised by the local leaders to wait for the police. The following day the local leaders together with the doctor (PW4) arrived. The sketch map was drawn and the villagers went in search of the murderers. The accused was then arrested by the villagers while in

hiding and in move to escape. The police then took him to the police station.

Nyambea Bhoke (PW3) is a peasant who was the first person to respond to the alarm raised by PW2. He testified that on the 17/7/2018 at 20:00 hours as he was returning from Bonchugo Centre, he heard the alarm "mwano" from river Bonchugo. He went and saw PW2 and he inquired to what was wrong and PW2 told him that his uncle was murdered. He identified the body using a torch and saw it was chopped on the neck. They kept on raising the alarm and people gathered. They informed the local leaders and they were told to wait for the police. The next day the police, doctor and local leaders came to the crime scene. The villagers decided to look for the murderers, they saw Chacha Kawa who fled when they saw him. They were able to catch him, and he was handed over to the police. They were also given the deceased's body after it was examined by the doctor.

DR. WILLY ELIAS MCHOMVU (PW4), a medical doctor. Stated that on the 18th July, 2018 he was at his work station at DDH at Mugumu proceeding with his daily duties. Police officers (Yunus and James) went to his office and informed him about the death of the deceased and they

needed him to conduct autopsy. They arrived at the crime scene at around 10:00 hours. He was shown the deceased's body lying beside the river. After examining the body, he saw that the deceased's pupils were dilated and white, the neck had a sharp wound cut and the clothes had clotted blood. The result of his examination established the cause of the death is due to excessive bleeding. He filed the postmortem report that was tendered and admitted in court without objection as exhibit PE1. After completion of the examination, he returned the deceased's body to his relatives. During re- examination, PW4 stated that the deceased was cut on a dangerous body part as there are numerous blood veins and capillaries transporting blood to different parts of the body , including the brain and the heart.

H. 3802 D/C YUNUS (PW5), a police officer at Mugumu, Serengeti. Testified that on 18/7/2018 while at Mugumu police station he was assigned duties by OC-CID Alfred Kyebe to go to Mbilikili village with other police officers and Dr. Willy Elias Mchovu. They arrived at Mbilikili village at around 10:00 hours after visiting the crime scene, they found a body lying beside the river. They also saw a big container (pipa). While at the scene they drew a sketch map and interrogated witnesses. They also

obtained information that the accused person was seen in the bushes. They went and found he was already arrested by the villagers. They asked him what had happened, and he said that his two sons had murdered the deceased. After arresting the accused person, he partly agreed and partly denied to the commission of the offence. He drew the sketch map that was not tendered and admitted in court as its admission was objected to and the court sustained the objection.

He submitted further that he recorded the statement of Kibandiko after he had returned at Mbilikili village. He prayed to tender the said statement as Kibandiko was nowhere to be found as per section 34 B. The prayer was objected to by the defense counsel and at the end the court sustained the objection.

When ruled that he had a case to answer to the charge following the closure of the prosecution's case, accused person testifying as DW1 defended himself by raising the defense of alibi. He stated that on 17th July, 2018 he had left his home village Mbilikiri for Bonchugo village at 10:00 hours, where he went to the market (soko) . He drank alcohol at the market together with his friends (Kiburye Marwa , Mahende Getochu and Mwita Mwikona). They drank until at 16:00 hours and he left for his home

at 17:00 hours. He arrived at his home around 21:00 hours, he found his wife praying and the other family members had already slept. He went straight to bed as he was drunk. The following day he went out at around 10:00 hours to his farm. He was slashing grasses , when he got tired, he gave his bush knife (panga) to his son Amos to return it at home. At 13:00 hours while still there at the bush, he saw people coming and they arrested him and started beating him. He told them that it was his sons who had murdered the deceased and not him. He was taken to Mugumu police station. He alleged he was beaten at the police station and admitted that his sons are the ones who murdered the deceased. He was interrogated for four hours . He stated that on the material date he was not at the crime scene he had gone to Bonchugu village and he had never seen Kibandiko. He deponed further that his wife is at Dar es Salaam getting medical treatment. Moreover, none of the prosecution witnesses saw him with the deceased apart from Julius Mwita Moroga. He did not know Julius Mwita Moroga and they did not have any quarrel. He prayed that this court discharges him as the accusations against him are not true, they are fabricated. When he was cross examined he stated that he has no PF3 to ascertain the torture he went through at the police station. He also

admitted to not calling his friends, the ones he was taking alcohol with and his son Amos. He denied to be arrested at the bush and said he was arrested at his farm.

Upon the close of the defense case, the learned counsel for both sides prayed for final submissions.

MR. CHUWA , LEARNED STATE ATTORNEY for the Republic submitted that, considering the prosecution's case as a whole, it is clear that the accused person is guilty of murder and deserves to be convicted. As to why he is guilty, he submitted that the prosecution as to the evidence adduced, has been able to prove the case beyond reasonable doubt that none but the accused and his two sons are guilty of this offence. That as the deceased (Marwa Moroga @ Lusana) his death is not by natural cause, the prosecution's evidence is clear and points responsibility to the accused person and his two sons. PW1's evidence is clear, precise and very elaborative. His evidence is direct, truthful, credible and reliable. The demeanour of the witness was steady and unshaken. It is settled law that what is measured from the witness is his competency, credibility and demeanor. To cement his submission he cited the case **of R**

v Lukakombe Mikwello and Kibega (1936) EACA and also the case of **Charles Kahiga v Republic , Criminal Appeal No. 96 of 2015**.

Regarding who killed the deceased , the evidence of PW1 is very clear that it is the accused person . According to section 143 of the TEA and the case of **Yohana Msigwa v Republic (1990) TLR 148**, that no particular number of witnesses is required to prove a particular fact.

The evidence of PW1 is corroborated by PW2 (Ikwabe Mwita) who testified that soon after witnessing the incident he informed PW2 that the deceased had been murdered by the accused person Chacha Kawa @ Mwita and his two sons. The fact that PW1 named the suspects shortly after the criminal incidence it is credible evidence. In the case of **Marwa Wangiti Mwita and others v Republic, (2000) TLR,** and the case of **Peter Efraim @ Wasambo v R, Court of Appeal** held that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability.

On whether the accused person had malice aforethought, the prosecution's witnesses described it very well how the deceased was brutally murdered, and it depicts malice aforethought. Malice aforethought

is depicted using brutal weapons, manner of killing, area of the cut (neck) and the act of the accused hiding in the bush. See the case of **Enock Kipela v Republic , Criminal Appeal No. 150 of 1994** .

As it was some moments before sunset, the degree of identification is unquestionable as PW1 is familiar with the accused person since his childhood thus there is no possibility of mistaken identity.

He further submitted that the common intention between the accused person and his two sons is well established as per section 23 of the Penal Code. He finally, prayed the accused person be convicted of murder as charged.

Replying, Miss Pilly learned advocate submitted that this is a murder case and the standard of proof is beyond reasonable doubt as per section 3(a) of the TEA , Cap. 6 R.E 2019. The meeting of this legal requirement has been well insisted in various cases by the superior courts such as the case of **Longinus Komba v Republic , (1973) TLR 39**

> *"the duty of proving the case is the Republic's duty. Accused person is only convicted on the strength of the prosecution case. It is the prosecution's duty to establish the guilty of the*

accused and not convicting the accused on failure to call his witnesses ".

In the case at hand, the accused person has failed to establish his defense of alibi because he failed to call witnesses to establish that assertion. This stance is also supported by the case of **Ally Msutu v Republic (1980) TLR** which stated that the accused person is not bound to prove his defense of alibi. She went further to submit that the prosecution evidence is not reliable, trustable and credible as it is false testimony. She stated so, as the degree of identifying the accused person was weak.

There was also inconsistency in the evidence of PW1, whereas at the police station he stated the distance to be 100 meters but in court he stated the same distance as ranging from 30 to 50 meters. With this evidence it is dangerous to act on it against the accused person. It is doubtful evidence and it needed corroboration. In the case of **Christine Kaher and Another v Republic (1992) TLR 302 at page 305** , the Court of Appeal held:

"where the evidence of a single identification is that of a single witness, such evidence must be very narrow examined and usually

the court will look for some corroborative evidence be it direct or circumstantial particularly where the circumstances did not favor correct identification ".

She went further to submit that PW1's evidence is doubtful as how the deceased happened to be with the murderers prior to his demise/ murdering. The evidence of PW2 is deficient of any valuable evidence as it is purely hearsay evidence. In the case of **Aziz Abdallah v Republic (1991**) TLR 71, it was held it is the duty of the prosecution to call material witnesses to prove their case.

The submission that the accused person confessed to committing the charged offence is very doubtful. PW5 testified that the accused person confessed to committing the offence but no other witness stated so and there is no evidence to show the accused person and PW5 remained together. Section 27 of the TEA describes the manner the confession is to be taken, there should not be any threats, promise and torture. In this case DW1 stated that he was threatened, tortured and promised. Hence this is not a confession as per the law. None of the witnesses (PW1-PW5) their evidence was direct. It was her humble view that the accused person

is not guilty as the prosecution have failed to prove their case beyond reasonable doubt.

Having summarized the case's evidence and the brief submission by both sides, it is undoubted that the said Marwa Moroga @ Lusana is dead and that he died of unnatural death (exhibit P.1 and the testimony of PW4). Thus, the vital questions here to be asked in dispose of this case are mainly three:

1. Who killed the said Marwa Moroga @ Lusana?

2. Whether malice aforethought has been established if the answer to question one is established.

3. Whether the accused person is responsible for the offense of murder he is charged with in respect of the death of Marwa Moroga @ Lusana?

The first issue for determination is who caused the deceased's death. I need to address my mind to the predominant legal principles which are of relevance to this case and will guide me in the final verdict of this judgment. These cover aspects of criminal law, as well as the law of evidence. These principles are meant to ensure that no innocent person is convicted unless guilty and on proof of evidence beyond reasonable doubt.

Legally, it is the prosecution which is placed with a higher responsibility than that of the accused in a proof of criminal charge. The first long-established principle in criminal justice is that on onus of proof in criminal cases, that the accused committed the offence for which he is charged with is always on the side of the prosecution and not on the accused person. It is reflected under Section 110 and Section 112 of the Evidence Act Cap.6 [R.E 2019], and cemented by several cases including the case of **Joseph John Makune v R** [1986] TLR 44 at page 49, where the Court of Appeal held that:-

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."

The second principle is that the standard of proof in criminal cases that is required by law is proof beyond a reasonable doubt. The Court of Appeal of Tanzania in the case of **Mohamed Haruna@ Mtupeni & Another v R,** Criminal Appeal No. 25 of 2007 (unreported) held that:-

> *"Of course in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof*

beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

It means the evidence must be so legally convincing that no reasonable person would ever question the accused's guilt. (See the cases of **Mohamed Said Matula v Republic [1995] TLR 3, Anatory Mutafungwa v Republic, Criminal Appeal No. 267 of 2010, Court of Appeal of Tanzania and Festo Komba v Republic, Criminal Appeal No.77 of 2015, Court of Appeal of Tanzania** (unreported)).

According to the testimony of PW1, as regards the deceased's death he is strongly suggesting that the accused person is responsible directly. Why is he suggesting so? PW1 testifies while seated on the rock, how he saw the accused person and his two sons namely Elia and Oginga as culprits. After they had reached down the valley (river Bonchugo), they ambushed the deceased, beat him, overpowered him and put him down. There after, Chacha Kawa (the accused person) held the abdominal area of the deceased, while Gongi Chacha held the legs of the deceased. Then Elia Chacha took a knife and chopped the neck of the deceased and started

slaughtering around the neck. He stated that he could see a lot blood oozing from the deceased's neck. He also saw Kibandiko but he ran away to unknown destination after seeing the incidence there at the scene.

As per law, proof of a case can be either orally or documentary. If it is orally then it must be by a person who saw it, heard, perceived it or a person of valid opinion. Thus, oral evidence must always be direct (section 62(1) of the Tanzanian Evidence Act, Cap 6 R.E 2019). The same reads:

> 62.-(1) Oral evidence must, in all cases whatever, **be direct**; that is to say- (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it.

In law, oral evidence is called the best evidence and superior in credence to other evidence if its witness is credible and trustworthy.

The serious concern of the defense has been doubt in credence of PW1. That his story though is so tasteful the same is incredible. The reasons for incredibility are said to be: The prosecution evidence in this case is not reliable, trustable as it is false testimony. That the degree of identifying the accused person was weak. There was also inconsistency in the evidence of PW1, between his testimony at court and what he stated at

the police station in respect of distance from the point where the Pw1 was seated to the scene. Thus, this evidence is dangerous to act on against the accused person. It is doubtful evidence and it needed corroboration. In support of this argument, the learned advocate cited the case of **Christine Kaher and Another v Republic (1992) TLR 302 at page 305** , the Court of Appeal held

> *"where the evidence of a single identification is that of a single witness, such evidence must be very narrow examined and usually the court will look for some corroborative evidence be it direct or circumstantial particularly where the circumstances did not favor correct identification ".*

In my digest to the testimonies of PW1, PW2 and that of PW3 they connect and collaborate each other. Digesting the manner PW1 described the accused person and his sons, how each is familiar with, one can hardly raise any doubt against his testimony. I say so, considering the fact that of his testimony of immediate reporting the incident to his sibling (PW2), that has led to the true findings of the body of the murdered deceased at the same pointed scene, his age and the witness' demeanor all the time in court. In my finding, the witness had no any personal interest to serve in testifying against the accused person. Though it is true that there is only a

single testimony pointing guilty to the accused person, the circumstances of this case establish no legal doubt. The evidence is irresistibly pointing to the accused person and is not leading to any other interpretation.

Nevertheless, the courts of law are warned while dealing with the issue of reliability of visual identification of suspects to consider the mode of identification. In the case of **Patrick Nabiswa v Republic** Criminal Appeal No.80 of 1997 (unreported) the Court of Appeal of Kenya stated that:-

> "This case reveals the problems posed by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in BLACKSTONE'S CRIMINAL PRACTICE, 1997, Section F.18
>
> *(a) Some persons may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crime are able to see the perpetrators only fleetingly, often in very stressful circumstances;*
>
> *(b) Visual memory may fade with the passage of time; and*
>
> *(c) As is in the process of unconscious transference, a witness may confuse a face he recognized from the scene of the*

crime (it may be of an innocent person) with that of the offender."

In dealing with such glitches, court of law needs to scrutinize and analyse with greatest care the evidence tendered on the issue to exclude the possibility of mistaken identification of a suspect. The factors affecting accurate of face recognition includes:-

1. *Shorter duration to the culprit*
2. *Relatively longer retention interval between the crime and the identification / the earliest opportunity to name the culprit*

In the instant case, the following criteria need to be applied when admitting eye witness testimony:-

1. *Degree to which the eye witness paid attention to the culprits – PW1 testified that he saw the accused and his sons passing nearby heading to the river Bonchugo (valley). At first, they were more close when passing but 30 to 50 meters when at the scene (river Bonchugo - valley).*
2. *Length of time observation. This incidence survived for relatively 10 minutes' episode. Thus, sufficient time for one to make a good recollection.*

3. *Length of time between the occurrence of the crime and the reporting. It hardly passed two hours between the occurrence and reporting of the incidence. PW1 reported instantly to PW2 where the local leaders of the area were immediately informed and then police (testimony of PW2, PW3 and PW4).*
4. *The eyewitness identification certainty how certain that it was the accused. As per PW1, his testimony looked certain, steady and credible. His demeanor could not suggest anything implanted or cooked.*
5. *The quality of the view the eyewitness had.... i.e. broad day light though evening but before sun set thus, nothing impeding.*

Based on the fore mentioned criteria, because the incidence took place on broad day light, the witness had a privilege of knowing all accused persons by names and their profile before, the considerable lengthy of attacking events at the deceased, I am confident that the visual identification had not been impedimental to the identifying witness. The favorable conditions existing in this case, do materially differ with what existed in the case of **Riziki Method Myumbo v R 2007,** where the Court held that:-

"Visual identification is a class of evidence that is vulnerable to mistake, particularly in the conditions of darkness. Courts must, as a rule of prudence, exercise caution in relying on such evidence. It may result in a substantial miscarriage of justice."

In fact I am aware that for the criminal incidences happening at nights, that courts should be very clear with the aiding factors favoring correct visual identification of the culprits in clearing danger of mistake of identity (See ***Waziri Amani v. Republic*** [1980] TLR 250; ***Michael Godwin & Another v. Republic***, CAT-Criminal Appeal No. 66 of 2002; and ***Florence Athanas @ Baba Ali v. Republic***, CAT-Criminal Appeal No. 438 of 2016 all unreported). With this a broad day light event there is no doubt that those impediments stated therein, do not exist in the current situation.

The arguments by defense that there existed some doubts to the credence of PW1, I think it is legally unpersuasive. Yes, there might be some minor discrepancies which in law do not corrode the root cause of the case. A mere difference of 30 -50 meters or 100 meters distance, in my view is a minor discrepancy. What can be gathered from him, it was short distance capable of viewing and identifying a person and the activities

going on. Otherwise, **I have warned myself that the credence of PW1 and his demeanor are nothing but potreying the truth narration of the episode.**

In the case of **Marwa Wangichi Vs. Rep.** (2002) TLR 39. Naming of accused person must be of earliest opportunity is important, short of that there should be an inference against the prosecution. Should naming of an accused have taken a week or month later; the argument by the defense on the competence, credit and reliability of the witness would have been sensible.

The accused person in his defense has raised a defense of alibi. I shake hands with stand of the defense counsel that the accused person need not establish his defense of alibi (This stance is also supported by the case of **Ally Msutu v Republic (1980) TLR** which stated that the accused person is not bound to prove his defense of alibi). However, failure to establish it, means failure to raise reasonable doubt as per law. With alibi defence of the accused person, yes there has been some explanations offered by the accused person in totality, but in consideration of strong identification testimony via PW1 at the scene of crime, his defence of alibi dies natural cause.

Thus, with the first issue, I rule out that it is the accused person and his sons: Elia and Oginga who killed the deceased.

Whether malice aforethought has been established (following the answer to issue no 1). The offence of murder encompasses unlawful killing of another person (human being) with malice aforethought. In law, the killing becomes unlawful if the act or omission causing the death cannot be justified. On the other hand, the killing is with malice aforethought if the person who killed another intended to cause death or grievous bodily harm. Circumstances to be considered in establishing malice aforethought are well stated in section 200 of the Penal, Code Cap. 16 of the R.E. 2019 which provides as follows:

> *"Malice aforethought shall be deemed to be established by evidence proving any one or 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 case of **Enock Kipela v Republic**, Criminal Appeal No. 150 of 1994 (unreported) has discussed what entails malice aforethought, when the Court of Appeal 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 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 above case law has well established that the elements for the offence of murder are as follows:

(a) That there is a person who died of an unnatural death;

(b) That the killing was unlawful or not endorsed or certified by the law;

(c)That the killer had malice aforethought.

(d) That the accused person arraigned before the Court is the one who killed the deceased.

In considering the facts of this case as proved by PW1 and PW4, for sure malice aforethought has been fully established. I say so because of the evidence in record how the deceased was murdered by the accused

person. He was chopped on his neck, slaughtered like a hen. The manner the said murder was being executed, it is clearly suggestive that malice aforethought existed and that the culprits intended nothing but murdering the deceased. The act of dismembering one's neck is the brutality of murder (testimony of PW1 and PW4 and exhibit PE1)

The last issue for consideration is whether this accused is responsible of the offence of murder he is charged with.

In all criminal trials parties to offence are provided for under section 22 of the Penal Code which reads;

"22.-(l) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely,

(a) every person who actually does the act or makes the omission which constitutes the offence

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counseling or procuring its commission.

Further, in terms of section 23 of the Penal Code, two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. In this case all the three pointed out had a common intention of murdering the deceased.

In my final analysis of the whole prosecution's evidence as who are responsible of the said murder of Marwa Moroga @ Lusana, I find the accused person being responsible. Though the accused person here is not the only one responsible as per PW1's testimony but the only one arrested, however the same cannot be left freely just because the other wrong doers have not yet been arrested and connected with these charges. Justice demands let the heavens fall, but justice seen done.

In the case **Magendo Paul and Another Vs 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"

This was held in line with the philosophy enshrined in the case of A **Chandrankat Ioshubhai Patel Vs the Republic,** Criminal Appeal No. 13 of 1998 (CAT - DSM) in which it was held that;

"remote possibilities in favour of the Accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of Criminal Justice if they were permitted to displace solid evidence or dislodge irresistible inferences"

By the evidence presented, it has been proved beyond reasonable doubt that, **Mr. Marwa Moroga @ Lusana** was killed amongst others by the accused person, by trying to dismember his neck with other parts of the body 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 cuttings were directed, the frequency of cutting/slaughtering and the extent of injuries 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. As was held in the case of **Mathias Mhyeni and Another v. The Republic [1980J TLR 290**, that:-

> *"Where a person is killed in the prosecution of a common unlawful purpose and the death was a probable consequence of that common purpose each party to the killing is guilty o f that murder*

The accused person in this case had a common intention to murder which he executed although each prayed a different role. This holding draws a concurrence opinion finding with the all assessors, all of whom were convinced that the accused person's guilty has been established by the prosecution. While their view is based on the strength of the testimony of PW1 being nothing but trustworthy, credible and reliable linking the accused person with the charged offence. That said, I find the accused person **Chacha Kawa @ Mwita,** guilty and consequently convict him of the murder of the deceased **Mr. Marwa Moroga @ Lusana** contrary to section 196 and 197 of the Penal Code [Cap 16 R.E 2019].

THE HIGH COURT OF TANZANIA MUSOMA

F. H. Mahimbali

JUDGE

25/10/2021

Considering the punishment for murder is only one known as per law, the accused person is hereby sentenced to suffer death by hanging pursuant to section 197 of the Penal Code, Cap 16 R.E 2019 as read together with section 322 (1) & (2) of the CPA, Cap 20 R.E 2019.

F. H. Mahimbali

JUDGE

25/10/2021

I further order that the RCO of Mara is put to task to find the whereabouts of these other culprits and connect them in the prosecution of this charge as well.

Right of Appeal fully explained to any aggrieved party under section 323 of the CPA, Cap 20 R.E 2019.

DATED at TARIME this 25th day of October, 2021.

F. H. Mahimbali

JUDGE

25/10/2021