

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 39 OF 2021

THE REPUBLIC THE PROSECUTOR

VERSUS

MUHERE MWITA @ GICHAMU..... 1ST ACCUSED

NCHORE S/O RICHARD MWITA @GABRIEL..... 2ND ACCUSED

MAKENE HONGA @ CHACHA..... 3RD ACCUSED

KISIRI SIMON @ MUHERE..... 4TH ACCUSED

JUDGMENT

29th September & 11th October, 2021

Kahyoza, J.

Muhere Mwita @ Gichamu, Nchore S/O Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere and Marwa Mwita @ Mrimi are arraigned with an information of murder contrary to section 196 and 197 of the Penal Code [Cap. 16 R. E.

2019]. It is alleged that on 14th day of November, 2019 at Itiriyo village within Tarime District in Mara Region, the accused persons murdered one **Justine s/o Sospeter**. The accused persons pleaded not guilty to the information of murder. After the closure of the prosecution's case, the Court found **Marwa Mwita @ Mrimi**, the fifth accused person, to have no case to answer, hence this judgment is against four accused persons.

There are facts not in dispute. It is not disputed that **Justine s/o Sospeter** is dead. He died violently on 14th day of November, 2019. **Justine s/o Sospeter's** death was due to acute loss of blood due to deep penetrating wound on a neck. According to Dr. Devotha Ernest Katunzi (**Pw4**), who examined the deceased's body the deep wound on the neck was inflicted by sharp object. The doctor tendered a post mortem examination report, which the Court admitted and marked Exh. P. 3.

Muhere Mwita @ Gichamu admitted to cause the death of **Justine s/o Sospeter**. However, he refuted to cause death with malice aforethought. **Muhere Mwita @ Gichamu** pleaded to the lesser offence of manslaughter during the preliminary hearing and when the information was read to him before commencing trial. The prosecution turned a defeat ear to **Muhere Mwita @ Gichamu's** plea of guilty to the lesser offence of manslaughter as result the case went to a full trial.

The prosecution summoned four witnesses to prove the accused persons' guilt. It also tendered two exhibits, the sketch map, and the post mortem examination report.

The prosecution's account is that in the morning hours on the 14th day of November, 2019 **Justine s/o Sospeter** rode Priscus Thadeus (**Pw1**) and Nick Shanikoma on his motorcycle. Priscus Thadeus (**Pw1**) and Nick Shanikoma were secondary school teachers, invigilating Form Four National Examination 2019. The journey commenced at Itiriyo village to Bungurere secondary school. Unfortunately, when they reached at Itiriyo primary school, they met a group of youths, wearing traditional apparel, each with a spear and a sword (sime). They stood on the road side. As **Justine Sospeter** approached, the youths entered the road to stop him. **Justine Sospeter** could not stop as he was riding at speed. One of the youths stabbed **Justine Sospeter**. **Justine Sospeter** lost control and they fell. The youths took to their heels.

Priscus Thadeus (**Pw1**) and Nick Shanikoma shouted for help. Police and students from a near-by school came to their help. **Justine Sospeter** bled profusely and died instantly. **Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere** and **Marwa Mwita @ Mrimi** were arrested on the very day whereas **Muhere Mwita @ Gichamu** surrendered himself to police the following day.

The prosecution's principal witness Priscus Thadeus (**Pw1**) did not identify a person who committed the offence or those who accompanied him. The prosecution's case hinges on **Muhere Mwita @ Gichamu's** cautioned statement.

Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere and **Marwa Mwita @ Mrimi** denied

to accompany **Muhere Mwita @ Gichamu**. **Muhere Mwita @ Gichamu** refuted to mention his co-accused persons as people who accompanied him on the fateful day. **Muhere Mwita @ Gichamu** summoned her mother, Rose Mwita Joseph (**Dw5**) who deposed that **Muhere Mwita @ Gichamu** was born on 15th December, 2006. She could not tender **Muhere Mwita @ Gichamu's** birth certificate as fire which burned down their house destroyed it.

Given the facts of this case, the prosecution's duty was to prove that **Muhere Mwita @ Gichamu** killed **Justine Sospeter** with malice aforethought. The prosecution had a duty also to establish that **Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere** and **Marwa Mwita @ Mrimi** were with **Muhere Mwita @ Gichamu** and had common intention with to kill **Justine Sospeter**.

Did Muhere Mwita @ Gichamu kill Justine Sospeter with malice aforethought?

Muhere Mwita @ Gichamu admitted to stab **Justine Sospeter** with a spear on the neck. The prosecution and the defence gave a different account on how **Justine Sospeter**, the deceased, was stabbed.

The prosecution's eye witness, Priscus Thadeus (**Pw1**) testified that while **Justine Sospeter** was riding a motorcycle to Bungerere secondary school when they reached at Itiriyo primary school, they met a group of youths, wearing traditional apparel, each with a spear and a sword. They stood on the road side. As **Justine Sospeter** approached, the youths

entered the road and to stop **Justine Sospeter**. **Justine Sospeter** could not stop as he was riding at speed. One of the youths stabbed **Justine Sospeter**. The witness did not state or know why the youths' intention to stop **Justine Sospeter** and his passengers. **Justine Sospeter** disobeyed the order from the youths to stop. One of the youths responded to **Justine Sospeter's** disobedience by stabbing him on the neck.

Dr. Devotha Ernest Katunzi (**Pw4**) described the injury as a deep penetration wound. She explained that wound was so deep that it penetrated **Justine Sospeter's** neck from one side to the other. She contended that considerable force must have been applied.

The defence through **Muhere Mwita @ Gichamu (Dw1)**, told the court that while he was working with other youths, with their bells tied on their leg making noise and wig covered ostrich feature on their heads, suddenly turned to his right-hand side stabbing the deceased. He deposed that he held the spear with his left hand. He contended that he did not hear the motorcycle approaching him the bells tied on their legs made noise as they were walking.

It is trite law that witnesses must be trusted unless, there is a cogent reason to question their credibility. The **Goodluck Kyando v. R.**, [2006] TLR 363 and in **Edison Simon Mwombeki v. R.**, Cr. Appeal. No. 94/2016 (the Court of Appeal stated that-

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

I passionately considered the evidence of Priscus Thadeus (**Pw1**) and **Muhere Mwita @ Gichamu (Dw1)** on **Muhere Mwita @ Gichamu (Dw1)**, regarding how **Justine Sospeter's** neck was stabbed. I find the prosecution's account credible. It is sounds logical, that the youth stopped the motorcyclist. He defied their order what followed was to stab him for his adamancy. The defence account that while **Muhere Mwita @ Gichamu (Dw1)** was walking he turned suddenly and hit the motor cyclist, sounds illogical. Was he walking holding a spear at such a level that when he turned to his right it pierced the motorcyclist on his neck. Dr. Devotha Ernest Katunzi (**Pw4**) deposed that the deceased attacker must have used considerable force to penetrate the neck from one side to the other. Had **Muhere Mwita @ Gichamu (Dw1)** suddenly with no intention harm the deceased, he would not have applied such force. I find defence evidence not credible, hence such evidence cannot punch holes to the prosecution's evidence.

I find it proved that the youths stopped the motorcyclist, **Justine Sospeter**. He defied their order, as result **Muhere Mwita @ Gichamu (Dw1)** stabbed him on his neck causing his death. The issue is whether those facts establish that **Muhere Mwita @ Gichamu (Dw1)** had malice aforethought.

Malice aforethought is said to be established where the prosecution establishes the intention to cause death or grievous harm, and knowledge however indifferent, that the act done could cause death or grievous harm to a person as stated by the Court of Appeal in **Bomboo Amma &**

Another v. R, Criminal Appeal No. 320 of 2016 (unreported). Section 200 of the Penal Code [Cap 16 R.E 2019] provides circumstances, which establish malice aforethought, thus;

"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.*

It is not very easy to establish malice aforethought by direct evidence, hence in most cases malice aforethought is inferred from circumstances surrounding the commission of the offence. The Court of Appeal considered factors establishing malice aforethought in several cases and held that **malice aforethought may also be inferred from the nature of the weapon used and the part or parts of the body**

where the harm is inflicted. See the **Bomboo Amma & Another v. R**, Criminal Appeal No. 320 of 2016 (unreported), **Saidi Ally Matola @ Chumila v. R**, Criminal Appeal No. 129 Of 2005 (unreported), **Mosses Michael alias Tall V R**. [1994] TLR. 195, **Elias Paul v. R**, Criminal Appeal No. 7 of 2004 (unreported) and the famous case of of **Enock Kipala v. R**, Criminal Appeal No. 150 of 1994 (unreported), a few to mention. In **Elias Paul v. R**, (supra), the Court of Appeal held that-

"Malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted. In this case, a stone was used and a stone was used and 14 was hit on the head, chest and abdomen which are vulnerable parts o f a human body"

In the present case, **Muhere Mwita @ Gichamu (Dw1)** used a leather weapon, a spear to stab the deceased. He certainly intended to cause death or severe injury. He inflicted a deep penetrating wound on the deceased's neck with force. **Muhere Mwita @ Gichamu (Dw1)** intended to kill the motorcyclist, **Justine Sospeter**, who defied their order to stop. He targeted the sensitive part of the deceased's body. I am of the considered view that **Muhere Mwita @ Gichamu (Dw1)** killed **Justine Sospeter** with malice aforethought.

Did the prosecution establish common intention between Muhere Mwita @ Gichamu and the rest of the accused persons?

Having found that **Muhere Mwita @ Gichamu** killed **Justine Sospeter** with malice aforethought, the remaining question is whether **Muhere Mwita @ Gichamu** and his co-accused persons had common

intention to commit the offence. The prosecution only piece of evidence connecting Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere and Marwa Mwita @ Mrimi with the offence is that **Muhere Mwita @** mentioned them in the cautioned statement.

Common intention is provided for under section 23 of the Penal code as follows:-

"23. When 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."

It is trite law that for the doctrine of common intention, under section 23, to apply there must be cogent positive evidence to establish that one or more persons had shared with the accused a common intention to pursue an unlawful act and that in the execution of the said pre-conceived plan an offence was committed by both or some or all of them. See **Daimon s/o Malekela @ Maunganga v. R.**, Criminal Appeal No. 205 of 2005 CAT (unreported). The Court of Appeal of Tanzania quoted with approval the decision of the East African Court of Appeal in **Wanjiro Wamiero & Others v. Republic** [1955] 22 EACA at page 523 while interpreting section 21 of the Penal Code of Kenya, which *pari materia* section 23 in **Elizabeth Elias v. R.**, Criminal Appeal No. 293 of 2015 CAT (unreported). The Court stated thus:-

"In order to make the section applicable, it must be shown that the accused had shared with the actual perpetrators of crime, a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged."

In the present case, the question is whether there is cogent positive evidence to establish that **Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere** and **Marwa Mwita @ Mrimi** had shared with **Muhere Mwita @ Gichamu** a common intention to pursue an unlawful act and that in the execution of the said pre-conceived plan an offence was committed by **Muhere Mwita @ Gichamu**. The only prosecution's evidence is that **Muhere Mwita @ Gichamu** admitted or confessed that he was with **Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere** and **Marwa Mwita @ Mrimi** when he stabbed Justine Sospeter causing his death. It is in **Muhere Mwita @ Gichamu's** cautioned statement that **Muhere Mwita @ Gichamu** and his co-accused planned to stop people they met and demand money.

Muhere Mwita @ Gichamu denied to have been in company with his co-accused person on the fateful date. He denied telling the police that they had planned to stop people and demand money in preparation to attend (salo) circumcision ritual. He added that his co-accused persons were arrested before he surrendered himself to police. **Muhere Mwita @ Gichamu** deposed that the police embellished his statement. He added that he confessed to the justice of peace and that the prosecution did not want to tender his extra-judicial statement for a purpose. **Muhere Mwita**

@ **Gichamu**'s advocate requested this Court to draw an adverse inference from the prosecution's failure to tender the extra judicial statement.

I wish to state at the outset Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere and Marwa Mwita @ Mrimi, were not charged because **Muhere Mwita @ Gichamu** mentioned them in the cautioned statement. It is undisputed that Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere and Marwa Mwita @ Mrimi were arrested before **Muhere Mwita @ Gichamu** surrendered himself to police and before he gave the cautioned statement. The prosecution never tendered evidence to account why Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere and Marwa Mwita @ Mrimi were arrested before **Muhere Mwita @ Gichamu** mentioned them, if he did. Not only that but also, **Muhere Mwita @ Gichamu's** cautioned statement did not mention that Marwa Mwita @ Mrimi, the fifth accused at the scene of the crime. Why then did the police arrest and charge him?

I am convinced that it is likely that **Muhere Mwita @ Gichamu** did not admit to police that they (he and his co-accused persons) had pre-conceived plan to stop people and demand money from them. The prosecution also did not persuade me that **Muhere Mwita @ Gichamu** told G. 6168 DC Selesius (**Pw3**) that Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere and Marwa Mwita @ Mrimi accompanied him at the time he committed the offence. Therefore, I do not find cogent positive evidence to establish that **Nchore s/o Richard**

Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere and **Marwa Mwita @ Mrimi** had shared with **Muhere Mwita @ Gichamu** a common intention to pursue an unlawful act and that in the execution of the said preconceived plan an, offence was committed by **Muhere Mwita @ Gichamu**.

The Lady and gentlemen assessors who sat with me opined unanimously that there was no evidence to establish that **Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere** and **Marwa Mwita @ Mrimi** had a common intention with **Muhere Mwita @ Gichamu** to pursue an unlawful act and that in the execution of the said pre-conceived plan **Muhere Mwita @ Gichamu** killed **Justine Sospeter**. I concur with them.

I, therefore find **Nchore s/o Richard Mwita @Gabriel, Makene Honga @ Chacha, Kisiri Simon @ Muhere** and **Marwa Mwita @ Mrimi** not guilty and acquit them the offence of murder contrary to section 196 & 197 of the Penal Code, [Cap. 16 R.E. 2019].

The Lady and gentlemen assessors also unanimously opined that **Muhere Mwita @ Gichamu** killed **Justine Sospeter** without malice aforethought, thus, guilty of manslaughter. They were of the view that it was possible that **Muhere Mwita @ Gichamu** did not hear the motorcycle approaching as he and his friends had noisy bells on their legs, he turned abruptly stabbing the deceased.

I, with due respect, differ from that opinion of the Lady and gentlemen assessors. I have shown above that the prosecution's witness,

Priscus Thadeus (**Pw1**) proved **Muhere Mwita @ Gichamu** and his friends stopped Justine Sospeter. Justine Sospeter failed to stop as he was riding at a speed. **Muhere Mwita @ Gichamu** stabbed Justine Sospeter because he defied their gesture to stop. It is therefore not true that **Muhere Mwita @ Gichamu** speared Justine Sospeter because **Muhere Mwita @ Gichamu** stabbed **Muhere Mwita @ Gichamu** suddenly turned to his right-hand side unaware that Justine Sospeter was approaching. The doctor stated that the wound inflicted onto Justine Sospeter was so deep so much so that it was inflicted with considerable of amount of force. If a person suddenly turned he would not stabbed the deceased such force to perforate the deceased's neck from one side to the other.

It is for the reasons stated above, I differ with the opinion of the Lady and gentlemen assessors who unanimously opinion that **Muhere Mwita @ Gichamu** killed **Justine Sospeter** without malice aforethought, thus, guilty of manslaughter. I, therefore, find the accused person, **Muhere Mwita @ Gichamu** guilty and convict him with the offence of murder u/s 196 and 197 of the Penal Code [Cap. 16 R.E. 2019].

It is so ordered.



J. R. Kahyoza

JUDGE

12/7/2021

SENTENCE

The accused person has been convicted with offence of murder, which has one sentence death by hanging except for a child, and a pregnant woman as provided by sections 197 and 26 of the Penal Code. In this case, the defence evidence shows that the accused is a child, meaning his age is below 18 years. The prosecution did not strongly object to that contention. I was tempted to conduct a pre-sentencing hearing to determine the accused's age. However, given nature of the circumstances of this case the pre-sentencing hearing will not unfold better facts than what we have. The accused's mother Rose Mwita (Dw5) told this Court as submitted by Mr. Obwana advocate that the accused was born in 2006. For that reason, he committed the offence when he was 13 years old. I will give the benefit of doubt to the accused person that he committed the offence when he was a child.

I therefore, sentence the accused person, Muhere s/o Mwita @ Gichamu to be detained during the president's pleasure under S. 26 read together with sections 196 and 197 of Penal Code [Cap. 16 R.E 2019].

It is ordered.



J. R. Kahyoza,

Judge

11/10/2021

You have a right to appeal after lodging notice within 30 days from today and upon being served with the record of appeal submit the grounds of appeal within 21 days.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', with a long horizontal stroke extending to the left.

J. R. Kahyoza,

Judge

11/10/2021