

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

**AT GEITA**

**ORIGINAL JURISDICTION**

**(MWANZA REGISTRY)**

**CRIMINAL SESSIONS CASE NO. 38 OF 2019**

**THE REPUBLIC**

**VERSUS**

**MASHAKA S/O MADAFU.....ACCUSED**

**JUDGMENT**

*02<sup>nd</sup> -8<sup>th</sup> & 15<sup>th</sup> June, 2022*

**ITEMBA, J.**

The deceased, **Muholela Kifungo @ Muhoja**, a traditional healer, being unaware of the tragedy about to happen that evening, he was sitting outside his house, treating one of his clients Mabula Masanja. He was suddenly invaded by two people armed with a machete. The two cut the deceased body on his head and shoulder, actions which led to his death. A report was made to police and an investigation was launched. The accused person **Mashaka Madafu**, was arrested and charged in relation to the said murder.

Before the High Court, the Information revealed that on 17<sup>th</sup> of January 2015, in Buziba Village within Geita District and Region, **Mashaka Madafu**, did murder one **Muholela Kifungo @Muhoja**. When the



Information was read over to the accused person, he entered a plea of not guilty. The prosecution case commenced. The Republic brought four witnesses and three exhibits, while the accused person fended for himself.

At the hearing, the prosecution was represented by Ms. Janeth Kisibo, state attorney while the accused person was represented by Ms. Neema Josephat who was later succeeded by Mr. Erick Lutehanga, both learned advocates.

As to what led to the deceased demise and the accused's arrest, the following was the evidence from prosecution's witnesses. The deceased was living and working as a farmer and a traditional healer in Buziba village within Geita District. On the fateful evening, the deceased was sitting outside the house, next to the tree with one **Mabula Masanja** who was his client. Mabula Masanja had visited the deceased to take some traditional medicine as he had hernia. It is explained by **Semeni Kamanilo, (PW3)** who was the deceased wife, that when the deceased and Mabula Masanja were outside the house, she was in the kitchen cooking. Her three children were also around. At around 19:00 hours, suddenly, PW3 heard Mabula Masanja yelling and he stated 'wewe



*Mashaka Madafu mwache huyo'* meaning that you Mashaka Madafu leave him'. Then she heard some people telling them 'you are under arrest'. PW3 and her children ran for their lives, Mabula Masanja and the deceased also ran with them. PW3 stated further that she could hear the deceased saying '*niache, mnaniua kwanini?*' which meant leave me, why are you killing me? She added that while running she quickly glanced back, just by chance, and saw the accused holding a machete, attacking and cutting the deceased head and neck. She stated that she could identify the accused because both the accused and herself had bright torches and there was a moonlight. She described that the accused was wearing a black jacket and a hat which covered his head. PW3 mentioned to have known the accused before the incidence as the accused used to work for them. That the accused was hired by the deceased to work in his cassava farm for two months. And that they had no grudges with the accused. It was stated further that, PW3 had ran to her neighbor Faida Guga and they raised an alarm (mwano) which attracted the villagers, when they went back to the scene, they found the deceased already dead next to his house. PW3 explained that she could not mention the accused's name at the earliest stage because she was worried that the attackers will come back for her.

PW3 finalized her testimony by stating that earlier, in June 2015 the deceased had told her that one Embassy Chuma, their neighbour, plans to kill him. That Embassy Chuma had claimed that the deceased was bewitching his cows and bewitching his daughters who are not getting married.

As mentioned above, in the following morning, on 18<sup>th</sup> of July 2015, a report was made at Rwamgasa Police Station by a Buziba village leader, that Muholela Kifungo has been murdered in Buziba Village. Riding their bicycles, two police officers **E 199 S/SGT Makongoro (PW1)** visited the scene together with **SGT Juma (PW2)** and one Dr. Matola. PW1 drew a sketch map of the scene (**exhibit P1**) and the medical Dr. examined the deceased body. A post mortem examination report (**Exhibit P2**) reveals that the cause of death was due to multiple cut wounds on head and shoulder.

According to PW1, he interrogated some of the witnesses at the scene and Mashaka Mabula said he identified the accused as the one who killed the deceased and that the deceased's wife stated that the deceased had once mentioned that one Embassy Chuma was planning to kill him.



PW1 stated that they searched for Embassy Chuma but in vain. On 30<sup>th</sup> of July 2015 through the aid of informers, the accused was arrested at his home by PW2 and other three police officers. PW2 recorded the cautioned statement of the accused person which was admitted before the court without objections and was marked **Exhibit P3**. In the said statement the accused confessed to have killed the deceased. He explained that he was approached by one Chuma Charles and he asked him to kill the deceased because he is bewitching his animals and his daughters are not getting married. He stated that he denied to kill the deceased and even informed the deceased about that plan but he did not report to any authority about it. However, he later decided to agree and killed the deceased for a payment of Tshs. 800,000/= which he shared an amount of Tshs. 400,000/= with someone else who he only recognises by face. He also mentioned in his statement that, when he was killing the deceased that was his sixth incidence to kill someone with a machete.

The said Mabula Masanja could not be found to testify before the court, therefore **F 4037 D/CPL Laurian (PW4)** who had recorded Mabula Masanja's statement tendered the said statement and it was admitted as **Exhibit P4**. According to the contents of Exhibit P4, Mabula



Masanja explains among others that, while at the scene, he witnessed two people including the accused, attacking the deceased. That he knew the accused before the incidence and that there was a torch light at the scene which enabled identification. That was the prosecution case in its totality.

At the close of prosecution case the accused was found with a case to answer, he defended himself that he did not kill the deceased. He stated that before the arrest he was living in Buziba village and was dealing in narcotic drugs (*cannabis sativa*) and playing football. That prior to 30<sup>th</sup> July 2015, he was arrested by 3 police officers for drug dealing and was taken to Rwamgasa Police Station, the said police officers asked for money amounting to Tshs 1,500,000/= and he gave them only Tshs. 1,000,000/=. The accused explained further that, he was given 4 days to bring the balance but he could not as his child got sick. As a result, on 30<sup>th</sup> July 2015, he was rearrested by two police officers Juma Marwa and PW4 if we go by record that will be D/CPL Laurian. The accused stated that officers told him that he did not give them the balance so they said '*ngoja tukakufanye sasa*' largely meaning they will teach him a lesson. He also explains that he was terribly beaten while in remand prison and forced to sign the document and was taken to the hospital on 6<sup>th</sup> of August. That, he



had his hospital documents, he even mentioned that fact during committal proceedings and showed the same to the magistrate. However, he did not disclose which type of documents he had from the hospital. The accused elaborated that on 14/4/2021 there were prisoners who escaped from Butimba prison using buckets as stairs, as a result, all the buckets in prison were burnt by a prison officer, including the bucket which he had stored his hospital documents.

The accused stated that he didn't know the deceased and he has never worked for the deceased in the cassava farm that the deceased was living far from his home in Songambe. He stated further that he neither knew Mabula Masanja nor Embassy Chuma. He also challenged the evidence by PW3 stating that she was fed the words by the police officers.

Having gone through the prosecution and defence case the main issue is whether the prosecution has established the offence of Murder against the accused person.

**Section 196 of the Penal Code Cap. 16 [R.E 2002]**, establishes the offence of murder and it states as follows:



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

Then, the main ingredients which needed to be proved against the accused person are **causing death, with malice aforethought**, which gives us two main issues:

- i. whether the accused person caused the death of the deceased.*
- ii. If he did, whether he had malice aforethought or he intended to kill the deceased.*

The prosecution case is based on the statement of Mabula Masanja and PW3 who were eye witnesses and the accused's own cautioned statement who confessed to have killed the deceased.

Mabula Masanja has explained that he was at the scene with the deceased when the two attackers arrived and started cutting the deceased with a machete. He stated that one attacker was holding a torch and a machete, and that they put the deceased under arrest, the deceased tried to escape but they chased him and hold his shirt, he took off his shirt and kept running but they got hold of him and attacked him with a machete



and killed him. He hid in the nearby bush about 20 meters from the scene. He could identify the accused as there was torch light and as he knew the accused before the incidence. Mabula Masanja said that he lived together with the deceased at Imalamawazo street in Buziba village.

The law which governs visual identification is well established in the celebrated case of **Waziri Amani v R** [1980] TLR 250. In this case the appellate court of the land established a principle that visual identification should only be acted upon after all possibilities of mistaken identity have been eliminated, I will quote part of the said landmark decision.

*'The evidence of visual identification is the weakest kind and most unreliable. It follows therefore that no Court should act on the evidence of visual identification unless all possibilities are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight.'*

The declaration in **Waziri Amani** was approved in **Mwalim Ally and Another v. Republic** (CAT DSM.) Criminal Appeal No. 39 of 1991 (unreported) in which it was held as hereunder:

*"Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction."*



In order to determine this aspect, I have considered the facts that the accused and Mabula Masanja were familiar with each other as they came from the same village of Buziba and same street of Imalamawazo; I have also considered that it was night hours around 20:00hrs. A part of Mabula Masanja's statement says:

*'Nikiwa pale na yule mzee Pamoja na familia yake walitokea watu wawili **mmoja** akiwa ameshika panga na tochi ambayo ilikuwa inawaka hawa watu walimfuata huyo mzee na kumwambia upo chini ya ulinzi'*

Mabula Masanja is explaining that there were two assailants at the scene and one of them had a machete and a torch. He did not say whether it was the accused, whom he identified or the other one. If he identified the accused then he could have said that it was the accused who was holding a machete and torch or it was the other assailant. The statement is silent on this aspect. The statement goes on that:

*'Huyu mzee alivyooona hivyo alisimama akaanza kukimbia wakamkimbiza kuelekea nyuma ya nyumba niliwafutilia kwa nyuma huku napiga kelele ..... niliweza kumtambua mtuhuiwa mmoja aitwaje MASHAKA MADAFU, niliweza kumtambua kutokana na mwanga wa tochi waliyokuwa nayo ilimulika wakati wa zile purukishani za kumshika shati yule mzee.....'*



He states that the torch light from one of the accused enabled identification. Considering that the torch belonged to one of the assailants then it must have been aimed to identify the deceased. If it was the accused holding the torch it is not expected of him directing the torch towards himself. If it was the second assailant holding the torch did he direct the torch towards the accused . Was it possible for a person hiding in a bush, 20meters afar to clearly identified the assailant? There was a lot of commotion at the scene, the assailant chasing the deceased, for a person hiding 20 meters away in the dark was it possible to properly identify the assailant?

The explanation of how Masanja Mabula identified the accused at the scene leaves more questions than answers.

The evidence of PW3 the deceased wife in its totality, she explains the fact that her husband was murdered and that he had some information that Embassy Chuma is intending to kill him. She also explained that she managed to identify the accused at the scene, a fact which was seriously challenged by the defence that she has never recorded in her statement to have identified the accused she has also never recorded to have carried a



torch. I find the circumstances of visual identification by PW3 wanting. The fact that she was in the kitchen cooking she did not see the assailants coming. She was in a tremor of being attacked and started running with the kids. While running she turns back quickly for three minutes and identify the assailant. It is not clear how far was the accused from PW3? PW3 stated that she had a bright torch, while running, did PW3 manage to direct her torch to the accused? Observing the sketch map, it shows a number of things like; the place where the deceased was sitting with Mabula Masanja and where his body was found, it shows the kitchen, the cow shed, the treatment spot, and even the place where PW3 was cooking. It does not however, show the location and distance of the said neighbor's house Faida Guga where PW3 was running before she stood and looked back and identified the accused.

In Elizabeth F. Loftus, a renowned author of the Eyewitness Testimony 19 (1979) had the following remarks:

*"The reasons as to why this kind of evidence has to be given great caution when the court intends to rely on, is that the basic foundation for eyewitness is a person's memory. And we often do not see things accurately in the first place, but even if we take in a reasonably accurate picture of some*



*experience, does not necessarily stay perfectly intact in memory, sometimes the memory traces can actually undergo distortion with the passage of time, proper motivation interfering facts. The memory traces seem sometimes to change or become transformed. These distortions can cause a human being to have memories of things that never happened. In **State of Utah v. Deon Lomax Clopten**, 223 P 3d 1103 (2009) 2009 UT 84:*

When it comes to PW3, there are several unanswered questions which raises doubt as to what happened at the scene therefore, it cannot be said that PW3 properly identified the accused.

As mentioned earlier, the third piece of evidence is the accused's cautioned statement. I have gone through the statement and the accused person states that he was hired by one Chuma Charles to kill the deceased in his own words he says:

*'Nakumbuka mnamo tarehe ../3/2015 muda wa saa 1200 huko Kijiji cha Buziba Imalamawazo nikiwa centre niliitwa na Chuma s/o Charles na alinieleza kuwa naomba nimfanyie kazi ya kumuua mzee Muholera s/o Kifungo kwa kumkata mapanga nilimuuliza chanzo ni kitu gani akasema analoga mifungo, ng'ombe zinakufa sana Pamoja na Watoto wangu kutoolewa wa kike ambao mpaka leo wako nyumbani kwa*



*mazungumzo ya siku hiyo niliwambia mimi siwezi kufanya kazi ya mauaji ya kumuua mzee Muholela s/o Kifungo. Baada ya taarifa hizo nilienda kumueleza Mzee Muholela s/o Kifungo kabla hajauwawa na mtoto wa marehemu aitwaye Gingo s/o Mhorela mipango hiyo nilipoikataa mzee aliendelea kusihhi na taarifa hizo sikuzitoa katika ofisi ya serikali. Mnamo tarehe 17/01/2015 muda wa saa mbili usiku siku ya Ijumaa (saa 20:00hrs) nikiwa na mwenzangu nilienda kumuua huyo mzee kwa kumkata na mapanga baada ya kuwa nimekodiwa na Chuma s/o Charles wa Imalamawazo Buziba ambaye katika malipo ya mauaji hayo alinilipa Tshs. 800,000/= ambazo niligawana na mwenzangu ninayemfahamu kwa sura..... tuligawana kila mtu Tshs. 400,000/=*

The contents of this statement translates that the accused person was hired by one Charles Chuma to kill the deceased because the deceased was bewitching Charles' animals and his daughters were not getting married. The accused initially denied and even informed the deceased but because Charles Chuma was insisting, he agreed and killed the deceased by cutting him with a machete; that he was paid Tshs. 800,000/= and shared it equally with another person whom they joined forces to kill the deceased. That he only knew the said other person, by face.



In **Tuwamoi v. Uganda** (1967) EA 84 the court provided among others that an accused persons' confession may be relied as a basis for conviction. The court stated that:

*'A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a court will act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary for law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.'*

It should be noted that this cautioned statement was admitted during preliminary hearing hence it was neither retracted nor repudiated. The statement was recorded on the same day of arrest 30<sup>th</sup> July 2015 about one hour after his arrest as he was arrested at 14:00 hours according to PW2. The statement was written for about one hour from 15:29 hours to 16:30 hours and it is duly signed by both the accused person and the



recording officer. The cautioned statement is also corroborated by the evidence of PW3 that the deceased was hinted about the fact that Charles Chuma was intending to kill him. Also, according to the sketch map there is a distance of 25 meters between the point where the deceased was sitting and where his body was found. It means therefore before the deceased died, he tried to run away as Mabula Masanja had explained. Henceforth, I find this statement to contain a valid confession of the accused Mashaka Madafu that he had unlawfully killed the deceased.

I have well-thought-out the accused defense in which he states that he has nothing to do with the deceased's death, he neither knew Mabula Masanja who is said to have identified him at the scene and he never knew Embassy Chuma who is said to have hired him to kill the deceased. It is noted that, the accused stated that, he was actually arrested by 3 police officers for drug dealing and he was later rearrested for failure to give some money to the said police officers. He mentioned the officers to be Juma Marwa and PW4. Secondly, the accused person detailed explained how he was tortured and how the evidence of such torture being a hospital document, was burned down by the prison officers.





As to the story of being framed up by Juma Marwa and PW4, the accused person had an opportunity to cross examine PW4 as regards the money which he gave him and the said torture, but he did not. That stage was the best time to hear the story from PW4 and to test the credibility of both, but the accused waited until he is defending himself and when PW4 is no longer before the court to testify and raises claims against PW4. This makes his claims an afterthought and unbelievable.

As regards the accused's documents from the hospital, I have gone through court records and they show that during committal proceedings the accused mentioned that he will bring his PF3. However, after noting that the same was burnt at the prison, the accused could still have brought another type of evidence for example prison officer to testify on the said fire situation, the accused could even bring the medical personnel who treated him to substantiate his claims, again, I find these explanations by the accused person to be mere allegations which does not amount to reasonable doubts against the prosecution evidence.



Having been established by the prosecution that it was the accused who killed the deceased, the second issue is whether he killed with malice aforethought. The law under section 200 of the Penal Code provides that:

*'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)n/a*

*(d) n/a*

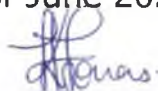
Apart from this provision, the stance of the Court of Appeal, has been that malice aforethought is established when among others, an attack is directed at sensitive and vulnerable part of the body. See also **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 and **Bujigwa John**



@ **Juma Kyriako v. Republic**, Criminal Appeal no 427 of 2018. In the present case, in his own words, the accused explained that he was aiming at killing the deceased as that was his assignment. The deceased's death was caused by a machete. Based on the Post Mortem Examination Report Exhibit P2, the attacks were directed to the deceased's head and shoulder which are delicate parts of the body. I find that the evidence against the accused person falls within the ambit of section 200 of the Penal Code and it establishes that the accused person intended to cause death to the deceased.

Finally, I am satisfied that the prosecution has proved its case to the required standard as provided for under section Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2019, that is beyond reasonable doubt, against the accused persons. I therefore, find the accused persons **Mashaka Madafu** guilty of unlawful killing **Muholela Kifungo @Muhoja** and accordingly, I hereby convict him for the offence of Murder contrary to section 196 and 197 of the Penal Code Cap. 16 [R.E 2002], as charged.

**Dated** at **GEITA** this 15<sup>th</sup> day of June 2022.

  
**L. J ITEMBA**  
**JUDGE**

## SENTENCE

There is only one sentence for the offence of murder that is **death by hanging**.

Consequently, in compliance with section 197 of the Penal Code, the convict **Mashaka Madafu** is hereby sentenced to suffer death by hanging.

It is so ordered.



**L. J ITEMBA  
JUDGE  
15.6.2022**

**Court:** Judgement delivered at Geita this 15<sup>th</sup> day of June 2022, in the presence of the accused person, Ms. Winifrida Ernest, State Attorney, Mr. Erick Lutehanga learned counsel for the accused and Mr. Pascal Alphonse, RMA.

Right of appeal explained.



**L. J ITEMBA  
JUDGE**