

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT TARIME

CRIMINAL SESSIONS CASE NO 94 OF 2021

THE REPUBLIC

VERSUS

- 1. THOBIA S/O MWITA @ MSABI**
- 2. DANIEL S/O MRIMI @ SABORA**

JUDGMENT

16TH FEB & 22ND FEBRUARY, 2022.

BEFORE F.H. MAHIMBALI, J.

The accused persons, namely Thobias s/o Mwita @ Msabi and Daniel s/o Mrimi @ Sabora are charged 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 was alleged by the prosecution that on 8th January, 2021 at Sokoni village within Tarime District in Mara Region, Thobias s/o Mwita @ Msabi and Daniel s/o Mrimi @ Sabora murdered one Marwa s/o Wambura Masana. The accused persons denied the charge levelled against him.

In this case, Marwa s/o Wambura Masana is dead and it is alleged that he was killed with malice aforethought by the accused persons. The

prosecution called **3 witnesses** with three exhibits namely, PMER (exhibit PE.1), Sketch map plan (PE2) and PE3 exhibit (witness' Statement under 34B (2) C of the TEA). The prosecution's witnesses were MASSANA WAMBURA MASSANA (PW1), BARAKA WAMBURA (PW2) and G.5081 D/C CYRIL (PW3).

The evidence adduced by the above prosecution's witnesses was as follows:

MASSANA WAMBURA MASSANA (PW1) a small business man (chinga boy) at Kenyamanyori Village within Tarime. His testimony is to the effect that he is the blood relative to the deceased. On the 8th January 2021, they were drinking beer at Kehongwe - bar. Around 20.30hrs or more of that 8th January, 2021 when with his relative (the deceased), they were on their way home. Along the path they were going through to their home while he being ahead of the deceased, he first met Daniel Mrimi (first accused) and shortly Thobias (2nd accused) heading to the direction they are coming from. These two guys he first met them at the Kehongwe bar, few minutes before they left. That no sooner had these two guys had passed him, than when he could no longer hear his relative talking from behind. When he turned around, he wondered to see his relative (the deceased) robbed around his neck by Mr. Daniel

and that Thobias then stabbed him on his left leg by knife he had held. Seeing this, he walked closer to them in efforts to rescue his relative, then Daniel (second accused) stabbed him on his stomach and head. He fell down, robbed his money he had held Ksh4800 and was then left on the stream. He cried for help where he then lost his consciousness. He regained his consciousness when he was in police vehicle heading to Tarime District Hospital. At hospital he was admitted and treated but his relative had already died and his body was kept at the mortuary. When asked by police he narrated the whole episode how he first saw his elder brother being invaded by the duo accused persons and also how he intervened and also himself being stabbed by Daniel and robbed his money. In his testimony, he stated how he had identified the accused persons. First they are familiar to him and that they are neighbors and that on the date of the incidence, they first met at Kehongwe Bar, where they were drinking beer and that on that date, Daniel asked for a drink from the deceased and he bought him one soda. As if this is not enough, PW1 testified that he had been able to identify these culprits at the scene, first there was an aid of bright electricity lights illuminating at the scene and that first the duo accused persons had passed him shortly before they invaded the deceased at the back. That as the lights were so bright and illuminating and that he was just closer to them, first at

five paces but later to almost one pace or zero when he intervened in assisting his relative from being stabbed. Furthermore he described their dress code before and during the incident as being the same. Thobias (first accused) had worn white T-shirt and Daniel had worn black t-shirt. Both were not masked. According to him, the deceased was badly hit on the said limb. Himself was hit on the stomach and head and he showed the zones he was cut. In essence, this was the eye witness of the said incident.

Mr. Baraka Wambura's testimony (PW2) in essence is just that the deceased is his relative and that he came to know about the incident at the night of 8th January 2021 and together with other relatives rushed straight to the Hospital and saw PW1 being admitted and the deceased was in the mortuary. When told by PW1 about the invaders/culprits, he quickly boasted that he personally knows them.

D/C Cyril testified as PW3. His testimony in one limb explains how he interrogated PW1 and later recorded his statement in which he explained how the accused persons invaded his elder brother (the deceased) and also how he was stabbed by Daniel on his head, stomach and how he identified them. He being investigator of the case, also testified how he organized the post mortem examination of the

deceased body. In his reading the police case file, he was aware of other witnesses whose statements were recorded. Amongst them was that of Happiness Isaya. He stated that prior to the hearing date set for this case, they looked for the said Happiness Isaya but in vein. She could not be traced at Kehongwe bar nor Rorya (home place). He then tendered the endorsed summons for the said Happiness - PE3 exhibit who could not be traced anywhere following shift of residence. He further tendered PE4 exhibit, written statement of the said Happiness to form part of the case's evidence in lieu of Happiness herself.

What exhibit PE4 (statement of Happiness Isaya) says, is this that she is bar attendant at Kehongwe Bar at counter – sales. That in her recollection, on the 8th January 2021 she entered work at 16.00hrs. With her, there were Yuni, Devota, and Zenny – bar attendants. She recorded that, amongst the clients they attended at that bar on that day were Marwa @ Kadanga (the deceased) and his relative Massana (PW1). She knows them as Chinga men and that they are relatives. That during all the that Tobias (first accused) and his wife were seated at counter drinking beer. When it reached around 21.00hrs, while at counter, she saw Massana with four empty bottles of beer and bought four beers. In paying the said beer, he issued out from his inner jacket's pocket some

good amount of money and selected only one Tsh.10,000 bank note and paid the four beers. The incident was well witnessed by Mr.Tobias, who was anxious of the money and shortly disappeared leaving his wife there. Then, Marwa @ Kadanga also went at counter, bought his one last beer and immediately left with his relative Massana. That after fifteen minutes had passed, Tobias had hurriedly returned at the counter (bar) and informed his wife that they should leave immediately as there is an incident. As his wife had delayed, he left her there and quitted. Just after Tobias had left, they heard an alarm call. She closed the bar and went to sleep. The next morning (i.e on 9th January, 2021) around 07.00hrs, her room door was knocked by police, when she opened the police inquired about the room of Tobias. She showed them as they lived in the same dwelling house as tenants where they arrested both, Tobias and his wife. Others were Yuni and Debo – her co workers at Kiongwe bar.

Both accused persons as they denied the charges against them and that they were found to have a case to answer, fended on oath and raised a defense of alibi saying that on the time of the incident of that day, each one had been at his respective home. They denied all the allegations. DW1 admitting that he was arrested at his home,

nevertheless he knew nothing about the incident and that he is not responsible for anything.

The testimony of the second accused is almost similar to the testimony of the first accused DW1. He just admitted to have been arrested by the alleged relatives of the deceased that he killed the deceased (their relative) the accusations which he denies. Other than this, there is no more worth evidence to tell.

In essence, what PW1 testified seems to be closely connected to what has been recorded by Happiness through PE4 exhibit dully admitted and is replicated by PW3 – the investigator of the case.

In digest to the case's evidence, it is undisputed that the deceased died unnatural death. This is in regard to the evidence of PW1, PW2, PW3, DW2 and exhibit PE1 (PMER of the deceased).

The said body when examined by medical practitioner established that the deceased's body was found to have a stabbed fresh wound on the left breast, active bleeding clots. Thus, the cause of the deceased was internal bleeding, acute hemorrhage (exhibit PE1 (PMER)).

The issue for consideration is whether given the evidence by the prosecution, the case has been proved beyond reasonable doubt? 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 Chandrankatloshubhai 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"

In establishing the charge of murder as alleged in this case, amongst other things the Prosecution is duty bound to establish that there was unnatural death of a human being, the said death is by killing, malice aforethought and that the accused persons in court are the one responsible. So far the first two issues are not in dispute. That the deceased died unnatural death and that is by being killed. Malice aforethought is well explained in section 200 of the Penal Code, Cap16 and well elaborated in the famous case of **Enock Kipela v Republic**,

Criminal Appeal No. 154 of 1994 (unreported - CAT) 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. [emphasis added].**

The manner PW1 described the hitting the weapon used, the body zone inflicted, the conduct of the attackers (returning counter and diapering), are nothing but malice aforethought.

The next vital question is whether as per circumstances of this case, there is malice aforethought as per law?

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.”

In reaching the verdict of this case, it is important to assess the evidence in record of PW1, PW3, exhibit PE1 and exhibit PE4. In essence PW1 is the eye witness and also a victim with the deceased. Exhibit PE4 describes how the first accused person (Thobias) was spotted by Happiness being so anxious with the bundle of money Pw1 had issued out when paying the bill and shortly disappeared from the bar – counter and later (after 15 minutes) returned at the bar counter talking about occurrence of an incident nearby. Being restless, he quickly disappeared leaving his wife back at the bar. This circumstance corroborates the testimony of PW1.

In the current case, the only eye witness in record is PW1. His testimony establishes how the both accused persons attacked the deceased and later himself. The incident though happened at night time but it was under broad electricity lights illuminating the scene. He having first met both accused persons at the bar (Kehongwe) had later met them on their way back home. Shortly after he had passed them (while heading to opposite direction), he turned around after he had noted his relative (the deceased who was just behind him) not talking any more,

he wondered to see him being engulfed by these two accused persons who had just passed them. He tried to intervene, he found himself being stabbed on his stomach by the second accused person – Daniel. He testified that as he had been so close to them (holding each other), that the persons are familiar to him, that he had just been with them shortly at the bar (kehongwe) and that the scene was being illuminated by sufficient broad electricity lights, he could not mistakenly identify them. In the case of **Goodluck Kyando Vs. Republic**, [2006] T.L.R 363, puts it clear that it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness. On this stance, another relevant case is that of **Mathias Bundala Vs. Rep**, Criminal Appeal No. 62 of 2004, Court of Appeal at Mwanza and section 146(2) of Tanzania Evidence Act, Cap 6. By this analogue, I am of the considered view that as per available evidence, I have no doubt that the PW1 by his demeanor, confidence and coherent in his testimony, I have no even a slight of serious doubt that what he testified is not true. I am satisfied beyond reasonable doubt that the PW1, clearly identified the culprits and this is corroborated by the evidence of PW3 via exhibit PE4. That said, I am comfortable that both accused persons were dully identified by the PW1 as culprits of the said murder incident.

In fact I'm 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).

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 (PW1) paid attention to the culprits – He testified that he saw both culprits first at the Kehongwe bar and later at the scene first before*

*attacking (when passing) and later during the attacking.
They were closer about 5paces to zero pace*

- 2. Length of time observation. This incidence survived for relatively 5 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 one hour between the occurrence and naming of the culprits to police when being sent to Tarime District Hospital.*
- 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 electricity lights illuminating the scene.*

Based on the fore mentioned criteria, I'm 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 would exist in other notorious situation.

In the case of **Raymond Francis v R** [1994] TLR 100 at page 103 it was held that ;

" ... it is elementary that in criminal case where the determination depends essentially on identification, evidence

on conditions favouring a correct identification is of the utmost importance."

With this incidence, I am satisfied that there are no impediments in the current situation which affected the visual identification as per the circumstances of this case.

In my final analysis of the whole prosecution's evidence as who are responsible of the said murder of **Marwa s/o Wambura Masana**, as per available evidence in record, I find the accused persons being responsible. Though the accused persons here raised a defense of alibi, yet the evidence by PW1 is irresistibly stronger and washes away the alibi defense. This is in consideration of PW1's testimony and that of exhibit PE4.

The last issue is whether given the evidence by the prosecution, the case has been proved beyond reasonable doubt? 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"

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"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, Marwa s/o Wambura Masana was killed by the accused person, by hitting him on his lib 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 stabbings were directed, 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 persons killed the deceased with requisite malice aforethought and he desired the deceased to die. That said, I find the accused person **Chacha Kawa @ Mwita**, guilty and consequently convict him of the murder of the deceased **Marwa s/o WamburaMasana** contrary to section 196 and 197 of the Penal Code [Cap 16 R.E 2019].As was held in

the case of **Mathias Mhyeni and Another v. The Republic**[1980] 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 of that murder"

In terms of section 23 of the Penal Code, where 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.

The accused persons in this case had a common intention to murder which they executed although each played a different role. This holding draws a concurrence opinion finding with the all assessors, all of whom were convinced that the accused persons' 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 persons with the charged offence. I am persuaded both, by my own conviction and the assessors' opinion that the totality of the evidence adduced during this trial (PW1) has left a

real and justified impression that no doubt that the accused persons had participated to the commission of the offence of murder against the deceased **Marwa s/o Wambura Masana**.

Considering the punishment for murder is only one known as per law, each 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

22/02/2022

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

F. H. Mahimbali

JUDGE

22/02/2022

DATED at TARIME this 22nd day of February, 2022.

F. H. Mahimbali

JUDGE

22/02/2022