

IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 24 OF 2020

THE REPUBLIC

VERSUS

PHILBERT MKONONGO

JUDGEMENT

Date of Last Order: 31st December 2021

Date of Judgement: 11th April 2022

NDUNGURU, J

Accused person, Philbert Mkonongo, stands charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 RE 2002 (hereinafter referred to as the "Penal Code"). it is alleged that on 2nd day of September 2016 at Kipande village within Nkasi District in Rukwa Region, did murder one Michael Mwenda (hereinafter referred to as "the deceased").

When the charge or information of murder was read over and properly explained to him. He pleaded not guilty to the offence, and thus plea of not guilty was entered, hence full trial.

During the trial of this case, Mr. John Kabengula, the learned State Attorney assisted by Ms. Marietha Maguta, the learned state attorney represented the Republic; whereas, the accused person was represented by Mr. Baltazar Chambi, the learned advocate.

To prove the allegation levelled against the accused person, the Republic brought a total of five witnesses namely John Mkonongo, who testified as prosecution witness No. 1 (PW1), David Kalyatumbe as PW2, Emmanuel Kajala as PW3, Godfrey Macheta as PW4, and Wilgis Mbunda testified as PW5. The prosecution also tendered a postmortem examination report and extra-judicial statement as exhibit P1 and P2 respectively.

Upon the closure of prosecution case, defence case opened after it was found that the prime facie case has been established against accused person; thus, requires him to give his defence story. In disapproving the prosecution allegation levelled against him, accused person testified as DW1. He neither called a witness to testify on his favour nor tendered exhibit. The summary of prosecution testimonies is as hereunder;

PW1, John Mkonongo, peasant resident of Kipande village Nkasi District, a father of seven children Beatus Mkonongo, Filbert Mkonongo,

Jacqlina Mkonongo, Lusia Mkonongo, Kaslano Mkonongo, Betina Mkonongo and Teresia Mkonongo and his son Filbert Mkonongo is now in prison while his father Michael Mwenda a deceased now.

PW1 testified that on 02/09/2016 the event date the deceased went to the farm to construct his hurt. At about 02.30 pm when the boys sent food to the home to the deceased did not meet him. They told his wife to tell him that the deceased has not yet returned to the farm. PW1 informed the villagers. At 05.00 pm they went to farms to look for him. At the hurt at the farm, they did not see him they went on looking for him. Along the river, but did not see him.

At about 22 hours one Japhet discovered the body as they dispersed at the farms. Japhet called them. They gathered where Japhet shouted. They met the dead body covered with grasses. They reported the matter to the police.

When the police came uncovered by removing the grasses. The body was found with cut wound on the neck. The police took the vehicle from Kilangala and took the dead body to the home village.

PW1 told the court that Filbert (accused) was not found at home. He did not know where the accused was. It took a long time till when Filbert was arrested. When the deceased called him reporting that Filbert was threatening him, Filbert was at home village. But on the date

when the deceased died Filbert was not around home village. He could not say anything on who killed the deceased.

When cross examined by defence counsel Mr. Baltazar Chambi PW1 replied that the deceased told him that Filbert was threatening him. He was threatening to sell cattles (cows). The deceased did not have an idea to report the matter to the police nor to him the threat was on selling cattles. He did not take any action. The threat to sell the cattles to him was something normal to him.

PW1 said the deceased reported to him on 02/09/2016. By then Filbert was at the village. Filbert was present from 02/09/2016 up to 09/09/2016. On 02/09/2016 Filbert was present. On 03/09/2016 the deceased disappeared. It was the date Filbert (accused) also disappeared. He did not know where Filbert went. He did not remember the date Filbert (accused) was arrested. Kasiano sent food on 02/09/2016 the date the deceased died.

PW1 stated that on 02/09/2016 the deceased left for the shamba in the morning at 08.00. The report that he was not found was given at 11.00pm.

The deceased reported on the threat to him on 02/09/2016 on the same date he went to the shamba.

He is living next house to Filbert. On 02/09/2016, 03/09/2016, 04/09/2016 up to 09/09/2016 he did not go to the home of Filbert. His wife told him that she did not know where Filbert has gone it was a 4th day after death event.

They left village at 03.00pm going to the farm to look for deceased. They arrived at the farm at 05.00pm. The body was discovered at 07.30. It was Japhet who discovered body. He did not remember what he said at what time Japhet revealed the body.

When re-examined by Ms Marietha Maguta, PW1 stated that the cattles which Filbert threatened to sell belonged to the deceased. The deceased as the owner had the right to sell his properties. The deceased disappeared on 02/09/2016. He was informed that the deceased was nowhere to be found at 11 pm. The body was revealed at 20.30pm. The boys had phones which showed time. Filbert was living very close to him. Filbert left on 02/09/2016.

PW2, David Kalyatumbe, peasant, resident of Kizi village Nkasi District testified that during evening hours he got informed that his grandfather has disappeared, that he has not returned from the shamba. His grandfather was called Michael Mwenda.

It was his testimony that he, with John Mkonongo (PW1) and other villagers went to the farm to look for him. It was about 07-8 hours

night. PW2 stated that his grandfather left in the morning going to the shamba. At the farms, John Mkonongo phoned to police saying the deceased was not at his hut (kibanda). They went on looking for him ultimately Japhet discovered the body lying while covered with grasses.

Having identified the body John Mkonongo (PW1) reported the matter to the police at Kipande police station. The police asked them was he alive? They said they are not certain. The police told them to look at him. Having looked at him they found him with a cut wound at his neck.

The police rushed to the scene and asked them if they could guard the body, they said it was far from home they could not. The police found the vehicle and carried the body to the village.

When cross-examined by defence counsel Mr Baltazar Chambi PW2 replied that he is living at Kizi from Kizi to Kipande is very far. He did not remember when he arrived at Kipande from Kizi. He had his house at Kipande he knew Filbert Mkonongo. He is the accused in this case. He knew him for a long time. There was a great distance between his house and the house of Filbert there at Kipande.

PW2 said he knew John Mkonongo he is his uncle. He is the brother of his mother. He knew the house of Filbert. The house of

Filbert was very near to that of John Mkonongo. From the date he arrived at Kipande he never met with Filbert.

PW2 went on asserting that on 02/09/2016 at 07 hours he was informed Michael Mwenda is not seen ever since he went to the shamba. His house is very far from that of Michael Mwenda. John Mkonongo sent Helena to come to tell him Michael is not seen. It was at 07.00 hours. He then followed where John Mkonongo headed. When he went to the farm he was with Patrick. Others had already gone. He met John Mkonongo at about 20.00 hours. He arrived at the farms at 20.00hrs. it was John Mkonongo who arrived first. There were many people and it was night. He did not see Filbert as it was at night and there were many people. There was no list of relatives. He was not certain if Filbert was present at the scene or not. The body was taken at 00hrs as the police arrived at 20.00hrs. The dead body had a cut wound at the neck. He went close to the place the body was laying. There were no weapons at the scene. He did not suspect anybody.

When re-examined by Ms. Magutta State Attorney PW2 stated that he identified the family members as they arrived earlier. He did not know where Filbert was. He was not living at Kipande that is why he could not suspect anybody.

PW3, Emmanuel Kajala Ex SP of Police, resident of Kahama Shinyanga, testified that in 2016 he was living at Nkasi at Namanyere. He was a police officer. He was OC-CID of Nkasi District. By then he was superintendent of police. His duty was to oversee all investigation process and activities pertaining criminal officers. He had been in that post for six years.

PW3 testified that on 03/09/2016 at about 06.am. he was at home preparing himself to go the office. At that time, he received information from Kipande police post that at Kipande there was a murder event. He was told the event happened on 02/09/2016. Where it was said the person has been found killed at the farms.

It was his testimony that he took some investigators with medical officer for medical examination. The medical officer was Mr. Macheta from Nkasi Government District hospital.

At Kipande, they met the dead body at the home of the deceased. He observed the body it had a cut wound slaughtered at the neck and on head. The medical officer conducted post mortem examination the body had been identified to him by the relatives that the deceased body was of Michael Mwenda Mkonongo.

The medical officer told them the cause of death was due to severe blood loss due to the cut wound. Then he went to the scene of

crime with the relatives of the deceased. At the scene. He found a hurt (kibanda) there were pull marks (miburuzo) and blood stains (oozing) for almost 40 paces from the hurt to the place where the dead body was found. It appears the deceased was killed near his hurt but pulled to the place where the body was found.

PW3 instructed D/CPL John to draw the sketch map being guided by John Mkonongo. He then interrogated the relatives of the deceased who do they suspected to have killed the deceased. They said they suspected Filbert Mkonongo, the grandson of the deceased. They said they suspected him because on the same year on April another person called Oswald Mkonongo was killed and they also suspected Filbert Mkonongo (accused) to have killed him. They said they suspected him because he was demanding cattles and on the first event he went to steal cattles at his next father Oswald Mkonongo and ultimately killed him.

Further to that, two days before the event the accused went to the deceased (Michael Mwenda) waiting to settle their difference that the deceased should not spread that the accused killed Oswald. That the deceased denied the settlement and refused the accused from going to his home and that he (deceased) will carry on naming him so that the law should take its course.

He then started looking for the accused. The accused was arrested on 31/10/2016. PW3 told the court that the accused was arrested at Karundi village which is near to Kipande village.

Upon his arrest the accused was brought to Namanyere Police Station. Before he was locked up, he was brought to his officer where he interrogated on his involved in the killing. The accused admitted to have involved in killing the two deceased. That the reason was that they denied to give him cattle, and that he killed Michael Mwenda because he was naming him to have killed Oswald Mkonongo.

He then instructed D/CPL George to record cautioned statement and also to send the accused to justice of peace to record extra judicial statement.

When cross-examined by Mr. Baltazar Chambi - Defence Counsel, PW3 replied that he went to the scene on 03/09/2019. That he got know how the event was committed, the weapons used and the culprits. At the scene the place where the body was pulled was cultivated as it was the time for preparing farms. There were many footsteps of the people who went to look for the deceased. The pull marks had blood stains. He did not go to the home of Filbert. He was told that Filbert was not present. He was told that Filbert disappeared after the first event but he was coming back during night hours to threaten his relatives.

It was John Mkonongo who told him that Filbert disappeared after the first event and he used to come at night to threaten his relatives. It was John Mkonongo who told him that Filbert had gone to apologize to his grandfather (the deceased). John Mkonongo was told by the deceased. The death of Oswald Mkonongo was reported to the police. He has forgotten who reported to police. John Mkonongo said he was reporting to Kipande police station. He did not give it weight.

He interrogated the accused as the Criminal Procedure Requires. When he interrogated the accused the investigator was present. He then instructed him to go to record cautioned statement of the accused.

When re-examined by Mr. John Kabengula – State Attorney, PW3 stated that the scene was at the farm part of the farm was cultivated. The pull marks seen as if something was being pulled which to his investigation is the deceased body not footsteps. The footsteps did not obstruct pull marks (miburuzo). Footsteps are deferent from pull marks. The death of Oswald was reported to Namanyere police. The event which sent him to Kipande was related with the death of Michael Mwenda.

PW4, Godfrey Macheta, resident of Namanyere, Assistant Medical Officer, testified that on 03/09/2016, he was in the office. When in the office he got an order from OC-CID one Kajala requiring him to do post

mortem examination report. He, with the police officers went to the scene at Kipande village. At the scene they arrived at about 01.00pm. It was at the home of the deceased. The relatives of the deceased identified the body for him. The deceased was a male person. he then started investigating the body. He started physical investigation by looking at external appearance. From external appearance, he revealed that the deceased had an open wound at the front part, which was caused by a sharp object. The deceased had also a wound on the back head. The skull was depressed (kuvunjwa). He looked at the chest cabit and abdomen cabit. They were intact.

He revealed that the cause of death was due to the excessive loss blood due to the throat cut wound and head injury.

He then completed the report in the special form. The report on Post Mortem Examination was admitted as exhibit "P1".

When cross-examined by Mr. Baltazar Chambi - Defence Counsel, PW4 replied that it was on 03/09/2016 about quarter to 01.pm. he went at Kipande village. The body was found in the house of the deceased. Among the police he remembered was Kajala who was OC-CID.

When re-examined by by Ms. Magutta – State Attorney, PW4 stated that he remembered the police officers Malick, Rael and Kajala

the ones he went with to the scene. His duty was to conduct post mortem examination.

PW5, Wilgis Mbunda, Resident Magistrate Kipeta Primary Court, by then was working at Kipande, Kate and Chala Primary Courts his duties are hearing and d testified that on 02/11/2016 at noon the accused one Philibert Mkonongo was brought by DC George for recording cautioned statement. He received the accused and told the police to go out almost five meters, he closed the door and left with the accused.

He introduced himself as a justice peace, the accused was willing to offer confession which then be used as evidence against him. Then he was free. He inspected his body. The accused has a hearing wound on his left side. As he told him that he was escaping home he thought the wound was caused where he was escaping. He then started recording the confession by writing. He started at 03.40pm and ended about 10.04pm. As the accused told him that he knew Swahili language, the statement was recorded in Kiswahili.

Having completed writing he called PC- George to take the accused. Before that the accused and himself signed the extra judicial statement which was admitted as exhibit "P2".

When cross-examined by Mr. Chambi, PW5 said he has seen the chief justice's circular. It has nine steps. Step 9 is present in their

statement. He recorded confession statement when the accused was willing to record. He was called to go to Namanyere to record statement upon called by his incharge, as there was no magistrate. He asked the accused if he was willing. He said he was willing. The accused was brought by the police officer. Having inspected he found the old wound.

When re-examined by Ms. Magutta State Attorney, PW5 stated that as justice of peace he uses the Chief Justice Guide on recording extra judicial statement. He observed the scar wound was very old. He did not know the cause, but it was very old.

The court having found that, the prosecution has sufficiently established a case against accused person to require him to make his defence, the accused person was called to defend himself and elected to testify under oath. He testified as DW1. He neither called witness to testify in his favour nor tendered exhibit. The summary of his evidence is as hereunder;

DW1, Philbert Mkonongo, peasant, resident of Kipande village Nkasi District, a grandson of Michael Mwenda testified that on 02/09/2016 he did not have any information regarding his grandfather. He got information on the death of his grandfather after his arrest. It was the police who told him his grandfather died on 03/09/2016. On

03/09/2016 he was at Kipande at home, he left on 04/09/2016 to Lake Tanganyika area. When his grandfather was buried, he was present. He attended the burial, after the burial he left, he went to Kingombe along Tanganyika Lake to find for Labor (Kibarua)

He stayed at Kingombe for 1 and half months. He then returned back to the village. He returned back to the village. He returned back on 30/10/2016 but he was arrested on the way at Karundi village. He was sent to Kipande police station. At Kipande police station (post) he was searched and was told to mention his fellow involved in killing. They did not tell him who was killed. He asked them how many have you arrested on that issue? They sent me at Namanyere police station. He was sent to Namanyere on the same date. He was arrested at 05pm and he arrived at Namanyere police station at 20.00hours.

On 31/10/2016 there came an investigator. It was about 09.00am. He was called George. It was George who interrogated him. He took him to the interrogation room. They were only two. He was beaten upon giving his statement to the police officer and then he was sent to the court.

At the court premises, the police stood at the door and the Magistrate was in the office, he told him to take out clothes. By then policeman was behind him. He took off the clothes he observed the

wound which was bleeding. He did not ask him about the wound. He handed him to the police. He was taken back to the police station. He stayed there for three weeks before he was brought Sumbawanga to the prison.

When cross-examined by Ms. Magutta - State Attorney, DW1 stated that he is living at Kipande. His wife passed away last year. His father is John Mkonongi. They have good relationship. From his house to his father's house is almost 20 paces. Due to the closeness whatever was happening to his father he knew.

He was arrested on 30/10/2016. It was the police who told him about the death of his father. DW1 told the court that the Magistrate who inspected him did not come to court.

When defence case was closed, both the State Attorney and learned advocate for the accused person respectively were given a chance to address this court on final submissions. They all had none and left the matter to the court. After thoroughly going through prosecution and defence case I summed up the case to court assessors who thereafter gave their respective opinions. In their considered opinion, all gentleman and lady assessors, have opined unanimously to the effect that the tendered evidence by the prosecution was water tight and the

accused person be found guilty of the offence facing him and thus be convicted.

The main issue before this court is whether or not the accused did cause the death of the late Michael Mwenda; and, if the answer to the main issue is in affirmative then what follows is whether he did so with malice aforethought.

In this case, it is not in dispute that as per exhibit P1 the deceased, Michael Mwenda died on the day of 2nd of September 2016 as a result of being assaulted by unknown person. The issue is who assaulted him leading to his death. According to the totality of the prosecution's testimony, neither of the witness testified to have seen the accused assaulting the deceased, the accused is only circumstantially connected with the death of the deceased.

As of the case, the available evidence hinges on circumstantial evidence. The issue to be resolved is whether the circumstantial evidence led by the prosecution proved the case against the accused person on the standard required in criminal cases.

For this court to find the accused guilty of the offence of murder, the available evidence must link the accused person with the offence he

stood charged with. The position was articulated in the case of Court of Appeal of **Mohamed Said Matula versus Republic**; [1995] TLR 3 where the Court held that;

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shift away from the prosecution and no duty is cast on the appellant to establish his innocence"

The prosecution side is duty bound to prove the link between the death and the accused person. In the instant case as earlier pointed out neither of the prosecution witness testified to have seen the accused person killing the deceased.

To start with circumstantial evidence, the law is very clear that court of law may ground conviction based solely on circumstantial, where the said evidence irresistibly led to the inference that it was the accused person and nobody else who committed the offence, thus the evidence also is incapable of more than one interpretation and the chain linking such evidence must be unbroken. See **Justine Julius and others vs Republic**, Criminal Appeal No. 155 of 2005; **John Mangula**

Ndogo vs Republic, Criminal Appeal NO. 18 of 2004; **Shaban @ Elisha Mpunza vs Republic**, Criminal Appeal No. 12 of 2002; **Aneth Kapwiya vs Republic**, Criminal Appeal No. 69 of 2012, **Francis Alex vs Republic**, Criminal Appeal No. 185 of 2017, all unreported, **Simon Masoke vs Republic** [1958] 715 **Ally Bakari vs Republic** [1992] TLR 10.

The question now is whether the available evidence creates a chain of events to connect the accused person with the offence of murder.

To start with the evidence of PW1, a key witness who tried to convince this court that the death of the deceased person was a result of the threatening words uttered by the accused against the deceased as regards selling of cattles. PW1 linked the death of the deceased with the threat of the accused. He informed this court that the accused has been threatening the deceased several times as regards the selling of cattle's property of the deceased. He was told by the deceased himself as regards the threat by the accused. It was his further testimony to this court that when the deceased reported to him on 02/09/2016 as regards threat, Filbert was at the village. However, on 03/09/2016 when deceased disappeared, also Filbert was nowhere to found at the village.

He did not know where Filbert went. He told the court that on 02/09/2016 was the date deceased left to the shamba in the morning at about 08:00hrs, but he never returned back. The disappearance of Filbert was also told by the wife of Filbert that it was the fourth day since the incident Filbert was not at home.

On his part, in his examination in chief, DW1 informed this court that on 02/09/ 2016 he was at home village of Kipande, however he said he did not have any information regarding his grandfather. He further told the court that as regards the death of his grandfather he got information after his arrest, that it was the police officer who told him of the death. However, later on DW1 contradicted himself when he said on the day of the death of his grandfather, he was present and he attended the burial ceremony.

In this contradictory testimony, the accused person in this case did not cast any reasonable doubt to the prosecution case, in the sense that he has not given plausible explanation with regards the death of his grandfather taking into consideration was the one accused of threatening the deceased before his death.

The circumstances gathered from testimony of PW1 clearly and certainly established that it was the accused person who caused the

death of the deceased. PW1 is a reliable witness and his evidence is credible as he was the one who told by the deceased concerns the threat he gets from the accused. This court has no reason to fault his testimony as per the case of **Goodluck Kyando versus Republic** [2006] TLR 263.

As well, the conduct of the accused person after the death of his grandfather suggests that he is responsible for the death. This fact is well supported by the evidence of PW1 who is a father of the accused. PW1 as earlier stated he said after the disappearance of the deceased since 02/09/2016, also the accused person was nowhere to be found in the village.

A reasonable man could not disappear without burying his grandfather in a normal circumstance if he is not responsible with the death and instead, he continued with other business until he was arrested by the police.

All these circumstances lead to a conclusion that the accused person knew what he did, that is he committed the offence of murder. The position was stated in the case of **Protas Kitogole & Another versus Republic** [1992] T.L.R 52 where it was observed that;

"We are fully satisfied that the circumstantial evidence against the appellant was enough to lead to the irresistibly conclusion that he was the killer."

Another incriminating evidence are the statements the accused offered to PW3 and extra-judicial statement recorded by PW5.

PW3 who was the OC-CID of Nkasi District informed this court that upon his interrogation, relatives of the deceased suspected the grandson of the deceased one Filbert Mkonongo to have killed Michael Mwenda. They suspected him because he was demanding cattles from the deceased.

However, it is a principle of law that however the strong may be mere suspicious alone may not ground conviction. In **Abdallah Wendo and Another versus Reginam** [1953] 20 EACA 166 at page 170 it was observed by Court that;

"Suspicion however strong cannot supply a basis for inferring guilt when proof of guilt cannot be safely inferred beyond reasonable doubt."

However, PW3 went further to inform this court that after his arrest and during the interrogation the accused admitted to him that he

killed the deceased. He clarified that the accused gave a reason for the killing being that he was denied to sell cattles by the deceased, also the other reason being the deceased was implicating him by naming him as the actual killer of one Oswald Mkonongo.

As per exhibit P2, the accused's extra-judicial statement tendered by PW5, the accused also confessed in the involvement in the killing of the deceased one Michael Mwenda.

The law is very clear that confession which is voluntary made and proved is admissible in evidence. See **section 27 of the Law of Evidence Act**, Cap 6 RE 2019. In some cases, trial court may ground conviction solely on confession without corroboration if it considers and accepts what transpired was nothing but the truth and was made voluntarily. See the case of **Shija Luyeko versus republic [2004] TLR 254.**

The details in the accused statement narrated of the historical background of his relation with his relatives, the killing of Oswald Mkonongo, the circumstances and the reasons behind that led to the killing of his grandfather Michael Mwenda.

That I find extra judicial statement made by the accused containing nothing but the truth of what transpired before the event and

during the event which may be relied by this court to determine its admissibility and as well conviction.

PW5 insisted to this court that the accused was in a good health and willingly recorded his statement for what he did to the deceased and he took the accused's statement, of which the accused person signed his statement which he tendered as exhibit P2.

With the foregoing chain of evidence, from PW1, PW3 and PW5 witnesses it is without doubt that the accused person has killed the deceased. The available evidence suggests that the death of the deceased was caused by the accused person, as the chain of event is unbroken. The evidence of two witnesses PW3 and PW5 testified the same to the effect that the accused person did confess to each of them that he has killed the deceased.

The circumstances as shown in the available evidence in this case, the facts do not provide room for this court to suggest that another person other than the accused person did assault the deceased leading to his death. The chain of event is unbroken. The circumstantial evidence did irresistibly point to the guilty of the accused. It appears the accused person assaulted the deceased which led to his death at evening of 2nd of September 2016.

It is a principle of the law in cases where conviction is founded on circumstantial evidence the evidence must be irresistible to the commission of the offence by somebody else other than the accused. In other words, the circumstantial evidence must eliminate the possibility of somebody else committing the offence. See the Court of Appeal case of **David Meikoki versus Republic**, Criminal Appeal No. 388 of 2013, unreported

The fact that some of the testimonies of the witnesses testified that the accused person admitted to have killed the deceased before them, in the absence of plausible explanation to the contrary is in law responsible for the deceased's death. This court is convinced that chain of events as depicted in this case obviously connect the accused person with the offence he stands charged.

Indeed, I may say the prosecution evidence proved all circumstances which excluded every reasonable fact other than guiltiness of the accused person with regard the death of the deceased. The accused failed to cast doubt to the prosecution case. There is no any plausible explanation from the accused which may fault the prosecution case. It was put clear that, in criminal trials, the prosecution is duty bound to prove any case beyond reasonable doubt as it was held

in the case of **John s/o Makolobela, Kulwa s/o Makolobela and Eric s/o Juma @Tanganyika versus Republic [2002] TLR** that;

"(ii)..... a person is found guilty and convicted of an offence because of the strength of the prosecution evidence against him which establishes his guilty beyond reasonable doubt"

Now considering the evidence given by five witnesses who were summoned by the Republic and supplemented by the exhibits I am therefore fully convinced that indeed the accused killed the deceased. The only question remaining I have to consider is whether the killing was done with malice aforethought.

It is cardinal principle of law in murder cases, that conviction cannot stand unless the prosecution has successfully established both the overt act (actus reus) and malice aforethought (mens rea).

The Court of Appeal decision of **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994, unreported, provides useful information when it comes to the question of ascertaining as to whether the killing committed by the accused was done with malice aforethought or not. It was observed that;

".....usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had the intention must be ascertained from various factors, including the following:

- (i) The type and size of the weapon which was used in the attack leading to the death of the deceased;*
- (ii) The amount of force which was used by the attacker in assaulting the deceased;*
- (iii) The part or parts of the body of the deceased where the blow/s of the attacker were directed at or inflicted;*
- (iv) The number of blows which were made by the attacker although one blow may be enough depending on the nature and circumstances of each particular case;*
- (v) The kind of injuries inflicted on the deceased's body;*
- (vi) The utterances made by the attacker if any during, before or after the attack;*

(vii) *The conduct of the attacker before or after the incident of attack"*

When I put a test to the above factors into our case regarding the available circumstances at hand, I find that on available evidence as established by the prosecution side sufficiently established that the killing of the deceased was made with the use of a sharp object which is a lethal weapon. Testimony of PW1 was that having found the body of the deceased in the farms it was found with cut wound on the neck, the same testimony was given by PW2.

Also, the postmortem examination report tendered by PW4 its summary of the report reads;

"Dead body found with incision injury anterior aspect of neck involving trachea and esophagus length 12cm and width 4cm, one depressed closed skull fracture occipital....."

The conclusion I get from foregoing cut and head injury is that great force was used by the accused in assaulting the deceased, and the cut and attacking were focused on the delicate parts of the body of the deceased, that is neck and head.

To combine all the events, the facts and the evidence of the prosecution which clearly point the accused actually that he killed the deceased by cutting his neck, I am of the strong opinion that the element of malice aforethought, *mens rea* has been established to the satisfaction of this court.

Finally, I shake hands with my esteemed gentleman assessor and lady assessors who entered a verdict of guilty and proceeded to find that the offence of murder against the accused person is sufficiently proved according to the requirement of the law. Therefore, I find the accused person guilty of the offence of murder contrary to section 196 of the Penal Code, and I hereby convict him forthwith.

It is so ordered.




D.B. NDUNGURU

JUDGE

11.04.2022