

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT TARIME
CRIMINAL SESSIONS CASE NO. 28 OF 2022
THE REPUBLIC
VERSUS
MUSA s/o KEHANGA @ CHACHA
JUDGMENT

2nd August & 4th August, 2022.

A.A. MBAGWA, J.:

The accused Musa Kehanga @ Chacha stands charged with murder contrary to sections 196 and 197 of the Penal Code. It is alleged that the Musa Kehanga Chacha on 26th day of August, 2021 at Bisarara village within Serengeti district in Mara region murdered James Mwita Marwa.

The accused, when arraigned before the court, denied the accusations hence a full trial commenced.

At the hearing, the Republic was represented by Monica Hokororo, learned Senior State Attorney whereas the accused enjoyed the service of Leonard Magwayega, learned advocate.

The prosecution brought about four witnesses and one documentary exhibit to wit, a post mortem examination report (exhibit P1). The witnesses who testified in favour of the prosecution are Mbusilo d/o Mwita PW1,

Thomas Amos Marwa PW2, H9990 D/C Kichere PW3 and Assistant Inspector Steven PW4.

In defence the accused stood a solo witness. He neither called a witness nor brought any exhibit.

Briefly, the prosecution account was that on 26th August, 2021 at around 16:30hrs, the deceased James Mwita Marwa was at Bisarara centre drinking local brew at Mbusilo's pub. All of the sudden, the accused came in while holding a bottle of beer (balimi) and a machete. Without saying any word to anybody, he directly went to where the deceased was sitting and aggressively attacked him. He heavily cut him on the head. The deceased stood up and started running to rescue himself but his efforts were in vain as he fell down just about ten metres away. The accused followed him and continued cutting him. He cut him on head, shoulders, back and legs. According to PW1, the accused separated the deceased feet from his legs and the upper part of the head fell away. Consequently, the deceased bled excessively and died instantly. While cutting the deceased, the residents raised alarm and gathered but no body rendered any assistance as the accused threatened to attack whoever dared come closer. According to PW1 Mbusilo d/o Mwita, the incident took place in the bright day around 16:30hrs.

As people raised alarm, PW2 one Thomas Amos Chacha, the village chairman heard it and therefore headed to the scene of crime. On arriving at the scene, he saw the accused holding a blood-stained machete while chasing people who wanted to help the deceased. PW2 went straight to where the deceased body was laying and noticed that the deceased was already dead. He thus conveyed the information to police who arrived at the scene a little later.

Having seen the police, the accused took at his heels. The police tried to pursue him but the accused managed to flee into the national park. As such, the police gave up and decided to take the dead body to Mugumu Designated District Hospital for further investigation actions. On the following day i.e., 27th August, 2021, Dr. Mnalimi conducted an autopsy and observed that the deceased's death was caused by severe bleeding which resulted from cut wounds. He thus recorded his findings in the post mortem examination report which was admitted in evidence and marked exhibit P1.

The accused remained at large until on 13th September, 2021 when he was arrested at Fantom area within Kahama district in Shinyanga region by PW3 H9990D/C Kichere. Subsequently, on 30th September, 2021 the accused was conveyed from Kahama Police Station to Mugumu Police

Station in Serengeti and thereafter e he was arraigned in the District Court of Serengeti.

Mbusilo d/o Mwita (PW1) eye witnessed the incident and identified the accused in dock. Further, Thomas Amos Marwa PW2 saw the accused holding a blood-stained machete at the scene of crime. PW2 further testified that the accused was threatening people who wanted to help the deceased and that upon arrival of the police, the accused fled into the national park.

In defence, the accused denied the accusation. He claimed that he does not know the deceased nor was he at the scene of crime on the fateful day. He said that he went to Kahama since July, 2021. However, during cross examination, the accused told the court that he had no grudges with Mbusilo Mwita (PW1).

At the close of the case for both sides, counsel made brief final submissions.

Mr. Leonard Magwayega, learned defence counsel had little to submit. He implored the court, while assessing the evidence, to take into account the fact that the prosecution did not tender the caution statement which was among the listed exhibits. He argued that failure to tender the caution statement connotes that the prosecution evidence is questionable. He

otherwise beseeched the court to assess the evidence and decide the case justly.

Monica Hokororo, learned Senior State Attorney, on behalf of the Republic, was of the firm views that the prosecution evidence is overwhelming. She said that the evidence of PW1 clearly tells it all the type of weapon which the accused used as well as the number of cuts he inflicted on the deceased. Monica expounded that the accused used a deadly weapon that is a machete and attacked the deceased on sensitive parts of the body. Further, the learned Senior State Attorney opined that the accused inflicted several cuts all this implying that the accused had malice aforethought.

Moreso, Monica argued that the incident took place in the broad day hence he was properly identified. She also said that the accused's conducts i.e., chasing people and fleeing to Kahama is evidence that he is the one who killed the deceased. Monica submitted that the defence of *alibi* which the accused raised cannot be accepted because the accused did not follow the procedures for, he did not issue the notice as required by law. Monica insisted that the prosecution evidence in particular of PW1 was not shaken.

With respect to the argument that the prosecution did not tender the caution statement, Monica replied that there is no legal requirement to that effect especially where the prosecution has adduced sufficient evidence.

In conclusion, the learned Senior State Attorney prayed the court to find the prosecution case was proved beyond reasonable doubt and consequently convict the accused accordingly.

Suffice it to mention, at the very outset, that there is no dispute with regard to unnatural death of the deceased James Mwita. What remains contested is the perpetrator of murder.

There is direct evidence from PW1 Mbusilo d/o Mwita that she eye witnessed the accused cutting the deceased in her pub and then outside her pub just ten metres away. PW1's evidence was corroborated by PW2 Thomas Amos Marwa, the village chairman who arrived at the scene of crime immediately after the incident. PW2 told the court that he found the accused still holding a blood-stained machete and was chasing people who had gathered in response of an alarm raised. Both PW1 and PW2 identified the accused in dock. The accused, in his defence, admitted that he had no bad blood with the prosecution witness in particular PW1 Mbusilo Mwita and for that reason there is no reason for this court to doubt her testimony.

Mr. Magwayega invited this court to doubt the prosecution evidence on the ground that a caution statement was not tendered despite the fact that it was listed as one of the exhibits. Ms Monica Hokororo, in response, said

that there is no law that compels production of caution statement provided there is sufficient evidence.

I agree with the learned State Senior Attorney that it is the prosecution's choice what evidence it wants to adduce in court. What is important for the court is sufficiency of evidence. I therefore do not see any anomaly by the prosecution's failure to tender the caution statement.

In view of the above, it goes without saying that it is the accused who caused death of the deceased. The next issue therefore is whether the accused caused the deceased's death with malice aforethought. It is a settled position of law that malice aforethought may be inferred from the type of weapon used, the amount of force applied, part or parts of body where blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attackers' utterances made before or after killing, and the conduct of the attackers before and after killing. See **Awadhi Gaitani @ Mboma vs the Republic**, Criminal Appeal No. 288 of 2017, CAT at Dar es Salaam and **Abdallah Rashid Namkoka vs the Republic**, Criminal Appeal No. 206 of 2016 CAT at Mtwara.

In this case, there is evidence from PW1 and exhibit P1 to the effect that the accused cut the deceased several times and on various parts of the

body. PW1 said that when the accused attacked and cut the deceased in the pub, the deceased stood up and ran away but fell down after a short distance. The accused followed him and continued cutting him. PW1 testified that the accused cut the deceased on head until the upper part fell away. He also cut him on the shoulders and legs. This evidence was also supported by the medical findings as reflected in the postmortem examination report (exhibit P1). This, in my view, proves that the accused had malice aforethought.

In the event, it is my unfeigned findings that the prosecution proved the case against the accused person beyond reasonable doubt. As such, I find the accused Musa Kehanga @ Chacha guilty of the offence as charged. Accordingly, I convict Musa Kehanga @ Chacha of murder contrary to sections 196 and 197 of the Penal Code.

It is so ordered.

The right of appeal is explained.



A. A. Mbagwa

JUDGE

04/08/2022