IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MUSOMA)

AT TARIME

ORIGIONAL JURISDICTION

CRIMINAL SESSIONS CASE No. 129 OF 2022

THE REPUBLIC

Versus

1. AGIRI OKEYO OPON @ TOYO

2. ISACK CLEMENCE ACHUET

JUDGMENT

20.09.2022 & 23.09.2022

Mtulya, J.:

In the present case, this court was invite to determine a situation where a person was killed in traditional alarm call, commonly known as *Yowe* in lake regions of Tanzania. The alert is normally brown by any villager when unusual situation or circumstances arise. This time, the alarm was brown at Tatwe Village within Tarime District in Mara Region and caused the death of **Mr. Obure Obure @ Mihago** (the deceased) and eight (8) individuals were cited by the prosecution side to have caused the death of the deceased.

Following the manhunt of the eight people in Tatwe Village and Sengerema District in Mwanza Region, **Mr. Agiri Okeyo Opon @ Toyo** (the first accused person) and **Mr. Isack Clemence Achuet** (the second accused person) were arrested and alleged

to have participated in the attacks which caused the death of the deceased hence were arraigned in this court to reply the charge of murder of the deceased contrary to section 196 and 197 of the **Penal Code [Cap. 16 R.E. 2019]** (the Code). The offence is alleged to have occurred on 2nd day of September 2018 at Tatwe Village within Tarime District in Mara Region,

The Republic, enjoying legal representation of Mr. Nimrod Byamungu, learned State Attorney, submitted that the accused persons, were brought in this court to reply the cited charge because were part of the dangerous group of eight (8) persons who went and attacked the deceased with sharp weapon *panga* to death without any justifiable cause. In order to persuade this court to decide in favour of the Republic, Mr. Byamungu invited a total of three (3) witnesses, namely: eye witness, Elida Jared Anjuro (PW1), Medical Doctor, Dr. Jabai Donald Tumbo (PW2) and police officer, G. 6787 Detective Goodluck (PW3).

According to PW1, the deceased was attacked by a group of eight (8) people who came at her residence during meal time around 15:00hours when she was taking her meal of *Makande* and *Uji* with the deceased. Testifying on what exactly transpired, PW1 stated that the group had grabbed the deceased from enjoying his meal to outside the house where they attacked him

to death and saw the incidence of attacks from four (4) meters and during the attacks she was also assaulted by *Panga* and *Fimbo* on different parts of her body, including head, mouth and back. With regard to where the blows were directed to the deceased, PW1 stated that the attackers used the same *Panga* to attack the deceased into his ear, neck, hands and foots. PW1 testified further that she was able to identify the attacks as they were living in the same hamlet of Kisana and village of Tatwe within Tarime District in Mara Region for more than twenty (20) years and knows the face and habits. During the hearing of the case, PW1 was granted leave to identify the accused persons and correctly identified them in the dock.

In mentioning the names of other six (6) hamlet and village mates who attacked the deceased, apart from the accused persons, PW1 mentioned: Awino Onyango, Pati Omwanda, Adiema Juma, Obabu Bebo, Fred Chali and Boniface Juma. In explaining the specific role played by each individual accused person during the attacks, PW1 testified that the first accused person had attacked the deceased's ear with one blow and second accused person had attacked at the neck of the deceased with single blow. According to PW1, after completion of the

attacks, they left the scene of the crime singing traditional songs: *vijana tumekubali, tumekubali.*

However, PW1 admitted in this court that she recorded police statement on 2nd September 2018, immediately after the attacks to the deceased and remained silent on several issues, such as: specific role played by the first accused person during the attacks; singing of traditional songs, and attacks against her by the accused persons. In giving reasons of the decline, PW1 produced two reasons, that he had forgotten because of injuries caused by the attack on her and the police did not question her on the issues. Finally, PW1 testified that she had no any previous quarrels with the accused persons, except after the attacks against her, misunderstanding between them erupted.

Mr. Byamungu also marshalled PW2 to testify that the death actually happened and it was unnatural. According to PW2, on 2nd September 2018, at around 16:00hours, he was summoned by Shirati Officer-Commanding of Criminal Investigation Department to accompany the police to Tatwe Village to conduct forensic examination and prepare report of the deceased, and performed the assignments as required by medical professional conduct. On his findings, PW2 stated that he found the deceased with multiple cut-wounds in the head, neck, right hand at elbow

joint and right side leg. In his opinion, PW2 stated that the deceased's death was caused by severe bleeding secondary to multiple cut-wounds. In order to substantiate his claim, PW1 had produced in court postmortem examination report of the deceased which was admitted as exhibit P.1 and shows that the cause of death is: *excessive blood loss due to multiple cut-wounds in head, neck, right arm and right leg.*

Criminal Investigation Officer working at the Utegi Police Station in Rorya District, PW3, had investigated case file UGI/399/2018 on the murder of the deceased and participated in arresting the first accused person at Tatwe Village in Tarime District and second accused person at Sengerema in Mwanza Region from the information of informer called Mr. Samson Obure. PW3's investigation report showed further that the deceased was alleged to be a cattle thief in his home village of Tatwe and on the day of the event, cattle theft had erupted at the Village. However, PW3 declined to mention the other six (6) accused persons and admitted during the hearing of the case that he cannot state on specific role that each of the accused person played during the attacks.

In defence, **Mr. Agiri Okeyo Opon @ Toyo** (DW1) and **Mr. Isack Clemence Achuet** (DW2) appeared and testified. According

to DW1 on the fateful day, 2nd September 2018, at noon hours, around 15:00hours, he was at his farmland and heard a *Yowe* alert from Obure's sister in law and upon arrival at the scene of the crime, he found the deceased had already expired. In testifying presence of persons, DW1 stated that there were many people at the scene of the crime, including PW1, Kisana Hamlet Chairman Mr. Ochera Ayeta, Mr. Omumwira Lawenyo, and Mr. Ben who are currently at Tatwe Village. On reasons of attacks, DW1 testified that the deceased was alleged to be a cattle thief in the village.

During the hearing of the case, DW1 claimed that he is prosecuted in the case because of love affairs disputes (*Bifu la Mapenzi*) as PW1 had fallen in love and seduced him, but declined the proposal and in any case his name is not Girisoni Okeyo, but Agiri Okech. However, during cross-examination DW1 admitted to have known PW1 very well as they are from the same hamlet; his full names are Agiri Okech Opon @ Toyo; Jaluo traditions require to move with weapons when Yowe alarms are blown, but he did not go to the scene of the crime with any weapon on 2nd September 2022. During questioning by this court on what are the available remedies when *Bifu la Mapenzi* causes chaos in another person in Jaluo tradition, DW1 stated that it is

just to let it go and that the *Bifu la Mapenzi* started after the attacks to the deceased person.

DW2 on his part had testified that on the fateful day he had left his home residence for farm in search of house building materials. In the farm, he harvested a total of thirteen (13) wood poles and around 16:00 hours, he heard *Yowe* noises and followed the direction of the *Yowe*. On arrival at the Yowe's scene, DW2 had found PW1 sitting down at her home residence with other two residents, namely **Upindo Lucas**, and **Pasaka Kungu** and the deceased had already expired. Upon inquiry on what transpired, he was informed that the deceased was killed by **Wanayowe** on reasons of allegations of cattle theft and decided to leave the scene of the crime. With regard to the evidences produced by PW1, DW2 stated that PW1 had produced lies in the court and her evidences cannot be relied as during committal the statement was read and alleged he did cut the deceased on legs whereas the evidence in court shows he did cut at the neck.

Complaining on his arrest, DW2 testified that it originated from **Samson Obure** who had previous conflict with his brother **Ogoso Clemence** for reasons of fighting of One Tanzanian Shillings (1/=Tsh.) at Tatwe Center. It is from the fight that

Samson Obure was ordered by clan members to pay treatment compensation of Tanzanian Shillings Three Hundred Thousand (300, 000 /=Tshs.) to **Ogoso Clemence**. It is this money, which was paining **Samson Obure** to the extent that he promised to revenge from the death of his brother, the deceased. In ending his evidence, DW2 stated that his name is **Isack Clemence Ochuet** and not **Isack Clemence Achuet**. However, during cross-examination, DW2 admitted that he has no problem with PW1 and have no any previous or current quarrels. He also admitted that common sense is defeated in situation where a villager is found dead and village mate leaves the scene of the event. Similarly, he admitted that it cannot be easily understood for him to be in Tatwe Village, but arrested in Sengerema District Mwanza.

Following registration of the materials of the prosecution and defence, learned minds in Mr. Nimrod Byamungu for the Republic and Mr. Obwana for the defence fine –tuned the facts and evidences constituting the present case. According to Mr. Byamungu, in cases like the present one, the Republic is required to establish four (4) important elements, namely: death had occurred, it was unnatural, accused persons have caused the death and they have caused with malice aforethought. In his

opinion, the Republic has established the four (4) points as required by the law, as there is no dispute that the deceased had died unnatural death that is not required to occur in our societies. Regarding the two remaining questions, as who has caused the death of the deceased with malice aforethought, Mr. Byamungu submitted that all facts and evidences point fingers at the accused persons as the killers with malice aforethought.

In order to substantiate his argument, Mr. Byamungu stated that in the present case there is eye witness PW1 who lived with the accused persons for more than twenty (20) years in the same hamlet and the event occurred in a day broad light and PW1 tested the attacks during the killing of the deceased. According to Mr. Byamungu, the first accused person admitted in this court that he knows PW1 and lived in the same hamlet hence there is no any possibility of mistaken identity or spelling errors, and if there is any, PW1 may be treated as a village woman who does not know how to read and write and could not grasp *Kiswahili* Language, has she has displayed during the hearing of the case. Mr. Byamungu invited this court to peruse the precedent in **Boay Bura v. DPP**, Criminal Appeal No. 54 of 2020 on the subject and to take note that PW1 correctly identified and touched the accused person in this court.

Regarding PW1's police statement which did not display actual role committed by the first accused person and record the second accused person to have attacked the deceased on the legs, Mr. Byamungu submitted that the court may disregard the evidence as the statement was not admitted in the case as per precedent in **Said Salum v. Republic**, Criminal Appeal No. 499 of 2016.

To Mr. Byamungu, even if the statement was admitted as evidence in this case, that would not change the fact that the accused persons have killed the deceased, as the complaints are minor and do not go to the root of the matter as per practice in **Abdallah Rajabu Waziri v. Republic**, Criminal Appeal No. 116 of 2004 and that human memory is prone to errors as it was said in the case of **Chrizant John v. Republic**, Criminal Appeal No. 313 of 2015. To Mr. Byamungu, the accused persons may be responsible for murder regardless of actual specific role played by each specific accused person under common intention as in the case of **Damiano Petro v. Republic** [1980] TLR 280.

According to Mr. Byamungu the accused persons had killed the deceased with malice aforethought as their actions and conducts showed intention to kill the deceased. According to Mr. Byamungu, the accused persons have used deadly weapon

Panga in the attacks, directed their blows at sensitive parties of the body, head, hand and legs. In order to substantiate his claim, Mr. Byamungu cited the precedent in **Enock Kipela v. Republic**, Criminal Appeal No.150 of 1994. In his opinion, Mr. Byamungu thinks that, even if the incident is said to be mob justice, it will be of its own kind organized by a group of eight (8) dangerous persons in a village.

Mr. Byamungu, in his closing statement, claimed that the defence had produced weak evidence as the first accused person alleged *bifu la mapenzi* is what brought him in this court and the second accused person claimed previous conflict of **Samson Obure** and his brother **Ogoso Clemence.** According to Mr. Byamungu, when prosecution evidence is stronger than that of accused persons, the accused persons may be convicted of the offence, as per precedent in **Magendo Paul & Another v. Republic** [1993] TLR 219.

On the other hand Mr. Obwana thinks that the prosecution has failed to discharge its duties in proving the offence of murder against the accused persons without any doubts. In his opinions, the present case has several doubts which cannot render conviction to the accused persons as per precedent in **John Makorobela v. Republic** [2002] TLR 296. In first place, Mr.

Obwana submitted that the prosecution has heavily relied in PW1, who could not properly mention the names of the accused persons, although she claimed they are from the same hamlet. According to Mr. Obwana the cited names of **Girisoni Okeyo** and **Achuet Clemence** are not part of the present accused persons. Regarding identification of the accused persons during the attacks, Mr. Obwana contended that visual identification is the weakest identification of accused persons as per precedent in **Waziri Amani v. Republic** [1980] TLR 250.

In Mr. Obwana's opinion, PW1 had recorded police statement, but remained silent on actual role played by the first accused person during the attacks by reason of forgetfulness or failure of a recorder to question her, but remembered the role played by the second accused person in the attacks. However, PW1 recorded one thing and testified the other during the hearing of the case, as in the statement she mentioned attacks on legs whereas during testimony in court she mentioned attacks on head. To the opinion of Mr. Obwana, the contradictions go to the root of the matter and show that the accused persons have not committed the offence as per decision of the court in **Oscar Josiah v. Republic**, Criminal Appeal No. 441 of 2015.

According to Mr. Obwana, even if this court finds the discrepancies are minor, still the prosecutions is duty bound to prove the accused persons have killed the deceased with malice aforethought as there was no dispute of *Yowe* at the scene of the crime which attracted many people without any common intention. Finally, Mr. Obwana complained on the poor investigation by PW3, who solely relied on information extracted from **Samson Obure** and arrest of the accused from his tips whereas **Samson Obure** had previous conflict with the second accused person's brother, **Ogoso Clemence**.

In the present case, the facts produced by the prosecution witnesses during the hearing point a finger to the accused persons. PW1 testified in this court that he had lived with the accused persons in the same Kisana Hamlet and witnessed both accused persons attacking the deceased on sensitive part of the body head, hands and legs. However, the evidence of PW1 has two lapses on contradictions of names and areas in which the attacks were directed by the accused persons. Similarly, PW1 remained silent on actual role played by the first accused person in the police statement. The reasons registered by PW1 and Mr. Byamungu shows that human memory is prone to errors related to time and level of understanding of the witness and that a

witness cannot remember every events in details as it was stated in the precedent of **Chrizant John v. Republic** (supra). PW1 during cross examination produced three answers, namely: first, she had forgotten to tell all details; second, the police recorder did not ask her on the role of the first accused person; and she had injuries caused by the attacks from the accused persons.

In the opinion of Mr. Byamungu, even if there are discrepancies of names of the accused persons in one hand and police statement with evidence of PW1 in this court, the discrepancies are minor as per law in **Abdallah Rajabu Waziri v. Republic** (supra), According to Mr. Byamungu the major issues which go to the root of the matter is whether the accused persons were identified by PW1 and whether they were present and attacked the deceased. In substantiating his claim Mr. Byamungu cited the authority in **Chrizant John v. Republic** (supra). I have read page 18 and 19 of the cited judgment. The following text is extracted for purposes of appreciation of the matter. The Court of Appeal (the Court) stated:

> *We wish to state the general view that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and*

impact of contradictions, it must always be remembered that witnesses do not always make a blow by blow mental recording of an incident. As such, contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case.

Before the recording of this statement, there was already in place the mostly cited precedent in **Dikson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal Case No. 92 of 2007, which had put in place a standard practice on discrepancies, that:

In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter.

It would seem to me that the present complained contradictions and discrepancies are minor ones as rightly observed by Mr. Byamungu. The words or spelling in the names of the accused persons cannot exonerate the accused persons for

four (4) reasons: first, PW1 lived with the accused persons at Kisana Hamlet in Tatwe Village for more than twenty (20) years and testified she knows them by face and habit; second, the accused persons did not dispute the material on recognition; third, the attacks took place in noon hours of broad day light; and finally, PW1 mentioned the accused persons at the police station in the earliest opportunity without a day delay, on 2nd September 2018.

This is an assurance of reliability and credibility of PW1 as indicated in the precedents of **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39 and **Sijali Juma Kocho v. Republic** [1994] TLR 206. In the practice of **Marwa Wangiti Mwita & Another v. Republic** (supra), the Court stated that:

> ***...the ability of a witness name a suspect at the earliest opportunity is in all important assurance of his reliability,*** *in the same ways as un-explained delay or complete failure to do so should put a prudent court to inquiry.*

(Emphasis supplied).

While I agree the discrepancies in names are minor for the two cited reasons, I disagree with Mr. Byamungu that the discrepancies in PW1's police statement and testimony in this

court is minor. I perused the cited judgment in **Abdallah Rajabu Waziri v. Republic** (supra), which Mr. Byamungu heavily relied to substantiate his argument.

However, the precedent was adjusted by recent judgment of the same court in **Onesmo Kashonele & Others v. Republic,** Criminal Appeal No. 225 of 2012 decided on 15th May 2014 whereas the decision in **Abdallah Rajabu Waziri v. Republic** (supra) was decided on 5th July 2006. The decision in **Onesmo Kashonele & Others v. Republic** (supra) and interpretation of section 164 (1) (c) of the **Evidence Act [Cap. 6 R.E 2019]** (the Evidence Act) were together considered by this court in the precedent of **Republic v. Petro Masaga**, Criminal Session Case No. 129 of 2016. The precedent of **Onesmo Kashonele & Others v. Republic** (supra), in brief, at page 13 & 14 stated that:

> *...the contents of PW1's statement which he made to the police immediately after the robbery, sharply contradicts material oral evidence adduced by PW1 and PW2 in the course of trial...both courts below did not address this vital evidence contained in Defence. Similarly, serious contradictions between the oral evidence and the evidence in Defence were not addressed and resolved...we consider the oral evidence given by PW1*

*and PW2 five months thereafter as having been exaggerated and an afterthought...**we can safely deduce that the appellants were implicated in the robbery incident on the basis of grave suspicion.***

(Emphasis supplied).

I am aware Mr. Byamungu said no in evidence of PW1's police statement was attached in the present case, and cited the authority in **Said Salum v. Republic** (supra) That is not correct as reflected at page 15 of the judgment that:

*We are dismayed to find that the trial magistrate in her judgment twisted the facts presented before her to her own personal view [the word superstition] was the trial magistrate's own perception. **It is not borne out of the record of proceedings.***

(Emphasis supplied).

However, in the present case the witness PW1 testified during cross examination that she declined to mention the specific role played by the first accused person on 2nd September 2022 in the police statement. The contradiction is major as it goes to the root of the matter. I understand Mr. Byamungu had argued that mere presence of the accused person at the scene of the crime is enough as he left his farm and followed the direction of Yowe and

in any case *Yowe* is a dangerous alert which people go with weapons ready for attacks. In his opinion, the accused persons must be responsible under the principle of common intention as in the case of **Damiano Petro v. Republic** [1980] TLR 280. It is true that section 22 of the Code may be invited when an offence is committed by several individuals as claimed by Mr. Byamungu. In the present case, the first accused person heard the *Yowe* alert and went to the direction of the *Yowe*, and did not say what he had followed at the scene of the *Yowe*.

During defence hearing, both witnesses mentioned persons who were present at the scene of the crime when they arrived and testified that they found the deceased had already expired. The said people who were present at the scene of the crime were Kisana Hamlet Chairman, **Mr. Ochera Ayeta, Mr. Omumwira Lawenyo, Mr. Ben, Upindo Lucas**, and **Pasaka Kungu**. The accused persons testified further that the cited individuals are still present at Tatwe Village, but declined to call them without any plausible explanation. The principle of law is that failure to call material witness may draw an adverse inferences to the case (see: **Azizi Abdallah v. Republic** [1991] TLR 71; **Sungura Athumani v. Republic**, Criminal Appeal No. 291 of 2016; **Godson Hemedi v. Republic** [1993] TLR 241; **R v. Gokaidas Kanji &**

Another (1949) EACA 116 and **Robert John v. Republic**, Criminal Appeal No. 70 of 2020). In the present case, both accused persons raised defenses relating to the circumstances out of the context. The first accused person raised the defence of *Bifu la Mapenzi*. However, during court's questioning, he admitted that in Luo customs and traditions, that *Bifu la Mapenzi* cannot be an issues. The solution is to let it go even if it reaches at conflict level. The statement was corroborated by the second accused person and went further to state that it is very rare for Luo tradition for woman to seduce a man.

The second accused person on his part claimed the previous conflict of his brother **Ogoso Clemence** and **Samson Obure**. However, he admitted in this court that the claim is defeated by common sense as there is no direct nexus how the conflict shifted into his hands. Having said so it is obvious that the prosecution case is overwhelming than the defence. The principle in criminal is that: *if the evidence is so strong against an accused as to leave only a remote possibility in his favour, which can easily be dismissed, the case is proved beyond reasonable doubt* (see: **Magendo Paul & Another v. Republic** [1993] TLR 220).

In the present case, the offence of killing the deceased is obvious. The only question is whether they have killed the

deceased with malice aforethought to amount to murder as per requirement of the law in section 196 of the Code. The meaning of malice aforethought was enacted in section 200 of the Code and has already receive judicial interpretation in the case of **Enock Kipela v. Republic** (supra). The Court said:

> *...usually an attacker will not declare his intention 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 blow 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 attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing*

In the present case, there is allegation of *panga* and *fimbo* being used against the accused, directed on head, hand and legs with single blow of each of the accused person. However, the record is silent on utterances before, during and after the killing event. However, at page

5 of the decision, the Court had considered a situation where there is mob justice.

> *We wish to observe that as far as we know there is no civilized country in the world in which the so called* ***mob justice*** *is regarded as justice. Depending upon the particular facts of the case,* ***an attack in the course of administering mob justice which results in the death of the victim may under the law of this country , constitute murder...it would not matter who inflicted the fatal wounds.***
>
> (Emphasis supplied).

It is therefore now settled that it is not mob justice, as such, but the killing of the victim. Any death resulting from a series of attack initiated by *Yowe* or *Mwano* may constitute murder (see: **Zaveri Kanyika & Two Others v. Republic**, Criminal Appeal No. 49 of 1979 and **Elias Gwae & Three Others v. Republic**, Criminal Appeal No. 184 of 1989). However, the Court had drafted by the word **may** in the judgment to consider circumstances of each case. Some of the circumstances may be: common intention, accompanied words during the attack, infliction of fatal wounds and prolonged beatings as indicated in the case of **Elias Gwae & Three Others v. Republic** (supra) where the Court stated that:

...the beatings accompanied by words which indicate an intention to kill and in absence of any evidence that any of them dissociated himself from this express intention all who participated in the prolonged beating must be taken to have shared that intention to kill.

All said and done. I must subscribe myself to the school of thought which thinks that a series of beatings by many people may not provide evidence of malice aforethought, highest guilty of manslaughter (see: **Zaveri Kanyika & Two Others v. Republic**, (supra). In the precedent of **Zaveri Kanyika & Two Others v. Republic**, (supra), the Court observed that:

...death resulting from a series of beatings by many people cannot provide evidence of malice aforethought and therefore that even those of the appellants who took part in the assault of the deceased are at the highest guilty of manslaughter.

In my considered opinion, and from reading of the cited cases on murder associated with mob justice, I think, four (4) important elements must be established to show that there was malice aforethought, namely: first, common intention; second, infliction of fatal wounds; third, accompanied with words before, during or after the attacks; and finally prolonged beatings. In the

present case, there are uncertainty of all the four indicated factors to establish malice aforethought. There is no materials to show common intention; the first accused person was not mentioned by PW1 at the earliest available opportunity and the second accused attacked one blow; no any words were recorded before or during the attack; and no any evidence of prolonged beatings.

CONVICTION

Having said so, I find that the accused persons killed the deceased, Obure Obure @ without malice aforethought. I am therefore moved to convict the accused persons, **Mr. Agiri Okeyo Opon @ Toyo** and **Mr. Isack Clemence Achuet** for the lesser offence of manslaughter.

F. H. Mtulya
Judge
23.09.2022

ANTECEDENTS

Byamungu: My Lord, we have no previous record of the accused persons. However, My Lord, when you consider sentence, you may deliver stiff sentence. My Lord, we have reasons.

First, the deceased was a young person aged 33 years. They did cut his life short. My Lord, the accused persons do not show any remorse of the killing. My Lord, the accused must receive stiff sentence as they caused dependants on part of the deceased. The deceased had left two (2) children and wife. My Lord, this sentence has to give lesson to the community that the conduct is highly prohibited in a civilised society.

My Lord, the accused were arrested very recent. They escaped since the event and were arrested last year. My Lord, there is **Tanzania Sentencing Manual for Judicial Officers** and accused persons are placed at high level manslaughter as they used *Panga*. My Lord, exhibit P.1 showed multiple wounds on several parts of the deceased's body. My Lord, in organised gang, the Manual provides for ten (10) years to life imprisonment.

My Lord, the accused persons may receive serious sentence to show that the right of the deceased was met accordingly. That is all from our side My Lord.

F. H. Mtulya
Judge
23.09.2022

MITIGATIONS

Obwana: My Lord, for the defence, I will register mitigations for all accused persons. My Lord, first of all we pray leniency of this court in sentencing the accused persons.

My Lord, the offence falls into discretionary mandate of this court as per Manual. The range of sentence is displayed at page 49 of the Manual. My Lord, the law is there not for revenge, but punishment. My Lord, this is the first offence for the accused persons. It was just unluck for them. This court be lenient to them. My Lord, the first accused person has 26 years. It is an age that the Republic may enjoy his efforts and raise the economy of this country. His parents are aged 60 and 65 and has young brothers and sister who depend on him.

My Lord, for the second accused person, he is also young with 42 years of age and may build this country. He has one wife and six (6) children and has no father or mother. The wife and children are all depend on him. He is also suffering from Tuberculosis (TB). My Lord, the accused persons regret commission of the offence. My Lord, the accused persons have spent time in custody. According to page 5 of the proceedings during Preliminary Hearing, the first accused person was

arrested on 16.03.2021 and second 22.04.2021. My Lord, the first accused person spent about 18 months in custody and second spent 17 months. My Lord, the Manual in Item 6.9 provides that the time spent in custody may be considered as in the case of **Augustino Mpunda v. Republic** [1991] TLR 97.

My Lord, for the first accused person, 18 months be deleted and second 17 months be deleted in sentence. My Lord, for all that I said, I pray for lenient sentence to these accused persons.

That is all My Lord.

F. H. Mtulya
Judge
23.09.2022

SENTENCE

The present accused persons, **Mr. Agiri Okeyo Opon @ Toyo** and **Mr. Isack Clemence Achuet** were prosecuted for murder of **Obure Obure @ Mihago** and found guilty of a lesser offence of manslaughter. The offence is prohibited under section 195 of the **Penal Code** [Cap. 16. R.E. 2019] and its penalty is enacted under section 198 of the Code and may go up to life imprisonment.

However, the practice of the Court of Appeal has been that in cases like the present one to sentence the accused persons to

twelve (12) years is reasonable (see: **Ramadhani Omary v. Republic**, Criminal Appeal No. 83 of 2018). According to the defence counsel, this court may sentence accused persons with leniency of lesser sentence as they have families which depend on them, they are young persons who can serve this nation and may consider time spent in prison custody, whereas the Republic thinks that the sentence against the accused person may send a lesson to all those intend to participate in mob justice in a civilized county.

It is fortunate that both learned minds agreed that currently there is **Tanzania Sentencing Manual for Judicial Officers** produced 31st December 2019 to assist judges in sentencing and avoiding high discrepancies in sentencing accused persons who are found guilty on various offences. For the offence of manslaughter three (3) levels of sentencing range were put in place at page 55 of the Manual and that, those manslaughter related to use of weapons, which cause multiple wounds and those motivated by gang, the sentencing range is ten (10) years to life imprisonment.

Having said so, my hands are tied to follow the Manual. However, page 57 of the Manual, the directives is to deduct any time served in custody. Following the directive, I have decided to

sentence both accused persons, **Mr. Agiri Okeyo Opon @ Toyo** and **Mr. Isack Clemence Achuet** to eight (8) years imprisonment from the date of this judgment, 23rd September 2022.

Ordered accordingly.

F. H. Mtulya
Judge
23.09.2022

This judgment was delivered in open court in the presence of the accused persons, **Mr. Agiri Okeyo Opon @ Toyo** and **Mr. Isack Clemence Achuet**, and in the presence of their learned counsel **Mr. Paul Obwana** and in the presence of learned State Attorney, **Mr. Nimrod Byamungu** for the Republic.

F. H. Mtulya
Judge
23.09.2022