

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT TARIME

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE No. 128 OF 2022

THE REPUBLIC

Versus

NG'WEINA MWIKWABE NG'WEINA

JUDGMENT

13.10.2022 & 17.10.2022

Mtulya, J.:

In the present case, **Mr. Ng'weina Mwikwabe Ng'weina** (the accused) was brought in this court to reply an information of murder of **Mr. Jeremiah John Marwa** (the deceased) contrary to section 196 and 197 of the **Penal Code [Cap. 16 R.E. 2019]** (the Penal Code). The murder is alleged to have occurred on 25th day of November 2018 at Kubiterere Village within Tarime District in Mara Region. The Republic alleged that **Mr. Okumu Nyambogei** (PW1) had witnessed the accused attacking the deceased with stick during mob justice to chastise deceased's theft behaviours.

The extract from PW1's statement, recorded at **Sirari Police Station** (the police) on 25th November 2018, immediately after the mob justice, which the Republic heavily relied to establish its case, reads that:

Niliwaona Maseke Mwikwabe Ng'weina, Ryoba Wankuru Isaro, Ng'weina Mwikwabe Ng'weina, Werema Wankuru Marasi na Magabe Marwa Marasi wakiwa wanamshambulia kwa kumpiga na fimbo sehemu mbalimbali za mwili wake ikiwemo sehemu za mbavu. Ambapo nilimshuhudia Ng'weina Mwikwabe Ng'weina akinyanyua fimbo na kumpiga Jeremiah John Marwa kichwani upande wa kushoto. Ndipo mimi nikawafuata na kuanza kuwauliza ni kwa nini wanampiga. Mwenyekiti, Maseke Mwikwabe Ng'weina, akajibu kwamba wanampiga kwa sababu ameiba solar ya watts 10 mali ya Ryoba Wankuru Isaro, ambaye pia na yeye alikuwa hapo. Alikuwa anashiriki kumpiga na kumshambulia kwa kumpiga Jeremiah John Marwa sehemu za mgongoni.

In situations like the one alleged by PW1 in his statement, the observation and thinking of our superior court, the Court of Appeal (the Court) in the precedent of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994, at page 5 of the judgment, is that:

*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 now settled law from precedent of the Court that if mob justice is established beyond reasonable doubt, a human killing emanated from it, may amount to murder. Therefore, any death resulting from a series of attacks initiated by *Yowe, Mwanu* or *correcting thieves behaviours*, may constitute murder (see: **Zaveri Kanyika & Two Others v. Republic**, Criminal Appeal No. 49 of 1979; **Elias Gwae & Three Others v. Republic**, Criminal Appeal No. 184 of 1989; **Republic v. Petro Massaga**, Criminal Sessions Case No. 129 of 2016 and **Republic v. Agiri Okeyo Opon @ Toyo & Another** Criminal Sessions Case No. 129 of 2022).

However, the Court had drafted its observations by use of the word **may** in the judgment to consider circumstances of each particular 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.

Similarly, it is established law in our country that the Republic must establish its cases brought before courts beyond reasonable doubt (see: of section 3 (2) (a) of the **Evidence Act [Cap. 6 R. E. 2022]** (the Evidence Act); **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Said Matula v. Republic** [1995] TLR 3; **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005 and **Amos Alexander @ Marwa v. Republic**, Criminal Appeal No. 513 of 2019). Where the onus shifts to the accused, it is on a balance of probabilities (see: **Said Hemed v. Republic** (supra) and **Republic v. Anthony Mchuma Mniko**, Criminal Sessions Case No. 55 of 2022).

The term beyond reasonable doubt is not statutorily defined. However, the practice in the precedents of **Magendo Paul & Another v. Republic** [1993] TLR 219 and **Nehemia Rwechungura v. Republic**, Criminal Appeal No. 71 of 2020, shows 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 a remote possibility in his favour which can easily be dismissed.

Regarding information of murder against accused persons, the Court in **Mohamed Said Matula v. Republic** (supra), observed 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 shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.

(Emphasis supplied).

In the present case, there is no dispute from the evidence of PW1, **Police officer, G.9298 D/C John** (PW2), **Mr. Msoba Chacha Mwita**, Witness Statement of PW1 (P.1) and Postmortem Examination Report of the deceased (P.2), that accused actually died unnatural death. Similarly, during final submissions of the learned minds, who appeared in this case, **Mr. Peter Iole** assisted by **Mr. Lusako Mwaikenda**, learned State Attorneys, who appeared for the Republic and **Mr. Samson Samo** for the defence, agreed that: *death resulting from a series of beatings by many people cannot provide*

evidence of malice aforethought. The dispute, therefore is on the link between the death of the deceased and accused.

The prosecution cites the above indicated paragraph from PW1 which links the deceased and accused. However, when the case was scheduled for hearing on 12th October 2022, PW1 turned hostile and the accused pleaded the defence of *alibi*. According to Mr. Samo, in the present case there is no link between the death of the deceased and accused.

In order to substantiate his point, Mr. Samo provided a total of five reasons, namely: first, eye witness PW1 testified in court that the accused is not Ng'weina Mwikwabe Ng'weina he saw at the crime scene; second, PW1 went to Sirari Police Station to say the accused is not the one mentioned in P.1; third, Ng'weina Mwikwabe Ng'weina mentioned in P.1 escaped and cannot be found; fourth, the accused testified he was in Morogoro during the attacks against the deceased on 25th November 2018; and finally, witness Mosoba Chacha Mwita (DW2) had testified that the accused had left Kubiterere Village for Morogoro since early 2000s to 2019. In ending his final submission, Mr. Samo stated that, although mob justice may amount to manslaughter, but the accused cannot be found of the same as the prosecution failed to establish the link as required by the Court in the precedent of **Anthony Kinanila & Another v. Republic**, Criminal Appeal No. 83 of 2021.

On the other hand Mr. Iole was of the view that the Republic had discharged its duties as per requirement of the law and established the nexus between the unnatural expiry of the deceased and accused. In bolstering his submission, Mr. Iole stated that the Republic has brought eye witness in exhibit P.1 and PW2 to establish the link and accordingly established without any doubts. In his opinion, oral evidence of PW1 during court proceedings may be disregarded as he decided to turn hostile against the Republic. In order to substantiate his point, Mr. Iole stated that PW1 admitted in this court that he knows how to read and write, but later when requested to read P.1 he declined with reasons of eye problems, but later during court questioning he read P.1 properly before the court.

The dispute on the connection between the unnatural expiry of the deceased and the accused can be easily appreciated after reading the following facts of the case brought in this case by the parties. During hearing of the case, PW1 testified that on 25th November 2018, when passing at Nyambache Hamlet Chairman's residence at Kubiterere Village, he saw Nyambache Hamlet Chairman, Mr. Maseke Mwikwabe, Kisamole Ryoba, Ryoba Wankuru, Ng'weina Mwikwabe Ng'weina and traditional security persons called Sungusungu attacking the deceased with sticks in different parts of the body.

According to PW1, he saw by his own eyes Ng'weina Mwikwabe Ng'weina, but it is not the Ng'weina Mwikwabe Ng'weina who is prosecuted in the present case, as there are plenty of Ng'weina Mwikwabe Ng'weina in Kubiterere Village. However, the oral evidence adduced by PW1 during the proceedings in the present case, has invited several doubts to his reliability and credibility. First, he declined to read P.1 when he was requested by Mr. Iole, complaining of sight problems, but read the same during court's inquiry; second, he initially identified the accused as Ng'weina Mwikwabe Ng'weina during questioning by Mr. Iole, but later during Mr. Samo's cross examination, he declined the same statement he had given earlier; third, he admitted to understand both reading and writing Swahili, and signed P.1, but complained some statement are not correct; he testified that the name Maseke Mwikwabe Ng'weina in P.1 is the same person as Ng'weina Mwikwabe Ng'weina; and PW1 had no any copy of complaint letter depicting a complaint on P.1 wrong recording or wrong arrest of the accused.

In any case, PW1 admitted in this court that he recorded the statement immediately after the attacking event and saw the accused attacking the deceased with sticks at the left hand side of the head. The law regulating *the ability of a witness to name a suspect at the earliest opportunity and assurance of his reliability*

and credibility is drawn from the Court's decision in **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39. The Court, in brief, stated that the ability of a witness to name a suspect at the earliest opportunity is the most important guarantee of reliability and credibility of the witness. The law has been followed by this court without any reservations whatsoever (see: **Republic v. Agiri Okeyo Opon @ Toyo & Another** (supra) and **Republic v. Muhiri Nyangaira Nyankaira**, Criminal Sessions Case No. 78 of 2021).

PW2 on his part testified that he had: investigated the murder against the accused by involving the deceased's family members; visited the crime scene; participated in the examination of the deceased's body; recorded PW1's statement; and interrogated the accused. Regarding relatives of the deceased, PW2 testified to have interrogated deceased's brother, Mr. Ryoba John Marwa who was recorded to have seen the accused and Nyambache Hamlet Chairman, Mr. Maseke Mwikwabe Ng'weina arresting the deceased at their farmland in good health, but a bit later the deceased was pronounced dead.

PW2 testified further that he had participated in witnessing post-mortem examination led by medical doctor, Dr. Devotha of Tarime District Hospital and interrogated the accused on the murder of the deceased, but denied to have attacked the

deceased by sticks on 25th November 2018. According to PW2, after the arrest of the accused PW1 was summoned at Sirari Police Station on 3rd August 2020 to identify him, and confirmed he is the one mentioned in the P.1. Finally, PW2 tendered the post-mortem report of the deceased by reason of absence of Dr. Devotha and cannot be found, as per requirement of the law under section 34B of the **Evidence Act [Cap. 6 R.E. 2019]** (the Evidence Act).

On the other hand the accused appearing as defence witness number one (DW1) testified that he did not participate in attacking the deceased on 25th November 2018 as he was at Iringa Road Hamlet of Mkino Village within Hembeni Ward in Mvomero District of Morogoro Region since 2001 and returned in home Village of Kubiterere within Tarime District in Mara District in December 2019 for taking care of his sick father. According to DW1, he was living all that time in Morogoro with his family, including a wife and children. Testifying on reasons of arrest and brought in this court for the murder of the deceased, DW1 stated that the police had confused him and his young brother, Ng'weina Mwikwabe Ng'weina. To DW1, it is the confusion on his arrest that brought DW2 and John Marwa to Sirari Police Station to correct the confusion, but the police did not cooperate.

In finalising his testimony, DW1 stated that the name Ng'weina belongs to many people in his home village and the prosecution must bring in this court appropriate Ng'weina who had escaped to neighbouring state of Kenya. However, DW1 stated that he had travelled from Morogoro to Mwanza by Nyehunge Bus Service and Mwanza to Sirari by Zakaria Bus Service; he cannot remember where he kept the busses' tickets; he cannot invite his wife and children to testify in support of his *alibi* defence as they are in Morogoro Region and cannot afford to come to Tarime to testify in the case; and he did not know PW1 before except after return from Morogoro in December 2019 as PW1 lives in Kenya and occasionally appearing in the village.

In support of his testimony, DW1 summoned DW2 who briefly testified that he was not present during the attacks and killing of the deceased, but was informed the whole saga by PW1. According to DW2, upon arrival at the crime scene, he was informed by villagers that the deceased was attacked and killed by *Wananchi Wenye Hasira Kali* led by some hamlet leaders and members of *Sungusungu*, including Hamlet Chairman Mr. Maseke Mwikwabe and Hamlet Sungusungu Commander Mr. Gesamule Ryoba Kisumte. Regarding the reasons of the attacks, DW2 stated that there were allegation of stealing Solar Power from Mr. Ryoba Wankulu. DW2 testified further that the names Ng'weina

Mwikwabe Ng'weina belong to four (4) up to six (6) persons in the Village as they originated from Ng'weina clan, which occupies 80% of the villagers.

However, DW2 testified that the reason of accused's arrest emanated from personal conflict between Magabe Mwikwabe, a brother to the accused and Mr. John Mwita, a father of the deceased, which occurred at a local brew bar, but he was not present during the conflict. Regarding knowing each other between the accused and PW1, DW2 testified that they know each other and very familiar to one another as they are neighbours in Kubiterere Village and PW1 had been living in the Village since 1998 and served as Village Council between 2014 to 2019; he did not register any complaint letter to police authorities on confusion of accused and other **Ng'weina Mwikwabe Ng'weina**; Village Registration Book had only one name of **Ng'weina Mwikwabe Ng'weina** and one name of **Maseke Mwikwabe**.

I have indicate above that the term beyond reasonable doubt is not statutorily defined, but precedents in **Magendo Paul & Another v. Republic** (supra) and **Nehemia Rwechungura v. Republic** (supra) stated 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 a remote possibility in his favour which can easily be dismissed.

I have also indicated in this judgment that for murder cases against accused persons, *the onus is always on the prosecution side to prove not only the death but also the link between the said death and the accused and that no duty is cast on the appellant to establish his innocence (see: **Mohamed Said Matula v. Republic** (supra).*

In the present case, the issue before this court is whether: *the materials registered by the Republic are strong and establish the case against the accused as to leave a remote possibility in his favour.* In determining the issue, the nexus between the death of the deceased and accused will be invited in the determination of the case. In the instant case, the Republic had brought P.1 which points a finger to the accused. P.1 was produced in court by PW1 as a hostile witness, who testified that the accused is not **Mr. Ng'weina Mwikwabe Ng'weina** mentioned in P.1.

However, PW1 had declined to read P.1 when he was requested by Mr. Iole during the proceedings in this court, complaining of sight problems, but read the same P.1 during court's inquiry; he initially identified the accused as **Ng'weina Mwikwabe Ng'weina** during questioning by Mr. Iole, but later during Mr.

Samo's cross examination, he declined the same statement he had given earlier stating that there are plenty of names **Ng'weina Mwikwabe Ng'weina**; he admitted to understand both reading and writing Swahili, and signed P.1, but complained some statement are not correct; he testified that the name Maseke Mwikwabe Ng'weina in P.1 is the same person as Ng'weina Mwikwabe Ng'weina whereas DW2 testified that at the occurrence of the event the Village Registration Book had only one name of **Mr. Ng'weina Mwikwabe Ng'weina**; and PW1 had no any copy of complaint letter depicting a complaint on P.1 wrong recording or wrong arrest of the accused on 3rd August 2020.

The oral contradiction against exhibit P.1 brought by PW1 in this court just lowers his credibility and reliability during the proceedings. However, his statement in P.1 corresponds with the directives of the Court in the precedent of **Marwa Wangiti Mwita & Another v. Republic** (supra) on the ability of a witness to name a suspect at the earliest opportunity and assurance of his reliability and credibility. The move stated in the precedent received several supports (see: **Republic v. Agiri Okeyo Opon @ Toyo & Another** (supra) and **Republic v. Muhiri Nyangaira Nyankaira** (supra)). In any case, PW2 testified in this court that PW1 was invited to recognize the deceased as a neighbor, village mate and accused, and confirmed the accused was the one cited in P.1. It is unfortunate

that the complaint on the confusions of the accused and **Mr. Ng'weina Mwikwabe Ng'weina** was brought in this court during the hearing of the case, without any necessary materials in support of the move.

I am aware the accused has raised the defence of *alibi*. The law regulating the defence of *alibi* requires the accused to adduce relevant materials that will convince the court that he was actually absent during the occurrence of the offence or else call such person(s) he claims he was with them at the time when the offence was committed. The practice from the Court in the precedent, **Sijali Juma Kocho v. Republic** [1994] TLR 206, is to the effect that:

The appellant was under no legal obligation to prove the alibi but in the fact of the allegations made against him one would reasonably expect him to call the person he claims he was with at the time of the event.

It is correct that the accused person has no duty of proving his defence of *alibi*. I am however, of the settled mind that since the accused person knew that his case was scheduled for trial on 11th October 2022, anyone would have anticipated the accused to summon his wife or any of his children to testify on his side in order to boost his defence (see: **Tongeni Naata v.**

Republic [1991] T.L.R. 54 and **Chrizant John v. Republic**, Criminal Appeal No. 313 of 2015). To have not done so, the accused defence becomes weak and unbelievable. In short, the accused defence of *alibi* did not cast any doubt on the prosecution case. I therefore do not agree with his defence of *alibi*.

Regarding the evidence of DW2, this court cannot be detained on the subject as during the hearing of the case, DW2 testified that he was absent and did not witness the attacks. He further contradicted the reasons of arrest of the accused in citing the conflict between deceased's father and accused's brother.

In the present case, the Republic had brought in this case stronger evidence than that of accused as per established precedent in **Magendo Paul & Another v. Republic** [(supra) and I hold that the accused attacked and killed the deceased with sticks on 25th November 2018 at Kubiterere Village within Tarime District in Mara Region. In the present case, all has been said and agreed on malice aforethought and I fully subscribe to the school of thought that series of sticks beatings by many people may not provide evidence of malice aforethought (see: **Zaveri Kanyika & Two Others v. Republic**, (supra); **Elias Gwae & Three Others v. Republic** (supra); **Republic v. Petro Massaga** (supra); and **Republic v. Agiri Okeyo Opon @ Toyo & Another** (supra).

In the end, and having said so, I hold the accused, **Mr. Ng'weina Mwikwabe Ng'weina**, responsible for manslaughter of the deceased, **Mr. Jeremiah John Marwa** that occurred on 25th day of November 2018 at Kubiterere Village within Tarime District in Mara Region, contrary to section 195 and 198 of the **Penal Code** [Cap. 16 R.E. 2019].

It is so ordered.

F.H. Mtulya

Judge

17.10.2022

The facts of the case and conviction order pronounced in open court in the presence of the accused, **Mr. Ng'weina Mwikwabe Ng'weina**, and his learned Defence Counsel, **Mr. Samson Samo** and in the presence of learned State Attorney, **Mr. Lusako Mwaiseke** for the Republic.

F.H. Mtulya

Judge

17.10.2022

ANTECEDENTS

Mwaiseke: My Lord, we have no previous records of the accused, but we pray this court to sentence the accused according to the law so that it may be a lesson to others. My Lord, this accused used sticks to attack the deceased and was motivated by a gang of people. My Lord, the gang used

unreasonable force in correcting the behaviours of the deceased.
My Lord, after saying all that, we let it to this court to decide the sentence. I thank you My Lord.

F.H. Mtulya

Judge

17.10.2022

MITIGATIONS

Samo: My Lord, I thank you. For the defence, we pray this court to consider the following before sentencing the accused.

1. He is the first offender;
2. He has seven (7) dependants, from his mother, wife and children;
3. He has been in custody for more than a year;
4. He is suffering from Tuberculosis;
5. He had no malice aforethought. He intended to correct deceased's behaviours.

My Lord, for the cited reasons, I pray to submit.

F.H. Mtulya

Judge

17.10.2022

SENTENCE

The accused was prosecuted for murder and found guilty of lesser offence of manslaughter contrary to section 195 and 198 of the **Penal Code** [Cap. 16 R.E. 2019]. Facts produced during

the hearing show that he participated in attacking the deceased at different parts of the body. During mitigations, his learned counsel, Mr. Samo stated that: he intended to correct theft behaviours of the deceased; he is first offender; he has seven (7) dependants; he has been in custody for more than a year; and he is sick suffering from Tuberculosis. However, this thinking is protested by Mr. Mwiseke for the Republic praying that this court to order stiff sentence that may send a lesson to other persons who engage in mob justice.

On my part, I think, the practice called mob justice has already been discouraged by our superior court, the Court of Appeal in the precedent of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994, that there is no civilised county in the world which the so called mob justice is regarded as justice. In the present case, the accused used sticks and attacked at vulnerable part of the body, head. The circumstances of this nature is regulated by the **Tanzania Sentencing Manual for Judicial Officers** in the **high level of manslaughter**, which itemised, use of dangerous weapons or substance, serious multiple wounds and offences motivated by gang, which may attract ten (10) years to life imprisonment.

However, each case is decided on its own peculiar circumstances, and after considering the antecedents and mitigations. The accused is the first offender, intended to correct behaviours of the deceased, he is currently sick suffering from tuberculosis and has been in custody for more than a year. Having said so and considering all materials registered in the present case, I have decided to sentence the accused, **Ng'weina Mwikwabe Ng'weina**, to six (6) years imprisonment from the date of this order, 17th October 2022.

It is so ordered.

Right of appeal explained to the parties.



F.H. Mtulya

Judge

17.10.2022

This sentence order was pronounced in open court in the presence of the accused, **Mr. Ng'weina Mwikwabe Ng'weina** and his learned accused, **Mr. Samson Samo** and in the presence of **Mr. Lusako Mwaiseke**, learned State Attorney for the Republic.

F.H. Mtulya

Judge

17.10.2022