THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

CRIMINAL SESSION CASE NO. 102 OF 2016

REPUBLIC

Versus;

AHAZI S/O KILOWOKO

JUDGMENT

28th Sept & 04th November, 2022.

UTAMWA, J:

The accused person, AHAZI KILOWOKO stands charged with a single count of murder contrary to section 196 of the Penal Code, Cap. 16 RE. 2002 (Now RE 2022), hereinafter referred to as the Penal Code. It was alleged by the prosecution that, on the 1st day of April, 2016 at Kilolo Village in Mufindi District, the accused murdered one THADEI S/O LUKUNGU, henceforth the deceased. When the charge was read over and explained to the accused person, he pleaded not guilty to it, hence a full trial.

It must be noted at this juncture that, the accused was previously tried by this court (Before Feleshi, J. as he then was) for the same offence. He

was convicted and sentences. Nonetheless, on appeal, the Court of Appeal of Tanzania (the CAT) nullified the proceedings and ordered a re-trial. This judgment is the result of the retrial. Indeed, the retrial proceeded without the aid of assessors vide the provisions of section 265(1) of the Criminal Procedure Act, Cap. 20 (The CPA) as repealed and replaced vide section 30 of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022. The current provisions of the Act thus, no longer make it compulsory for a trial of this nature to be conducted with aid of assessors.

During the retrial the republic was represented by Mr. Matiku Nyangero, learned State Attorney whereas the accused person was represented by Mr. Alfred Stephano, learned advocate.

It was not disputed during the preliminary hearing conducted under section 192 of the CPA that, at the material time the accused resided in Kilolo village, the deceased and the accused knew each other since the former was father in law of the latter ant that, the deceased died on the 1st day of April, 2016 in Kilolo village.

In supporting the charge against the accused, the prosecution paraded three (3) witnesses. Their evidence was accompanied by three (3) exhibits. The accused person relied upon his own sworn defence and called no other witness.

According to the first prosecution witness (PW.1) one E. 9803, D/Sgt Pendo Kalula, a police officer and investigator of this case, the prosecution case was essentially that; in 2016 while working at Mafinga Police Station, PW.1 was assigned by his superior officer to go to Kilolo village for attending

a murder event. PW.1 collected his fellow officers and went to the scene of crime accompanied by a medical doctor. When they arrived at Kilolo village they met village leaders who led them to the scene of the crime (the deceased's house). They found the deceased's body lying near the door bleeding. His body had wounds on the head.

PW.1 testified further that, the doctor examined the deceased's body and he (PW.1) drew a sketch map of the scene of crime (exhibit P.1). He also interrogated various persons who were acquainted with the facts of the event. He was informed by such persons that, the suspect of the murder was the accused. They then searched for the accused, but they could not find him. On 25th June 2016 he was informed by his senior officer (ASP Damas) that, the accused had been arrested and held at Kilolo village offices. On 26th June 2016 the accused was taken to Mafinga Police Station by one Cpl. Athumani.

It was also the PW.1's testimony that, he was then instructed to record the accused's cautioned statement. He thus, took the accused to the interrogation room where he introduced himself and informed him of his rights before recording the statement. He then gave the statement to the accused to verify the contents and he (accused) signed the statement. The said statement was however, objected by the defence side. Upon this court conducting a trial within trial (The TWT), the statement was rejected in evidence.

Mrs. Sekela Eden Kyungu testified as PW.2. Her testimony was basically that, at the material time she was a primary court magistrate

stationed at Mafinga Primary Court. She was thus a Justice of Peace (JP). On 28th June 2012 while at her work place, there came a police officer with a suspect who wanted to have his Extra Judicial Statement (EJS) recorded by her (PW.2). She thus, instructed the police officer to stay away from her office and she ensured that he complied with the directives. She then asked the accused if he was ready to have his statement taken. PW. 2 also asked the accused if he knew Kiswahili. Upon inquiry she was satisfied that the accused was willing to have his EJS taken. She therefore, recorded it. The statement was objected by the defence side, but upon the court hearing both sides it made a ruling (order) admitting it in evidence as exhibit P.2.

The PW.2 further told the court that, in the exhibit P.2, the accused confessed to have killed the deceased because he was bewitching his family. He also confessed to have used a metal bar (*nondo* in Kishwahili) to hit the deceased on the head several times. The deceased thus, fall down and died. The accused then left.

Another prosecution witness was Dr. Valentino Chula who testified as PW.3. In his testimony, he said that he is a medical doctor. In 2016 he was stationed at Kasanga Health Centre. On 2nd April 2016 while at his work place he was approached by police officers and informed him that there was a dead body at Kilolo Village, hence the need to be examined. He (PW.3), together with the police officers went to a house at Kilolo village where they found a dead body of a male person lying on the floor. It was surrounded by blood. The body was identified to him as one of the deceased. He thus, examined it and found that, there was a wound on the head. PW.3 then filled

a Post Mortem Report (PMR). The PMR (exhibit P.3) showed that, the cause of death was severe head injury due to sharp like object.

Upon the closure of the prosecution case, this court, under section 293 (2) of the CPA made a ruling which found the accused with a case to answer. The court informed him of his rights under the cited provisions. The accused opted to give evidence on oath without calling any other witness to testify for his support.

The sworn defence of the accused was essentially that, on 24th June 2016 while working in his farm three people approached him. They informed him that he was needed in the village offices and they took him there. While in the village offices there came a motor vehicle with three persons. He was then handcuffed and taken to the said motor vehicle. He was taken to Igowole police station where he was put in the lock up. On 25th June, 2016 at about 15:00 p.m he was taken to Mafinga Police Station where they arrived at around 18:00 p.m. On 26th June, 2016. He was then taken to an interrogation room where he was interrogated.

It was also the evidence by the accused that, on 28th June 2016 he was taken to a lady whom he called the "boss." The police officer who took him there told him to agree with everything that the boss could tell him (accused). The lady had some papers and she forced him (accused) to sign them. He thus, signed the same by a pen and not by thumb.

The accused thus, denied to have been involved in the charged offence since on the material date he was in Makambako. He also said, on 1st April, 2016 he was only informed of the death of the deceased by one Petro Moto.

He thus, went to Kilolo village on 2nd April, 2016 for the burial. He concluded his defence by praying for this court to acquit him.

Upon the closure of the trial, both sides opted to make written final submissions. The learned State Attorney contended that, the issue for determination in this case is *whether the accused is the one who murdered the deceased*. There is no direct evidence to connect the accused person with the charged offence. The onus of proof is always on the prosecution. It must prove not only the death of the deceased, but also the link between the said death and the accused. The accused has no duty to establish his innocence as it was stated in the case of **Mohamed Said Matula v. Republic (1996) TLR 3.**

The learned State Attorney submitted further that, the burden of proof placed on the prosecution is based on the presumption of innocence in favour of the accused. The same is well enshrined under Article 13(6)(b) of the Constitution of the United Republic of Tanzania, 1977. This stance was also underscored in the case of **John Makolobola v. Republic (2002) TLR 296.**

The learned State Attorney also contended that, it is trite law that the prosecution is required to prove all the ingredients of murder in order to secure a conviction. It must thus, prove beyond reasonable doubts that the deceased really died, the death was caused by the accused unlawfully and with malice aforethought. This was the position underlined in the case of **Antony Kinanila and Enock Antony v. The Republic, Criminal Appeal No. 83 of 2021, Court of Appeal (CAT) at Kigoma** (unreported).

In the present case, the learned State Attorney submitted, the evidence shows that it is undisputed that the deceased died and his death was caused by an unlawful act. The killing was committed with malice aforethought as proved by the evidence of PW.3 (Dr. Valentino) who tendered exhibit P.3 (the PMR). The exhibit shows that, the cause of death was severe head injury due to sharp-like object. This evidence was corroborated by the evidence of PW.1 who saw the dead body of the deceased. The accused did not also dispute that the deceased is actually dead.

It was also the contention by the State Attorney that, the pertinent question in this case is whether the accused person participated in the murder at issue. The only evidence connecting the accused to the offence is his own EJS tendered as P.2. He referred the court to the case of **Tuwamoi v. Uganda (1967)** where the erstwhile East African Court of Appeal held that, a trial court should accept with a caution a confession which was retracted or repudiated after being satisfied that the confession is true. The accused's EJS is good evidence against him. The information contained in it is nothing, but true and could not be obtained from any other person apart from the accused himself. There is therefore, no reason whatsoever for not believing the JP's testimony which contains relevant information connecting the accused person to the charged offence. He cited section 28 of Cap. 6 which provides that, a confession which is freely and voluntarily made before a JP may be proved as against that person.

Additionally, the learned State Attorney argued that, it is trite law that a retracted or repudiated confession can secure conviction against the

accused provided that the court believes that the statement is true. To support his argument, he cited the case of **Michael Luhiye (1994) TLR 181**. He added that, it is a principle of law that the best evidence in a criminal trial is a voluntary confession from the accused himself as it was held in **Nyerere Nyague v. Republic, Criminal Appeal No. 67 of 2010, CAT at Arusha** (unreported). The accused person in the present case is thus, the one who intentionally caused the death of the deceased.

It was also submitted by the learned State Attorney that, the accused's defence that he did not voluntary give his EJS is an afterthought. This is because, the allegation was not raised before admission of the EJS. Moreover, the JP was not cross-examined on the said allegation that she forced the accused to sign the EJS. The law clearly guides that, failure to cross-examine a witness on the facts in his evidence implies that the facts are undisputed as it was held in **Nyerere Nyague case** (supra).

The learned State Attorney also argued that, the defence of *alibi* raised in the defence should be rejected by the court. This is because, the defence side did not comply with the requirements set under section 194(4) of the CPA. Furthermore, the accused did not call any witness to support the fact that he was in Makambako on the material date. To bolster his contention, he cited the case of **Masudi Amlima v. Republic (1989) TLR 25.** He thus, urged the court to convict the accused on his EJS. He added that, the entire prosecution evidence had no any contradiction. In case of any contradiction the same is minor and does not go to the root of the matter since they are inconsequential as stated in the case of **Said Ally Ismail v. Republic, Criminal Appeal No. 249 of 2008** (unreported).

On the other hand, the learned defence counsel urged the court to find the accused innocent. This was so because, the prosecution has failed to prove its case beyond reasonable doubts as required by the law. He further contended that, the duty casted on the prosecution to prove the case beyond reasonable doubts was underscored in the case of **Woodmington v. DPP (1935) AC 462.** There is no statutory definition of the phrase beyond reasonable doubt. Nonetheless, in various cases courts of law have defined the said phrase. One of the cases is **Magendo Paul & Another v. Republic (1993) TLR 219.**

The defence counsel further contended that, in the present case, the prosecution has left doubts which must be resolved in favour of the accused. There is contradicting testimonies by the prosecution witnesses. PW.1 for example, testified that the sketch map of the scene of crime was drawn on 2nd April, 2016 while the sketch map admitted in court reveals that it was drawn on 1st April, 2016. Moreover, PW.2 testified in court that the accused's EJS was recorded on 28th June, 2016. However, her own statement made at the police station (which was admitted as exhibit D.1 during her cross-examination) revealed that the EJS was recorded on 2nd June, 2016. Another contradiction is that, the PW.2 testified that, the accused was arrested at Igowole and then taken to Mafinga Police Station. Nonetheless, the PW.1 testified that he was informed that the accused had been arrested at Kilolo Village. Moreover, the PW.3's evidence showed that, the cause of death of the deceased was multiple head injury and excessive blood loss. Nevertheless, the exhibit P. 3 shows that the cause of death was severe head injury.

The defence counsel also submitted that, in law, not every contradiction in the prosecution case has the effect of dismantling it. However, the contradictions in the present case go to the root of the case. He thus prayed for the court to disregard the prosecution testimony. He supported his prayer by citing the cases of **Sylvester Stephano v. Republic, Criminal Appeal No. 527 of 2016, CAT at Arusha** (unreported) and **Anold Loishie @ Leshai v. Republic, Criminal Appeal No. 249 of 2017, CAT at Arusha** (unreported).

The defence counsel also faulted the prosecution's case on the failure to call material witnesses and produce material evidence. He submitted that, PW.1 testified that when he arrived at the crime scene he interrogated various witnesses who named the accused as the instigator of the murder, but no such people were called to testify in court. Furthermore, the prosecution did not in any way give reasons why such witnesses were not called. Another witness who was not called was one Damas Massawe who informed the PW.1 on the arrest of the accused and instructed him (PW.1) to record his cautioned statement. He argued that, in law, failure to call a material witness entitles the court to draw an adverse inference against the prosecution case. He cited the case of **Allen Frank Maguzo v. Republic, Criminal Appeal No. 46 of 2021, High Court of Tanzania at Moshi** (unreported) to support his contention.

The learned defence counsel further contended that, the accused's EJS is tainted with irregularities as it offends the Chief Justice's Guidelines. This is because, there is no prosecution witness who testified that there was a letter from the police officer in-charge which showed that the accused

wanted to voluntarily make his statement as required by the guidelines. PW.2 also violated the guidelines as she did not seek the accused's consent to examine his body. She also did not record the time the accused was arrested and did not inform the accused that his EJS will be used as evidence in court once he is charged. He also argued that, the guidelines require that, once the JP is done with recording the statement, the statement should be handled to the court clerk. But, the PW. 1 in the present case, upon finishing recording the statement, handled it to PW.1. He thus contended that, failure to comply with the guidelines shows that, the confession was involuntarily procured. To cement his position, he cited the cases of **Geofrey Sichzya v. DPP, Criminal Appeal No. 176 of 2017, CAT at Mbeya** (unreported) and **Japhet Thadei Msigwa v. The Republic, Criminal Appeal No. 367 of 2008, CAT at Iringa** (unreported).

It was also the defence counsel's submission that, the accused did not tender proof of his *alibi* because, the means of transport used was a bicycle. No fare ticket or receipt could thus, be issued to the accused for producing in court. The court should thus, not convict the accused on the weakness of his defence since that will not sweet the law as it was underlined in the **Allen Frank case** (supra). He added that, no weight should also be accorded to the accused's EJS as there is no evidence that corroborated it. He thus urged the court to acquit the accused person for the interest of justice.

I have considered the charge sheet in the case at hand, the evidence from both sides, final written submissions from both sides and the law. The major issue is whether the accused *Ahazi s/o Kilowoko is guilty of the murder of the deceased, Thadei s/o Lukungu.*

In law, to prove the offence of murder under section 196 of the Penal Code, the following key ingredients must be established:

i. That, the victim of the crime (murder) mentioned in the charge, actually died,
ii. That, it was the accused person who in fact, caused the death of the deceased (or killed him),
iii. That, the killing of the deceased was with malice aforethought,
iv. That, the killing was performed by committing an unlawful act or omission.

It is also trite law that, the prosecution bears the burden of proving a criminal charge against an accused. The standard of proof thereof, is beyond reasonable doubt as rightly contended by the counsel for both parties. This is the spirit underlined under Section 3(2) (a) of the Evidence Act, Cap. 6 R.E 2019 (The Evidence Act) and the holding by the CAT in the case of **Hemed v. Republic [1987] TLR 117.** The CAT in the **Magendo Paul case** (supra) described the standard of proof beyond to mean a situation where the evidence is so strong against an accused as to leave only a remote possibility in his favour, which can easily be dismissed. The law further guides that, an accused person bears no duty to prove his innocence. His/her duty is only to raise reasonable doubts in the mind of the court. It is also a legal principle that, any reasonable doubt left by the prosecution evidence in criminal proceedings should be resolved in favour of the accused person.

In the matter at hand therefore, I will test one ingredient after another before I answer the major issue posed above.

In regard to the first ingredient of the offence of murder, the sub-issue is *whether or not the victim of the murder mentioned in the charge sheet (i.e Thadei s/o Lukungu) actually died*. In fact, this fact has not been disputed by both parties. It is also supported by the PW.3 who medically examined the body of the deceased. The accused himself in the memorandum of agreed matters admitted that the deceased died on 1st April, 2016. The PMR tendered by the PW.3 also cements this fact. The first ingredient of murder has thus, been proven beyond reasonable doubt. The first sub-issue is therefore, answered in the affirmative that the victim of the murder mentioned in the charge sheet, i.e Thadei s/o Lukungu, actually died.

Regarding the second ingredient, the sub-issue is *whether it was the accused person who in fact, caused the death of the deceased (or killed him).* Indeed, no prosecution witness testified to have seen the accused killing the deceased as rightly submitted by the learned counsel for both sides. The only evidence relied upon by the prosecution that links the accused to the charge is his EJS (Exhibit P.2). It is worthy of notice at this point that, for a confession to be acted upon it must be corroborated. The CAT in **Ndalahwa Shilanga & Another v. The Republic, Criminal Appeal No. 247 of 2008, CAT at Mwanza** (unreported) observed that, the requirement of corroboration is either a matter of law or of practice. Where it is a matter of law, no conviction can be sustained without corroboration. But, if it is a matter of practice, a conviction would not necessarily be illegal or quashed if it stands on uncorroborated evidence. The court however, has to warn itself as a matter of practice in such cases. In the **Ndalahwa Shilanga** case, the CAT cited with approval the case of

Hatibu Tengu v. Republic, Criminal Appeal No. 62 of 1993 (unreported) where the court developed two tests for a confession to pass so as to be acted upon by a court. The Court observed as follows;

> "The first test is whether the confession was made voluntarily and properly, that is legally if necessary by the process of trial within a trial or inquiry. The first test determines the admissibility of the confession. The second test is the evaluation of the confession, to determine, whether it is true including the need of and whether or not there is corroboration. This stage determines the weight/value of the confession. If the court finds that there is corroboration it can convict. If the court finds no corroboration, it can still convict if the court finds that the confession contains nothing but the truth, and after warning itself of the danger of convicting without corroboration. But in determining whether or not the confession contains the truth, the circumstances of the particular case, must be taken into account including whether the confession is retracted or repudiated by an accused person."

The above legal position was also underscored in the cases of **Jackson Mwakatoka and 2 Others v. Republic [1990] TLR 17** and **Kashindye Meli v. Republic [2002] TLR 374.**

In my view therefore, and in the light of the above cited precedents, the accused's confession (the EJS) in the present case, can be acted upon because, this court finds that it contains nothing, but the truth and it was made voluntarily by the accused. This finding is based on the following reasons: that, the accused gave (in the EJS) a detailed history of the entire event. This included the conflict between him and the deceased, how he believed that it was the deceased who was bewitching his family and that he had on various occasions reported the matter to the village authority, but the deceased did not respond. The accused also explained in the confession that he decided to go to the deceased home, hit him several times with a metal bar on the head and he fall dawn and died. He (accused) decided to act so because he believed that the deceased could kill him if left to live.

Furthermore, the nature of the killing demonstrated in the EJS of the accused is corroborated by the testimonies of the PW.1 and PW.3 who went to the scene of crime soon after the event and saw the body of the deceased. They testified that, the body was lying on the floor with blood and had wounds on the head. Moreover, Exhibit P.3 corroborated that evidence by showing that, the cause of death was severe head injury and loss of blood.

Another reason for the above finding that the EJS was true and voluntarily made, is that, during the retrial, the accused and his counsel objected the EJS only because it had been recorded in contravention of the guidelines. He did not deny it totally. However, during his defence, the accused changed mind and testified that he did not make the said statement, but the PW.2 forced him to sign the same. His defence in my settled opinion, was an afterthought which cannot help him. Besides, as shown earlier, the accused did not cross-examine the PW.2 on the alleged act of forcing him to sign the EJS. The legal effect of this omission is that, what the PW.2 testified in court that the accused made the EJS voluntarily is not shaken.

It must also be noted here that, the PW.2 who recorded the EJS was a competent witness. The law guides that, every witness is entitled to credence in his/her testimony and must be believed unless there are cogent grounds for not believing him or her; see the CAT decision in **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003, CAT at Mbeya** (unreported). In the present case, the accused did not adduce any reason as to why the PW.2 could tell lies against him and should not trusted by this court. Her testimony, and the EJS she recorded thus, remain stable and credible.

The learned defence counsel also argued that, the accused defence raised reasonable doubts. With due respect I will not agree with him for the reasons shown above. If anything, the defence only raised remote and fanciful possibilities which do not in law, exonerate him from liability as per the **Abdallah Seif v. Republic, Criminal Appeal No. 122 of 2020, CAT at Dar es Salaam** (unreported) which followed the case of **Chadrankant Joshubhai Patel v. Republic, Criminal Appeal No. 13 of 1998** (unreported) which had also took inspiration from the English case of **Miller v. Minister of Pension [1974] 2 All ER 372.** In the contrary, I find that, for the above analysed evidence, it cannot be concluded that the prosecution evidence failed to prove the second ingredient of murder in the meaning offered in the **Magendo Paul case** (supra).

I have also considered the accused's defence that he was in Makambako when the incident occurred. This is essentially a defence of *alibi* in law. The law provides for a specific procedure to be followed by an accused who intends to rely upon such defence. Sections 194(4)-(6) of the CPA guide that, where an accused person intends to rely upon an *alibi* in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case commences, but if he does not do so, he shall furnish the prosecution with the particulars of the alibi at any time before the prosecution case is closed. In case the accused fails to comply with such requirements, the court may in its discretion, accord no weight of any kind to his defence. This legal position was also underlined by the CAT in the case of **Mwiteka Godfrey Mwandemele v. The Republic, Criminal Appeal No. 388 of 2021, CAT at Dar es Salaam**

(unreported) following the case of **Kibale v. Uganda [1999] 1 EA 148** in which it was held, thus and I quote the pertinent passage for a readymade reference:

> "A genuine *alibi* is, of course, expected to be revealed to the police investigating the case or to the prosecution before trial. Only when it is so done can the police or the prosecution have the opportunity to verify the alibi. An alibi set up for the first time at the trial of the accused is more likely to be an afterthought than genuine one".

In the present case, the accused did not comply with the statutory requirements highlighted above and gave no reasons for not doing so. He just raised the *alibi* during his defence. I therefore, consider this course an afterthought which cannot save him. I will not thus, give weigh to it as per section 194(6) of the CPA. That defence will thus, not shake the prosecution evidence narrate previously.

The defence side also faulted the prosecution's case as it contains contradictions among its witnesses. In my settled opinion, this contention is also not forceful enough to assist the accused amid the above narrated prosecution evidence. The law is in fact, well settled that contradictions by any particular witness or among witnesses cannot be avoided in any particular case. The court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter. In the case of **Dickson Elia Nsamba Shapwata and Another v. The Republic, Criminal Appeal No. 92 of 2007, CAT at Mbeya** (unreported) the CAT took inspiration from the book "The Law of Evidence, Sarkar, 16th Edition, 2007" which observed that-

> "Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental

> disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do."

I have also considered the fact that, in the case at hand, the event occurred in 2016, being a lapse of more than five years now. Normal errors of memory on the part of prosecution witnesses could not thus, be avoided. This court is also entitled to presume this fact under section 122 of the Evidence Act. These provisions guide that, the court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The spirit embodied under these provisions was underscored by the CAT in the case of **Issaya Renatus v. Republic, Criminal Appeal No. 542 of 2015** (unreported).

In the end results, I consider the above inconsistencies (in the prosecution case) complained of by the learned defence counsel, to be minor. They did not shake the prosecution evidence narrated above to the effect that the accused had killed the deceased.

Owing to the reasons narrated above, I answer the sub-issue posed above affirmatively that it was the accused who killed the deceased. The second ingredient of murder has thus, been established in the required standard.

In relation to the third ingredient listed above, the sub-issue is *whether the killing of the deceased was with malice aforethought.* Section 200 of the Penal Code provides for various circumstances that constitutes malice aforethought. Section 200(a) provides that malice aforethought shall be deemed to be established by evidence proving an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not. In the present case, the accused's confession (The EJS) clearly shows that he had premeditated to kill the deceased. This fact can be verified from the following passage from his own confession:

> "Baada ya hapo nilisubiri tena akaniambia kwamba, mimi ukiendelea kunisumbua nitakuua wewe mwenyewe. Ndipo na mimi nikamwambia kama hutaki, nitakujia na mimi kukua. Mwisho nilifika muafa na tarehe 01/04/2016 nikaenda kumuua baada ya kumwambia na yeye hataki, asije akanitangulia kuniua yeye."

The above quoted passage simply shows that, the accused planned to kill the deceased because, he believed that he (deceased) would kill him (the accused) if left to survive. The nature of the killing also shows that, the accused had really determined to do so. He hit the deceased on the head several times. It is common ground that a head is a delicate part of the human body. The accused also used an iron bar to accomplish his mission. This, in my view, is a deadly weapon when applied against a human body.

The circumstances of the killing in the case at hand thus, fit the requirements under section 200(a) of the Penal Code cited above and constitutes malice aforethought. I therefore, answer the third sub-issue in the affirmative that, the killing of the deceased was with malice aforethought, hence the proof for the third ingredient of murder.

The fourth and last ingredient of murder calls for the sub-issue of *whether the killing of the deceased was performed by committing an unlawful act or omission.* As found above, the accused killed the deceased with malice aforethought. This finding calls for the positive answer to the above sub-issue. This is also because, the law prohibits inflicting bodily injury or using violence on other people intentionally. The law also prohibits any person from taking the law at hand. I consequently answer the sub-issue affirmatively that, the killing in the case at hand was performed by committing an unlawful act or omission, hence a proof for the fourth and last ingredient of murder.

Having answered all the sub-issues posed above affirmatively, I find that, the prosecution has established beyond reasonable doubt all the four important ingredients of the offence of murder against the accused. I accordingly answer the major issue posed previously affirmatively that, the accused Ahazi s/o Kilowoko is guilty of the murder of the deceased, Thadei s/o Lukungu. I accordingly convict him of murder as charged, contrary to section 196 of the Penal Code. It is so ordered

JHK UTAMWA

JUDGE

04/11/2022.

Date: 04/11/2022

Coram: JHK. UTAMWA, J.

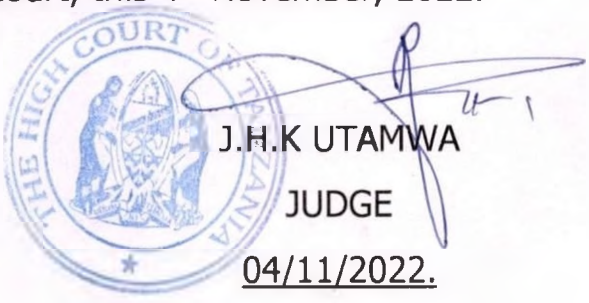
For Republic: Ms. Hope Masambu, State Attorney.

For Accused: Mr. Alfred Stephano, advocate.

Accused: Present.

B/C: Gloria

Court: Judgement delivered in the presence of Ms. Hope Masambu, State Attorney for Republic, the accused and Mr. Alfred Stephano, advocate for the accused, in court, this 4th November, 2022.



J.H.K UTAMWA

JUDGE

04/11/2022.