IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT TARIME

CRIMINAL SESSIONS CASE NO 89 OF 2021

THE REPUBLIC

VERSUS

CHACHA S/O MARWA MWERA @ JUMA

JUDGMENT

14TH FEB & 22ND FEBRUARY, 2022.

BEFORE F. H. MAHIMBALI, J:.

The accused person, namely Chacha Marwa Mwera @ Juma is charged before this court for the offence of murder which is based under section 196 and 197 of the Penal Code [Cap 16 RE 2019] (the Penal Code). It was alleged by the prosecution that on 18th March, 2021 at Kerende village within Tarime District in Mara Region, Chacha Marwa Mwera @ Juma murdered Jackson s/o Bhoke @ Marwa. The accused person denied the charge levelled against him.

According to the facts and evidence in record, it is undisputed that Jackson s/o Bhoke @ Marwa is dead. In order to prove malice aforethought and guiltiness against the accused person, the prosecution called **2 witnesses** with two exhibits namely, PMER (exhibit PE.1) and Sketch map plan (PE2). The prosecution's witnesses were ERNEST

MASEKE MARWA (PW1) and MUSA MAGAIGWA MSABI (PW2) the eye witnesses.

The evidence adduced by the above prosecution's witnesses was as follows:

ERNEST MASEKE MARWA (PW1) a peasant and pastoralist at Kerende Village, on 17th March 2021 at 23.00 hrs had been with his friend Musa Magaiwa Nsambi (PW2) were watching UEFA football match (Chelsea V. Atletico Madrid) at the local arena owned by PW2. As breaking news broke that the then His Excellency the President of United Republic of Tanzania – Dr. John Joseph Pombe Magufuli passed away, they were puzzled and got out for shock. When it reached around 23.45hrs while still there out, suddenly they saw one motorcycle passing near them carrying Chacha Marwa Mwera and Wegama Steven Mgesi@ Kerege. The said persons with motor cycle went straight to the bar of Maria Matiko Marwa where one Jackson Bhoke Marwa had seated. Suddenly, Chacha Marwa did hit the said Jackson Bhoke Marwa by using a bottle of beer on his head. As he wanted to escape, the two Chacha Marwa Mwera and Wegama Steven Mgesi@ Kerege held the said Jackson Bhoke Marwa and then Chacha Marwa Mwera issued out his knife and chopped him by that knife on his left mammal grand and the

left armpit. No sooner had they chopped the deceased than when the culprits had escaped via their motorcycle ridden by Chacha Marwa Mwera. Just after they had left, they (PW1 and PW2) went to the scene to offer assistance to the victim who had two deep wounds on the left mammal grand and the left armpit but missed transport to rush him to hospital. Following an alarm raised, many people had gathered including the relatives of the deceased and that they named who were the culprits. That they had been able to identify the culprits because first they are familiar to each other, they passed closer to where they had stood (there out about 6 to 8 meters), there was sufficient bright electricity lights illuminating the area including the scene and thus capable of making full identification of any person one knows without any mistake. It was through the said bright illuminating electricity lights that illuminated at the scene in which had made them identified the culprits without any obstacle. In identifying the culprits, each described the culprits' similar dress codes as follows: whereas Chacha had dressed a short sleeve's grey color T-shirt and blue jeans, Wegama dressed black jeans and long sleeve white shirt with black dots/marks. Considering further that they were closer to the scene and that the incident lapsed for a period of 2 to 5 minutes after the midnight, they fully described the culprits. When cross-examined as to why they didn't

offer the assistance to the deceased following that incident as they were witnessing the whole episode, Pw1 replied that though he is also kurya, and that kuryas are brave men traditionally, considering that it was night time and that they were not armed, it was unsafe for them to intervene for help as per circumstances of this case for fear of their lives as well.

In essence, what PW1 and PW2 testified seemed to be identical and suggested nothing but that they witnessed the incident thoroughly.

On the other hand, the accused person admits that the said Jackson Bhoke @ Marwa is dead and he died by being stabbed by Wegama by use of knife. Though he admits that he was with the said Wegama at the scene on that day and time, he disputes that it was him who stabbed the deceased as alleged but Wegama and that he is ready to testify @ Wegama on that. He further stated that the reason of being stabbed by the said knife, there emerged a quarrel between the two (deceased and Wegama) on the issue of return of the money the deceased was indebted by the said Wegama. That in his intervention as to why the said Jackson (deceased) should settle the debt, he only found himself being hit by a bottle of beer by the deceased. In essence he denies the allegation that he personally killed the deceased but Wegama.

In digest to the case's evidence, it is undisputed that the deceased died unnatural death. This is in regard to the evidence of PW1, PW2, PW3, DW1 and exhibit PE1 (PMER of the deceased).

The said body when examined by medical practitioner established that the deceased's body was found to have two fresh wounds (left chest and the left armpit) sizing 3*4cm, 10cm depth and 2*3cm and 2cm depth respectively. Thus, the cause of the deceased was due to hypovolemic shock secondary to acute blood loss and multiple organic failure – exhibit PE1 (PMER).

The central issue here for consideration is whether given the evidence by the prosecution, the case has been proved beyond reasonable doubt? In the case Magendo**Paul and Another Vs The Republic [1993] T.L.R 219 (CAT),** it was held inter alia 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 only a remote possibility in his favour which can easily be dismissed"*

This was held in line with the philosophy enshrined in the case of **A.Chandrankatloshubhai Patel Vs the Republic,** Criminal Appeal No. 13 of 1998 (CAT - DSM) in which it was held that;

"remote possibilities in favour of the Accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of Criminal Justice if they were permitted to displace solid evidence or dislodge irresistible inferences"

The offence of murder encompasses unlawful killing of another person (human being) with malice aforethought. In law, the killing becomes unlawful if the act or omission causing the death cannot be justified. On the other hand, the killing is with malice aforethought if the person who killed another intended to cause death or grievous bodily harm. Circumstances to be considered in establishing malice aforethought are well stated in section 200 of the Penal, Code Cap. 16 of the R.E. 2019.

For an offence of murder to be established, there must be a cause of death. Since murder is killing with malice aforethought, the cause of death is essential ingredient to be established. The law under section 203 of the Penal Code, Cap 16, defines various situations of causing of death as hereunder:

A person is deemed to have caused the death of another person, although his act is not the immediate or sole cause of death, in any of the following cases-

a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death; in which case it is immaterial whether the treatment was proper or mistaken if itknowledge and skill; but the person inflicting theinjury is not deemed to have caused the death ifthe treatment which was its immediate cause wasnot employed in good faith or was so employedwithout common knowledge or skill;

b) if he inflicts bodily injury on another whichwould not have caused death if the injured personhad submitted to proper surgical or medicaltreatment or had observed proper precautions asto his mode of living;

c) if by actual or threatened violence he causes thatother person to perform an act which causes thedeath of that person, the act being a means ofavoiding the violence which in the circumstanceswould appear natural to the person whose death isso caused;

d) if by any act or omission he hastens the death of aperson suffering under any disease or injurywhich, apart from that act or omission, wouldhave caused death;

e) if his act or omission would not have causeddeath unless it had been accompanied by an act oromission of the person killed or of anotherperson.

The duty to prove the case at hand lies on the prosecution and the standard is beyond reasonable doubt (see section 3(2)a of the Evidence Act, Cap 6. It is well established also that the accused cannot be convicted relying on the weakness of his defence, inability to defend himself or because of lies. The law requires he only be convicted relying on the strength of the evidence adduced by credible prosecution witness (es).

In this case, it is the testimony of PW1 and PW2 who actually told this court how on that date and place they saw the accused person being with his colleague Wegama (not party to this proceeding), how they approached the deceased, attacked him first by bottle and later stabbing him by knife and as if that was not enough, hitting him by a stone on his back as last blow. The deceased suddenly fell down and met his demise shortly after they had gone to offer assistance after the culprits had vacated the scene. They testified that, they could not intervene promptly as was expected because it was night time and that themselves were not armed. They thus feared of being endangered of their lives as well. The two witnesses thoroughly described the duo

culprits very well while at the scene of crime. They had been able to identify the culprits because of the short distance they stood from the scene (five to six meters), familiarity with the both culprits, the aid of bright electricity lights that was illuminating at the scene. This fact is corroborated by the defense testimony of the accused person, who admitted to have been at the scene and that he had been with Wegama and that it is true that the said Jackson(deceased) was attacked by the said Wegama but not him. Thus the issue of accused person and his colleague Wegama being identified at the scene is undisputed. In the case of **Goodluck Kyando Vs. Republic**, [2006] T.L.R 363, puts it clear that it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons of not believing a witness. On this stance, another relevant case is that of **Mathias Bundala Vs. Rep,** Criminal Appeal No. 62 of 2004, Court of Appeal at Mwanza and section 146(2) of Tanzania Evidence Act, Cap 6. By this analogue, I am of the considered view that as per available evidence, the first issue whether the killing was unlawful or not endorsed or certified by the law is answered in the affirmative.

I am aware that this incidence happened at night, the courts of law are warned while dealing with the issue of reliability of visual identification of suspects to consider the mode of identification. In the

case of **Patrick Nabiswa v Republic** Criminal Appeal No.80 of 1997 (unreported) the Court of Appeal of Kenya stated that:-

" This case reveals the problems posed by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in BLACKSTONE'S CRIMINAL PRACTICE, 1997, Section F.18

(a) *Some person may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crime are able to see the perpetrators only fleetingly, often in very stressful circumstances;*

(b) *Visual memory may fade with the passage of time; and*

(c) *As is in the process of unconscious transference, a witness may confuse a face he recognized from the scene of the crime (it may be of an innocent person) with that of the offender."*

In dealing with such glitches, court of law needs to scrutinize and analyse with greatest care the evidence tendered on the issue to exclude the possibility of mistaken identification of a suspect. The factors affecting accurate of face recognition includes:-

1. *Shorter duration to the culprit*

2. *Relatively longer retention interval between the crime and the identification / the earliest opportunity to name the culprit*

In the instant case, the following criteria need to be applied when admitting eye witness testimony:-

1. *Degree to which the eye witness paid attention to the culprits – PW1& PW2 testified that they saw the accused and his friend Wegama passing nearby heading to the deceased. They were closer about 6 meters*
2. *Length of time observation. This incidence survived for relatively 10 minutes' episode. Thus, sufficient time for one to make a good recollection.*
3. *Length of time between the occurrence of the crime and the reporting. It hardly passed 30minutes between the occurrence and reporting of the incidence. PW1& PW2 reported instantly to PW2 where then immediately police were informed.*
4. *The eyewitness identification certainty how certain that it was the accused. As per PW1& PW2, their testimonies looked certain, steady and credible. their demeanor could not suggest anything implanted or cooked.*
5. *The quality of the view the eyewitness had.... i.e. broad electricity lights illuminating the scene and that even the accused person admits the fact of being there and involved into the said saga, thus, nothing impeding.*

Based on the fore mentioned criteria, I'm confident that the visual identification had not been impedimental to the identifying witness. The favorable conditions existing in this case, favored the visual identification without any hesitation.

In fact I'm aware that for the criminal incidences happening at nights, that courts should be very clear with the aiding factors favoring correct visual identification of the culprits in clearing danger of mistake of identity (See ***Waziri Amani v. Republic*** [1980] TLR 250; ***Michael Godwin & Another v. Republic***, CAT-Criminal Appeal No. 66 of 2002; and ***Florence Athanas @ Baba Ali v. Republic***, CAT-Criminal Appeal No. 438 of 2016 all unreported). With this incidence, I am satisfied that there are no impediments in the current situation to affect the visual identification as per the circumstances of this case.

The next question for consideration is whether the killer had malice aforethought as per law. In the case of **Enock Kipela v Republic**, (supra) has discussed what entails malice aforethought, when the Court of Appeal held that:-

> *"Usually an attacker will not declare 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 blows 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 attacker's utterances if any; made before, during or after the killing and the conduct of the attacker before and after the killing.*
7) *The conduct of the attacker before and after the killing.*

It is my finding that, since there was no elements of quarrel or fight prior to the said attacking as well stated by PW1 and PW2, contrary to what is suggested by DW1 (accused person), what was done: attacking the deceased on his left armpit, chest (left side), use of dangerous weapon (knife), two blows inflicted into the dangerous body zone and the act of the culprits leaving the deceased there unaided, suggests nothing but the culprits' culpable mind of killing the deceased. That in law is malice aforethought. What constitutes malice aforethought or intention to kill is well defined by laws, literature and decided cases (see section 200 of the Penal Code and the case of **Enock Kapera and**

AjiliAjili (supra). According to the Black's Law Dictionary, malice aforethought is defined as:

"A pre-determination to commit an act without legal justification or excuse.... An intent, at the time of killing, wilfully to take the life of human being, or an intent wilfully to act in callous and wanton disregard of the consequences to human life: but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed" (see Criminal Law in Tanzania, A Case Digest, by Dr FauzTwaib and DaudiKinywafu at page 335).

Lastly is whether the accused person here is responsible of the said murder as charged. The evidence of PW1 and PW2 suggests no one else save the accused person here. The accused himself does not dispute the fact of being present at the scene on the particular moment but only disputes active involvement into it. He throws the ball to his colleague promising that he is ready to testify against him on that account. The defense testimony seems to be sweet for the accused person but irresistibly contrary to what has been established by the prosecution side. Considering the cardinal principle in criminal law that accused person's story should not solely be depended on entering conviction but the prosecution evidence on record, I am satisfied that as

per evidence on record (PW1 and PW2), suggests nothing but the truth of what happened.

By the evidence presented, it has been proved beyond reasonable doubt that, **Jackson s/o Bhoke @ Marwa** was killed amongst others by the accused person, by hitting his armpit and left part of the chest thereby causing massive bleeding which caused his death. Given the circumstances and the manner which includes, the weapon used, the force applied, the part of the body of the deceased where the cuttings were directed, the frequency of cutting and the extent of injuries and his conduct after the attack. I find without any scintilla of doubt that it has been proved beyond reasonable doubt that the accused killed the deceased with requisite malice aforethought and he desired the deceased to die. That said, I find the accused person **Chacha Marwa Mwera @ Juma,** guilty and consequently convict him of the murder of the deceased **Jackson s/o Bhoke @ Marwa** contrary to section 196 and 197 of the Penal Code [Cap 16 R.E 2019].As was held in the case of **Mathias Mhyeni and Another v. The Republic [1980J TLR 290**, that:-

> *"Where a person is killed in the prosecution o f a common unlawful purpose and the death was a probable consequence of that common purpose*

each party to the killing is guilty o f that murder

The accused person in this case had a common intention to murder which he executed although each prayed a different role. This holding draws a concurrence opinion finding with the all assessors, who were convinced that the accused person guilty has been established by the prosecution. While their view is based on the strength of the testimony of PW1 and PW2 being nothing but trustworthy, credible and reliable linking the accused person with the charged offence. I am persuaded both, by my own conviction and the assessors' opinion that the totality of the evidence adduced during this trial (PW1, PW2 and PE1) has left a real and justified impression that no doubt that the accused person had participated to the commission of the offence of murder against the deceased **Jackson s/o Bhoke @ Marwa**.

F. H. MAHIMBALI

JUDGE

22/02/2022

Considering the punishment for murder is only one known as per law, the accused person is hereby sentenced to suffer death by hanging pursuant to section 197 of the Penal Code, Cap 16 R.E 2019 as read together with section 322 (1) & (2) of the CPA, Cap 20 R.E 2019.

DATED at TARIME this 22nd day of February, 2022.

F. H. Mahimbali

JUDGE

22/02/2021

Right of Appeal fully explained to any aggrieved party under section 323 of the CPA, Cap 20 R.E 2019.

F. H. Mahimbali

JUDGE

22/02/2022