

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CRIMINAL SESSIONS CASE NO. 62 OF 2021**

**THE REPUBLIC**

**VERSUS**

**1. KISIKA OMARY @ MGAYA**

**2. JUMA MWEYA**

**JUDGMENT**

***16<sup>th</sup> & 28<sup>th</sup> FEBRUARY, 2022***

**A. A. MBAGWA, J.**

The deceased's demise in this case resulted from what is commonly known as mob justice. Shida s/o Peter (the deceased) was killed following attacks that were inflicted by a crowd of people on the suspicion that he was a thief. It was alleged by the prosecution and undisputed by the defence that on 6<sup>th</sup> day of October, 2019 the 1<sup>st</sup> accused's wife one Bahati Mang'ara (DW2) noticed that her cassavas had been plucked and stolen from her farm. She thus notified her husband (the 1<sup>st</sup> accused) who raised an alarm to that effect. The villagers assembled in response to the alarm. They then started tracing footprints which led them to the deceased's home. Thereat they found the deceased and started attacking him. They beat and cut the

deceased on various parts by using sticks and machete. Finally, they set him on fire and burnt him to death. The incident was reported to Butiama Police Station who later on arrived at the scene of crime and found the deceased still burning while already dead. At that juncture all attackers had dispersed except the 1<sup>st</sup> accused. The police therefore removed the deceased body from fire and arrested the 1<sup>st</sup> accused instantly. Postmortem examination was conducted and revealed that the deceased's death was caused by a stab wound and burn injuries. Thereafter investigation commenced which, in turn, revealed that the 1<sup>st</sup> and 2<sup>nd</sup> accused were among the persons who directly inflicted blows on and finally burnt the deceased. Thus, the race to locate and arrest the 2<sup>nd</sup> accused Juma Mweya started hence on 16<sup>th</sup> October, 2019, the 2<sup>nd</sup> accused was arrested by PW2 at Buhemba.

On the above account, the 1<sup>st</sup> accused Kisika Omary @ Mgya and 2<sup>nd</sup> accused Juma Mweya were arraigned and charged with murder contrary to sections 196 and 197 of the Penal Code. The particulars of offence alleged that on 6<sup>th</sup> day of October, 2019 at Buturu village within Butiama district in Mara region, the duo murdered the deceased one Shida s/o Peter.

Both accused denied the charge (pleaded not guilty) hence the matter inevitably went to a full trial. The prosecutions, in a bid to prove the

allegations beyond reasonable doubt, paraded four witnesses namely, Tumaini Peter Sambaganye (PW1), F. 7760 D/CPL Lawrence (PW2), E. 9989 D/SGT Asukile (PW3) and Peter Shida (PW4). In addition, the prosecutions tendered in evidence, during preliminary hearing, one exhibit to wit, a report on postmortem examination. The same was received in evidence without objection from the defence side and marked **Exhibit P1**.

In defence, the accused called a total of three witnesses. The 1<sup>st</sup> accused person Kisika Omary Kisika stood as DW1 and called another witness one Bahati Mang'ara Fwelefwele (DW2) to testify in his favour. Further, the 2<sup>nd</sup> accused Juma Mweya testified as DW3 but did not call any witness to testify in support of his defence.

The prosecutions' evidence is to the effect that the deceased person Shida Peter died unnatural death which resulted from a stab wound and burn injuries. It is further testified by PW1 and PW4 that the deceased was attacked, assaulted and finally burnt to death by a crowd of people including the accused persons Kisika Omary @ Mgaya and Juma Mweya.

Moreso, it is alleged by the prosecutions and uncontested by the defence that the source of the attacks against the deceased was the allegations that the deceased had stolen cassavas from DW2's farm. It is also not in

Exhibit P1, the report on postmortem examination is very clear that the deceased's death was caused by a stab wound and burn injury. Exhibit P1 tallies with the testimonies of PW1, PW3 and PW4.

After hearing the evidence of both parties, this court, for purposes of determining this case, directed itself to four issues;

- (1) Whether there was a person who died.
- (2) Whether the deceased died unnatural death.
- (3) Whether the death was caused by the accused persons.
- (4) Whether the accused persons caused death with malice aforethought.

To start with the 1<sup>st</sup> and 2<sup>nd</sup> issues, it is not in dispute that the deceased Shida s/o Peter died unnatural death. This is exhibited through PW1, PW3, PW4 and exhibit P1 (postmortem examination report) which was tendered without objection. P1 tells it all that the deceased died of hemorrhage which was caused by a stab wound at the chest and burn injuries. The prosecution's evidence was corroborated by defence witnesses who confirmed that the deceased was beaten and finally burnt to death. Thus, on the strength of the foregoing evidence it goes without saying that the

prosecutions have managed to prove not only that Peter Shida died but also that he died unnatural death.

Coming to the 3<sup>rd</sup> issue, it is in evidence particularly of PW1 and PW4 that both accused were actively involved in the killing of the deceased. Both PW1 and PW4 said that the 2<sup>nd</sup> accused Juma Mweya cut the deceased at his chest with a machete. The cut wound was also observed by the medical doctor while conducting postmortem examination as exhibited in the report (exhibit P1). Further PW4 testified the 1<sup>st</sup> accused ignited fire by match box which burnt the deceased to death. The defence did not cross examine PW1 and PW4 on these incriminating facts. The accused came to deny their active involvement in killing the deceased during their defence. It is a trite law that where a party does not cross examine on an important fact, such fact is taken to have been admitted and therefore proved. And where a party comes to deny a fact during defence on which he did not cross examine, such defence is taken to be an afterthought. See **Athanas Ngomai vs The Republic**, Criminal Appeal No. 57 of 2018, Court of Appeal at Dar es Salaam, **Imamu Selemani Msovu and Another vs The Republic**, Criminal Appeal No. 306 of 2010 Court of Appeal at Tanga and **Moses Nobert Achiula vs The Republic**, Criminal Appeal No. 63 of 2012, Court of Appeal at Mbeya. The prosecution's evidence therefore remains

dispute that DW2 Bahati Mang'ara is a wife of the 1<sup>st</sup> accused Kisika Omary @ Mgaya.

During their defence, all defence witnesses told the court that on 6<sup>th</sup> day of October, 2019 a crowd of people assembled at the deceased's home following an alarm that was raised by the 1<sup>st</sup> accused Kisika Omary. The cause of alarm was the allegations that the deceased Shida s/o Peter had stolen cassavas from DW2. The defence witnesses also confirmed that the deceased was beaten by a mob and finally burnt to death. However, all the defence witnesses declined to have identified any specific person among those who beat, cut and burnt the deceased.

In contrast, the prosecutions eye witnesses in particular PW1 Tumaini Peter Simbaganye and PW4 Peter Shida testified that the accused persons Kisika Omary @ Mgaya and Juma Mweya were among the people who actually inflicted attacks and finally burnt the deceased. Both PW1 and PW4 testified that the second accused Juma Mweya cut the deceased at the chest with a machete. Further, PW4 Peter Shida said that it is Kisika Omary (1<sup>st</sup> accused person) who lit fire by using a match box to burn the deceased.

that 1<sup>st</sup> accused set fire to burn the deceased while the 2<sup>nd</sup> accused cut the deceased on his chest with a machete.

During final submissions, Ms. Mary Joakim, counsel for the defence invited this Court not to rely on the testimonies of PW1 and PW4 on the ground that they were contradictory. Mary pointed out that PW1 said that he was at the scene when the deceased was being attacked whereas PW4 said that PW1 came at the scene of crime after the deceased had been attacked and killed. Mary continued to assault the prosecution evidence that PW1 testified that the accused had hidden the weapons when they arrived at the deceased's home whilst PW4 said that they were carrying weapons openly. It was Ms. Mary's strong submission that such contradictions created reasonable doubts in the prosecution case which should be resolved in favour of the accused.

In rebuttal, Mr. Nimrod Byamungu, learned State Attorney strenuously submitted that PW1 and PW4 were credible witnesses and their testimonies were reliable. He said that throughout the evidence there is no scintilla of evidence which suggests that the two witnesses had bad blood with the accused that would make them concoct the case against them. Furthermore, the learned State Attorney did not see the alleged contradictions in the testimonies of PW1 and PW4. However, Mr.

Byamungu remarked that the alleged contradictions, if any, do not go to the root of the case. He concluded that the prosecution case was proved beyond reasonable doubt. In bolstering his argument, Byamungu sought reliance on the case **Magendo Paul and Another vs The Republic 1993 TLR 219** where it was held that if the evidence is strong against the accused as to leave remote possibility in his favour then the case is proved beyond reasonable doubt. Mr. Byamungu was opined that doubts, if any in this case, are minor which cannot create reasonable doubt.

I have keenly gone through the evidence of PW1 and PW4 along with the rival submissions. The fact that PW1 said that the accused came at the deceased's house while hiding weapons does not mean, in my views, that they had no weapons. Further, PW1 continued to testify that, despite hiding the weapons he was able to see them consequently he took trouble to call the police in order to come and arrest the situation. PW4 simply testified that the attackers had machetes and sticks. With due respect to the defence counsel, I do not find any material contradictions in the testimonies of PW1 and PW4. Moreover, I agree with Mr. Byamungu that throughout evidence there is no iota of evidence to suggest that PW1 and PW4 might have framed up the story with the view to implicate the accused persons. The accused, on their part, did not deny their presence during the

attacks. In the event, I find PW1 and PW4 credible and their testimonies reliable. As such, I have no hesitation to hold that both accused person were involved in the brutal killing of Shida s/o Peter.

With regard to whether the accused persons had malice aforethought, the law is settled that in establishing the intention to kill, courts should take into account the following factors, among other things: -

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 or blows were directed at or inflicted in;
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
7. the conduct of the attacker before and after the killing.

The evidence on record clearly tells it that the accused used deadly weapons namely, machetes and sticks. More abominably, they inflicted blows on critical part of the body such as chest. PW1 and PW4 both

testified that the 2<sup>nd</sup> accused cut the deceased at his chest with a machete. To crown it all, the 1<sup>st</sup> accused ignited fire which burnt the deceased. In my considered views, all these events bring no other inference than malice aforethought of the accused.

It is common cause that all these atrocities were inflicted on the deceased by a mob justice, the accused inclusive. It should be noted that unlawful killings resulting from mob justice, may amount to murder where the intention to kill is proved. On this, I find support in the decision of the Court of Appeal in **Enock Kapela vs The Republic**, Criminal Appeal No. 150 of 1994, CAT at Mbeya at P5 where the Court held that:

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***'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. Provided common intention existed, it would not matter who inflicted the fatal wound or wounds.'***

In this case there is abundant evidence that both accused inflicted fatal blows on the deceased which led to his death. I am therefore of the

considered findings that the prosecutions have proved that not only the accused had common intention to kill but also inflicted fatal blows on the deceased.

Upon summing up of the case, all the three lady assessors were of the unanimous findings that both accused are guilty of the offence charged.

In the results, like the lady assessors, I find both 1<sup>st</sup> accused Kisika Omary @ Mgaya and 2<sup>nd</sup> accused Juma Mweya guilty of the offence of murder and consequently convict them with murder contrary to sections 196 and 197 of the Penal Code.

The right of appeal is duly explained.



**A. A. Mbagwa**

**JUDGE**

**17/02/2022**

### **SENTENCE**

I have considered the mitigation factors advanced by defence counsel. However, the offence of murder for which the accused have been found guilty and convicted, attracts only one mandatory sentence of death by hanging. Thus, in terms of sections 26, 196 and 197 of the Penal Code, I

hereby sentence the 1<sup>st</sup> accused Kisika Omary @ Mgaya and 2<sup>nd</sup> accused Juma Mweya, to suffer death by hanging.

Right of appeal is explained.



  
**A.A. Mbagwa**  
**JUDGE**  
**28/02/2022**