

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

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT TARIME**

**CRIMINAL SESSIONS CASE NO. 140 OF 2022**

**REPUBLIC**

**VERSUS**

**MARWA S/O HONGERA MARWA**

**JUDGEMENT**

*01<sup>st</sup> & 03<sup>rd</sup> March, 2023*

**M. L. KOMBA, J:**

**Mwita Mahanga @ Ng’oina** (the deceased) was murdered while is too young, self-employed in bodaboda industry (he was motorcycle driver). It was on 01/01/2021 at the bar owned by Charles Marwa Bigenda at Nyangoto village within Tarime District in Mara Region where it was alleged that **Marwa s/o Hongera Marwa** stabbed Mwita Mahanga @ Ng’oina and caused massive internal bleeding which caused his death as per Exhibit P1 (post mortem report).

As a result, the accused was arrested and arraigned before this court facing charges of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [R. E. 2019].

Particulars in information revealed that in the evening of 01/01/2021 deceased together with his friends were in the bar at Nyahongwa centre enjoying their drinks, suddenly enter accused person in that bar and go straight to the table where the deceased person was seated, he stabbed him with the knife and he disappeared. The accused person was arrested 14 months later at Nyansusura village and denied the charge which attracted full trial.

At the trial, the prosecution was represented by Ms. Esther Kyara a learned State Attorney. While the accused was represented by Mr. Samson Samo, learned advocate.

Prosecution case was first built by **Chacha Masiko Mahende, PW1** who informed the court that he resides at Nyakunguru and that on 01/01/ 2021 he was invited to his uncle Massana Chacha Mwita who resides at Nyarwana. He used private transport of motorcycle which was driven by Mwita Mahanga. They arrived to his uncle and after food and drinks he decided to go back home using the same motorcycle. On the way he said they (PW1 and Mwita Mahanga) decided to pass to a bar for drink. They entered in a bar owned by Charles Marwa Bigenda and sat on the table which has two

other customers. They sat looking each other facing the table, ordered and were served with two bottles of drinks each and started enjoying the drink.

It was PW1 testimony that when he finished the 1<sup>st</sup> bottle and ordered the second bottle to be opened, some body by the name of Omahe Degenga he just looked at the bar in a friction of minute and go away. This witness informed the court that after few minutes he entered Marwa Hongera, a man who is familiar to him as they reside nearby villages and they used to play traditional dance which was liked by PW1, when he entered in a bar, according to PW1, he went straight to Mwita Mahanga and stub him at the right side of chest. He said, there was no distance between him and Mwita as they were separated by a table. After that incident they panicked and all at the table stood up wondering. Marwa Hongera went outside and that PW1 manage to see the knife which Marwa was holding through light from the electricity bulb, that the knife had a blue handle.

He informed the court that they helped the victim and took him to Nyarwana health centre where, upon arrival, the doctor informed them that because the victim was in bad condition, they have to rush him to Tarime District Hospital. The victim died on the way to Tarime. It was his testimony that doctor at Nyarwana Health centre after being informed that the victim died

on the way to Tarime District hospital, he informed the relatives to inform police. It was a village leader who called police and informed them of the incidence.

He further informed the court that in the following day, that is 02/01/2021 police took the body of deceased from the village together with some relatives including Geoffrey Wambura, Masiko, the village chairman and PW1 to Nyangoto health centre where the body of Mwita Mahanga was examined and they were allowed to bury him.

When was cross examined, PW1 testified that the bar had roughly 12 people and there was a music played but people were not dancing. He elaborated that the place they seated and door was just like two footsteps, he saw Marwa Hongera entering in bar but he failed to stop him and that crime was committed at night, during night there is dark but, in the bar, there was light from electricity bulb which produced bright light. He insisted he saw knife and he saw Marwa Hongera stabbed the deceased. He did not hear the story from anybody.

**PW2 (Jackson Pius Chacha)** informed the court that on 02/01/2021 he was at his working station, Nyangoto Health center continuing with his

normal duties and he saw police officers who were accompanied by citizens who asked for examination of the dead body. He informed the court that the body was introduced to him by Geoffrey Nyirabu and Mbusiro Masiko. He said, by physical appearance the clothes which covered the body was fully in blood and that the body was discharging fluid from the mouth. The body had wound on right side of the chest. He informed the court that it seems wound was caused by sharp object which entered into the body and disturb internal organs including lungs.

It was the testimony of this witness that deceased had only one wound that caused internal bleeding in the chest and made the deceased fail to get oxygen (caused difficulties to inhale and exhale). He told relatives cause of death and surrendered the body to relatives and police for their further steps. He filled post mortem order form from police on the same day and gave copy to police and maintain the office copy. Later on, when police wanted Post mortem examination report he prepared and give them (ExH. P1).

During cross examination PW2 informed the court that the body had deep penetration wound and that in Exh P2 there is nowhere written sharp object. He confesses he did not see Marwa Hongera stabbing the deceased.

**PF 19498 Insp Ally Sharif** appeared as PW3 who informed the court that while on his normal duty on 23/03/2022 he was informed by informer that accused who was involved in murder case was at Nyansurura in Nyarwana village in mourning of one of their village-mate. Together with other police officers they went to the said village and manage to arrest the accused, when asked his name he said he is Marwa Hongera. After informing his offence they took him to Tarime Police Station. It was his testimony that police know Marwa was suspected to kill Mwita Mahanga and connected with police file Tarime/IR/26/2021 concerning murder offence.

During cross examination he informed the court that he was involved in arresting the accused on March 2022 and that, he did not go to the scene of crime but was informed the murder took place at the bar owned by Charles.

The prosecution case was marked closed and the accused person were required to enter his defense in accordance with section 293(2) of the Criminal Procedure Code Cap 20 [R. E. 2022]. The defense case was opened and there were three witnesses and one exhibit.

**In his defense DW1,** Marwa Hongera Marwa who is the accused informed this court that on 20/12/2021 he left Nyarwana to Waigita village for farming

purposes where he returned on 10/01/2021. He said it took two hours to walk from Nyarwana to Waigita. It was his testimony that on 01/01/2021 he was at Waigita village and there was a ceremony at the house of his in-law at Waigita and they danced till dawn. On 02/01/2021 he went to his farm to guard his crops from destructive animals. When he returned home (Nyarwana), he participated in various social activities including mourning and that on 23/03/2022 he was at the mourning where he was arrested by police who informed him that he was involved in murder of Mwita Mahanga and they asked him to surrender the weapon. He denied to be involved in the murder of Mwita Mahanga.

It was the accused testimony that all this was framed case from his haters as he was making the follow up of those who killed his young brother, Robert Wankuru @ Mwikwabe to be arrested. He said Mwikwabe died on 28/04/2013 and he reported the incident to Tarime police station where he was given RB number TAR/IR/1397/2013 (Exh. D1) so that he can cooperate with police to facilitate arrest of the suspects who according to DW1 are Nyakichogo Wambura, Marwa Hamis and Chacha Mbusiro Masiko.

During cross examination DW1 informed the court that he doesn't know the size of the farm in which he planted maize. He elaborated that they planted

August, 2020 and expected to harvest on February. During harvest they just put food in the store (*ghala*) and therefore he doesn't know how many bags he harvested. When asked what he was doing on 12/12/2020 as they expected to harvest in August, he said he was preparing other part of the farm which he doesn't know its size and further that Chacha Musiro Masiko who is among the suspects of the murder of Mwikwabe is the son of PW1 that's why he claims the case against him is framed.

**DW2, Mkami Marwa Hongera** testify to the effect that she married Marwa Hongera Marwa and her husband left Nyarwana village on 20/12/2022 he went to Waigita to his in law, for farming and he returned on 10/01/2021. She informed the court that they don't have farm at Nyarwana. She said, during new year cerebration her husband was still at Waigita and he just sent money via mobile money agent for the family use and further informed the court they have family conflict after the death of Robert Hongera.

During cross examination he informed the court that when her husband left to Waigita on 20/12/2020 he informed her he is going to prepare a farm, one acre farm which was given by his in-law and confirm she know the place as she has been there and even was involved in the time of harvesting and that they get 5 bags of maize from that farm. They harvested June 2021 and



that time her husband was already in remand. When she was asked under which case, she twist the words that he was around and that they harvested together and was assisted by Pili, the wife of Nyamhanga who is (DW3).

**Nyamhanga Mseti** testified as **DW3** that he resides at Waigita and that he gave a piece of land, two acres to Marwa Hongera for agriculture purposes. It was the first time he cultivates in Waigita as before that he cultivated at Nyarwana. He said after planting he has to remain in farm guarding farm from destructive animals like monkey. Further, he informed the court that on 01/01/2021 he was with Marwa Hongera cerebrating a new year. He further informed the court that what he knows is the existence of the conflict between their family and the family of the deceased due to the death of Robert Hongera and they decided to fabricate two murder cases to stop him from making follow-up.

He further informed the court that they harvested in March, 2021 and by the time of harvesting Marwa was under arrest so his family went in the farm and harvest where they got 6 bags while he and his wife pili was harvesting in DW3 farm. Then defence case was closed.

After the closure of the case for both side counsels had opportunity to make their final submissions. Ms. Kyara candidly submitted that the prosecution managed to prove the offence beyond reasonable doubt as there is a dead person and his death was unnatural as testified by PW1 that cause of death was due to excessive bleeding as was in Exhibit P1. She elaborated that the accused was witnessed while committing the crime by PW1 who was an eye witness and that PW3 arrested the accused who was involved in the crime.

Ms. Kyara criticized the defence of *alibi* which was relied by accused as it contravening section 194 (4) and (5) of the Criminal Procedure Act, Cap 33 [R. E. 2022] (the CPA) and that the prosecution was taken by surprise and sought reliance on the case of **Kibale vs. Uganda** (1999) 1 EA 148 where the court said;

*'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 contrast, Mr. Samson Samo was of strong views that the prosecution failed to prove its case beyond reasonable doubt. He said that it was incumbent upon the prosecution to prove the case as provided under section

110 up to 112 of Tanzania Evidence Act, Cap 6 [R. E 2022] (the Evidence Act).

Mr. Samo submitted that PW1 had the duty to prove what they alleged but that was not done. He said that PW1 informed the court that he saw the accused holding knife in his hand while entering in bar and that the whole handle was covered by hand, if that is so how did he know that the knife handle was blue in color.

The learned defence counsel contended also that PW2 testimony should not be relied upon as Exh. P2 has two dates, more over PW3 testimony was hearsay as he did not investigate the crime neither visited the scene. It was his submission that the accused was not in Nyarwana village when the crime was committed and all three defence witnesses testified that accused was in another village. About violation of Section 194 of CPA he prayed for this court's mercy.

I have carefully appraised the evidence adduced by parties. I have also accorded a deserving attention to the counsel submissions. Without much ado, it is important to state here that there is no dispute that there is person who died. Although defence side disputed Exh. P1, it was elaborated on how

it was prepared to show the examination was conducted on 02/01/2021 and the report was collected on 28 /03/2022. It is the position of this court that Mwita Mahanga died and his death was unnatural as he had a deep wound which disturbed internal organs and cause him complication in inhale and exhale due to internal bleeding, this is according to Exh. P1 and testimony of PW2. The pivotal issue therefore for determination is whether, the accused Marwa Hongera Marwa stabbed the deceased.

In determining the fate of the accused person before this court, the prosecution must prove beyond reasonable doubt that, indeed, accused person is the one who murdered the deceased contrary to sections 196 and 197 of the Penal Code, Cap 16.

Accused before this court is alleged to kill the deceased and in proving this, prosecution relied in two witnesses, one being eye witness. According to section 143 of the Evidence Act, and the case of **Yohana Msigwa vs. Republic** (1990) TLR 148, there is no particular number of witnesses is required to prove a particular fact. Prosecution relied on testimony of PW1 and PW2. In the cause of composing judgement, I will also consider the evidence of both parties adduced before this court.

First, is the fact of identification, PW1 who is an eye witness, testified to have witnessed the accused person stabbing the deceased. This witness informed the court that incidence took place at night in a bar. He informed the court that while having drinks the accused entered while holding a knife and go straight to **Mwita Mahanga @ Ng'oina** and stabbed him on right side of the chest. The fact that PW1 named the accused immediately after the criminal incidence it is credible evidence. See the case of **Marwa Wangiti Mwita and others vs. Republic**, (2000) TLR, and **Peter Efraim @ Wasambo vs. R**, Court of Appeal held that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability.

Crime occurred at night and this witness informed the court that there was enough light from electricity bulb and the room used as a bar was not too big so PW1 manage to see all four walls of the bar. By the brightness of the electricity bulb, he said he saw accused entering the bar and went straight to the place where **Mwita Mahanga @ Ng'oina** seated and stab him with a knife he was holding and disappeared. In his final submission the defence counsel argued that the PW1 stated that the accused hand was held the knife handle in fully so there is no way he can see the color of the handle of

the knife. It is my opinion that in this point the learned counsel has analysed half of the testimony, this witness elaborated that he managed to see the handle after the accused has stabbed the victim on his way out.

In order for this court to rule out if the identification of accused by victim was watertight, the evidence adduced by witness must be subjected to a test to make sure that there was a positive identification for this court to be able to rely on. In this regard, I will navigate in the principle of identification as enunciated in the landmark case of **Waziri Amani vs. Republic** [1980] TLR 250 in which the Court of Appeal held that;

*"The evidence of visual identification is of the weakest and most unreliable. It follows, therefore, that no courts should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is watertight".*

The Court of Appeal went further to elaborate on how the possibility of mistaken identity could be eliminated as it stated that, the court would be expected to determine the following questions; the time the witness had the accused under observation, the distance he observed him, the condition the observation occurred, whether it was day light or at night, whether there

was poor or good lighting, whether the witness knew the accused or had seen the accused before or not. (See also **Aus Mzee Hassan vs. Republic**, Criminal Appeal No. 17 of 2020, **Yohana Kulwa @ Mwigulu & 3 Others vs. Republic**, Consolidated Criminal Appeals No. 192 of 2015 and 396 of 2017 and **Alfred Kwezi @ Alphonse vs. Republic**, Criminal Appeal No. 216 of 2021). The Court of Appeal insisted that, when the court is satisfied that there was no mistake of identity then the court can convict the accused trusting the identification of the accused person.

In the case at hand, the crime took place at night, around 20.00 to 22.00 hours, the room where the crime took place has electricity lights and according to PW1 the room wasn't not big as he was able to see all walls of the said room. There was only four table each on different direction and was able to see all tables from where he was. He said the distance from where he was and the door where accused used to enter was only two footsteps. As he was facing the door, he had enough time to see Marwa Hongera entering approaching their table and stab **Mwita Mahanga @ Ng'oina**. Moreover, witness informed the court he knew accused as they stay in nearby village and used to play traditional dance (*kupiga ngoma*) in his village and the witness was attending that dance.

Before I rule out that the accused was positively identified, I advance to weigh the credibility of PW1 who was an eye witness. In the cause, eye witness can be a very powerful tool in determining a person's guilt or innocence but it can also be devastating when false witness identification is made due to honest confusion or outright lying. In **Jaribu Abdalah vs. Republic** [2003] TLR 271, CAT, quoted with authority the case of **Mawazo Mohamed Nyoni @ Pengo & 2 Others vs. Republic**, Criminal Appeal No. 184 of 2018 where it held that: -

*'In a matter of identification is not enough merely to look at factor favouring accurate identification equally important is the credibility of the witness, the ability of witnesses to name the offender at the earliest possible moment is reassuring though not a decisive factor.'*

See also **Kadumu Gurube vs Republic**, Criminal Appeal No. 183 of 2015, while quoting with authority the case of **Marwa Wangiti Mwita vs Republic**, Criminal Appeal 6 of 1995.

It is my finding that, the accused was properly identified by PW1. His testimony covered all circumstances surrounding the positive identification and removed all possibility of mistaken identity. PW1 informed the court that



accused used knife to stab **Mwita Mahanga @Ng'oina** who died in few hours due to deep wound on his chest which disturbed internal organs and cause internal bleeding.

As it was said in the case **Philimon Jumanne Agala @ J4 vs. The Republic**, Criminal Appeal No. 187 of 2015, all four ingredients constitute the offence of murder must be proved. In the case at hand there is a person, **Mwita Mahanga** who is died and his death was unnatural as his internal organs were injured and cause internal bleeding where, in few hours he died and that accused is associated with the death.

Following that analysis, I have to look at ill will, guilty mind, under section 200 of Cap 16 is referred to as malice aforethought. The section reads;

*'Malice aforethought shall be deemed to be established by evidence proving **any one** or more of the following circumstances-*

*(a) 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;*

*(b) knowledge that the act or omission causing death will probably cause the death of **or grievous harm to some person**, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or **grievous bodily harm is caused or not**, or by a wish that it may not be caused;*

*(c) an intent to commit an offence punishable with a penalty which is **graver than imprisonment for three years;***

*(d) .....'*

Court of appeal in the famous case of **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994 (unreported) saying 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.

In the case at hand, accused used a knife to inflict at the chest of the victim, accused had one wound but the depth of it was too long that it disturbed other internal organs. Knife is a dangerous weapon and the area stabbed

was chest which is sensitive part of the body. One blow was heavy as the depth of the wound was 8 cm long. Kind of injury was wound with deep penetration, although attacker did not utter any word before and after the crime, he disappeared after the action. This shows that he intended to kill the deceased as most of the tests of malice aforethought if proved.

In defense, accused relied on defence of *alibi* that he was in nearby village, in Waigita where he went for farming purposes. Although section 194 (5) of CPA was not observed in this defence, the court has discretion under subsection 6 of the same provision to consider it.

DW 1 informed the court he went there 20/12/2020 and preparing a farm, he planted maize and that he has to remain in that same village guarding his crops against destructive animals. He decided to go back to his village on 10/01/2021. One can wonder how can he guard crops of 20 days only from animals. He said, he doesn't know the size of the farm and how many bags was harvested as they don't use bags they just store maize in store (ghalani) in the contrary, DW2 informed the court that they harvested 5 bags while DW3 said they harvested 6 bags.

Moreso in their defence, DW2 informed the court that when the crops were ready for harvesting her husband was already arrested where upon she makes her memories that he was arrested in 2022 and that her sister-in-law who is Pili the wife of DW3 helped her in harvesting. In the contrary, DW3 said his wife Pili was in his farm while the accused farm was harvested and that it was accused family who harvested their farm while accused was already arrested. Apart from this court exercising the discretion of admitting defence of *alibi*, defence testimony is tainted with contradiction and one may wonder if at all there was a farm as the accused did not know even the size of his farm which he has been cultivating several times. Beside the distance from Nyarwana where the crime was committed to Waigita where he confessed to be is just two hours walking, which means he can be at Waigita and still be able to go to Nyarwana for various reasons.

It has been held in the case of **July Joseph vs. The Republic**, Criminal Appeal No. 226 of 2021 CAT at Kigoma, that;

*'It is common ground that the appellant is under no duty to prove his innocence, but that does not mean he can have his way and be as inconsistent in his story as he likes.'*

It was testimony of defence witnesses including DW1 that the case was framed due to his conflict with one family in neighbor village. I find that reliance in the conflict with other family in neighbor village was afterthought because the death of deceased young brother occurred in April 2013 and he was arrested to face the charge in this case on 23/03/2022. Its almost 9 years. If at all there were the issue of revenge for his effort to make sure that murderers are arrested, then it could have been done at any time not for the duration of 9 years. Is it true that there was nobody died in Nyarwana village since 2013 so that those persons who are condemned to frame the case can make one? The answer is no. DW1 claimed that one of the suspects of murder of the Mwikwabe is PW1 son, this was not proved because the accused had a chance to put questions to witness but he did not.

I am aware that in criminal trials an accused person cannot be convicted on the weaknesses of his defence as clearly stated in **Christian s/o Kale and Rwekaza s/o 5 Bernard v R.** [1992] TLR 302 (CA) Omar JJA, Ramadhani JJA, Mnzavas JJA:

*"Although second appellant's defence, like that of his co-accused, was a cock-and-bull story of what happened on the material day; and it must be conceded that he obviously has a*

*talent for fiction; an accused ought not to be convicted on the weakness of his defence but on the strength of the prosecution case."*

Now weighing the evidence from the prosecution side with the defence side, I am of the view that, the prosecution has successfully proved the case beyond reasonable doubt against the accused. First, the prosecution has managed to prove the identification of the accused which was watertight, it was night but there was an electricity light. Second, witnesses were able to prove that the accused person intended to kill as he used knife. The accused only deny the charge, without establishing evidence to cast a shadow as to his identity at the scene.

All that being said, the prosecution has managed to prove the case beyond reasonable doubt. Therefore, the accused **Marwa Hongera Marwa** is hereby convicted for the offence of murder contrary to section 196 of the Penal Code [Cap 16 R.E 2019 now R.E 2022].



  
**M. L. KOMBA**  
**JUDGE**  
**3 March 2023**

## **SENTENCE**

The accused herein has been convicted for the offence of murder contrary to section 196 and 197 of the Penal Code, the offence when proved has only one punishment. My hands are tangled leaving me with no other option than sentence **Marwa Hongera Marwa** to suffer death by hanging.



NA  
**M. L. KOMBA**  
Judge  
**3 March, 2023**

**Court:** Right of appeal is fully explained.

NA  
**M. L. KOMBA**  
Judge  
**3 March, 2023**