

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

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**CRIMINAL JURISDICTION**

**SITTING AT MPANDA**

**CRIMINAL SESSION NO. 21 OF 2021**

**REPUBLIC**

**VERSUS**

**JEREMIA S/O LUAMBA @ KESI S/O HANDO**

**07/02/2023 & 06/03/2023**

**JUDGMENT**

**MWENEMPAZI, J.**

The accused in this case has been arraigned in Court and charged with the offence of Murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E 2019. The prosecution alleges that the accused Jeremia s/o Luamba @ Kesi s/o Hando on the 28<sup>th</sup> day of June 2020 at Ikondamoyo Village within Mpanda District in Katavi Region murdered one CHACHA S/O ZAKARIA.

On the 3<sup>rd</sup> day of October, 2022 this case was scheduled for plea taking. The charge was read over and explained to the accused person and him being called to plea thereto, he pleaded not guilty to the charge. He

also denied all the facts prepared under section 192 of the Criminal Procedure Act, Cap 20 R.E 2019, which facts were read over and explained to him. He only admitted his names, sex, age, religion and place of residence. He admitted that he was arrested by the police and interrogated for committing the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2019 and charged for the offence.

At the hearing, the prosecution was being led by Mr. Lugano Barnabas Mwasubila, Learned State Attorney and the accused was being represented by Mr. Sweetbert Alphonse Nkupilo, Learned Advocate. In the course of the hearing the prosecution called six (6) witnesses and the accused defended himself. He had no any witness to support his case.

As a matter of law, the offence of murder is proved when both actus reus and malice aforethought are proved by the prosecution. The story in this case begins with the conflict between Gabriel s/o Beatus (PW1) and the deceased in this case. Both were residents of Ikondamoyo Village. It was led in the evidence that PW1 works at the site where he makes bricks for construction. On the 28<sup>th</sup> day of June, 2020 during the evening hours as he was walking on the way towards his mother's residence, he found Chacha s/o Zakaria (now deceased) sitting on the side of the road or way. He was

holding a machete on one hand and a knife on the other hand. He started chasing PW1 who ran away to save his life and stormed into his mother's house wherein he took refuge.

According to PW1 he informed his mother, one Maria D/o Federiko Mlagi who testified as PW2. The mother in turn called the chairman of the village Mr. Philipo Mswanya (PW4). It is in the evidence of PW2 that after she had received complaints from her son, she called Philipo Mswanya (PW4) in order to resolve the dispute which had just been reported. The deceased, after realizing that PW1 was residing that house, went away and a few minutes later returned with his friend Zakaria. However, he was still holding a machete and knife. They came to apologize for what had just happened. The lady (PW2) refused to welcome them for a talk, instead she called the village chairman.

The village chairman, Philip Mswanya testified as PW4. After he had received the information following PW2's call, he in turn called the OCS of Katumba Police Station; this is none other than Inspector Conrad Nchimbi(PW5). At the time the latter came to testify, he had already shifted to Mwese Police Station. PW4 testified that he called for reporting and seeking assistance from the police. After brief talk and or discussion the



OCS instructed PW4 to go at the residence of Maria Federiko Mlaji (PW2) so that he may assess the situation and if possible reconcile the parties.

The village chairman went at the place as instructed after he had finished his job at his farm. He found Maria Mlaji (PW2) and his son (Gabriel Beatus PW1). He was told the story by PW2 and PW1 that Chacha Zakaria (deceased) was chasing Gabriel Beatus while holding a machete and knife. He called the OCS and informed him the story. He was then instructed by the OCS to reconcile these people. He therefore took the initiative to look for Chacha's friend, whom he found at the house apologizing to the woman (PW2) on behalf of Chacha. He instructed Zakaria to call Chacha s/o Zakaria, who in turn came, again hold machete and knife. Since the mission was to reconcile the parties; he confiscated the weapons and kept safe in the house they were in. when he inquired, Chacha s/o Zakaria apologized for what had happened without disclosing the details. They settled their difference and the chairman reported to the police.

As they were about to leave, the accused in this case, Kesi s/o Hando came accompanying his wife, Stella d/o Amenya. The accused's wife complained to the chairman that Chacha was seducing her and forcing her to accept him. The chairman (PW4) told them that it was late and basically



they have settled the dispute. If there are any other complaints, they should report at the Village Office next morning. The woman showed that she was emotional. According to the testimony by Maria Federico Mlagi (PW2), Kesi reacted to the statement by the chairman on settlement that *'if you have forgiven him it is your decision. I still have grudges; he has seduced my wife.'*

At this point the situation started to be difficult. As they were coming out of the house, the chairman saw that there were many people outside the house. He became concerned with the safety of Chacha s/o Zakaria. He ordered the militiamen present (though he did not mention any) to arrest Chacha s/o Zakaria and put him in remand. When he was so directing the militiamen, the victim Chacha s/o Zakaria was around and heard the directives. He decided to run away.

It is in the evidence of Gabriel s/o Beatus (PW1) that Kesi s/o Hando (accused) picked a brick and threw it to the direction Chacha was heading. PW2 is not sure whether Chacha Zakaria was hit as she (PW2) testified at cross – examination by defence. However, at this juncture it is important we have the words or statement as the witness was testifying; during examination in chief PW2 testified:



*"At my home there is a lamp, we could see Kesi picking a brick and started chasing Chacha. Then they (people) started to attack him (Chacha). Chacha Zakaria ran up to a certain house, they attacked him with bricks (witness not confident). The victim was weak they took him in the motor vehicle and sent him to hospital on 29<sup>th</sup> June, 2020 we heard that Chacha has died.*

When this witness was being cross examined by the defence counsel, Mr. Sweetbert Nkupilo, Learned Advocate, PW2 testified as follows:

*"From my house to the place the deceased was attacked, you pass by two houses and at the third one that is the place. I did not go to the scene where the attack occurred. I only heard voices of people; I think there were many people who attacked the deceased. I know Kesi Hando picked a brick and started chasing Chacha".*

Apart from Gabriel Beatus (PW1), Maria Federico Mlagi (PW2) Chacha s/o Zakaria, his friend and or co-worker Zakaria there was also Philipo Mswanya. The rest were people who joined them and the account of the story does not identify them individually. Philipo s/o Mswanya (PW4) is the village chairman, he came to reconcile the parties in order to maintain peace



for the public good. The rest had their sides either for or against Chacha s/o Zakaria and or the accused (Kesi Hando). As it will be clear soon, I find the testimony by PW1 and PW2 not safe for the interest of justice. Philipo s/o Mswanya (PW4) on the account of the events after the initial reconciliation, when they were about to leave the house of Maria d/o Federiko Mlaji (PW2) testified as follows:

*"When Chacha was running away, after I had said 'arrest Chacha', almost all of them started to run after him. They were chasing Chacha, the deceased, Gabriel Beatus did not chase Chacha. The victim was hit by stones immediately he started to run on the street road. Almost, all people threw stones. I was confused. The distance from where I was standing and where they started to throw stones to the deceased was approximately thirty (30) meters".*

It would, at this level, suffice to say that the deceased was attacked and hit by stones. The only question remains, who is the person responsible? Is it the accused or somebody else?

Before we embark on determining the question it would be helpful to assess the evidence as tendered. The prosecution in their effort to prove the

case against the accused person, produced an exhibit P1 which is a Post Mortem Examination Report. It was produced by PW3 Dr. Philipo Felix Mwita, who conducted the examination. His testimony is that the external appearance of the body of the deceased Chacha s/o Zakaria, seemed not to have injuries but only small wounds around the mouth and under the nose. When the stomach was opened, after surgery, *it was found that the small intestine had ruptured showing that he had been hit by something heavy. It showed that the deceased had lost a lot of blood due to internal bleeding causing lowering of blood pressure and therefore death.* Thus, in exhibit P1 the cause of death is recorded to be:

*"Hypovolemic shock secondary to visceral injury (perforated ileum)".*

Now, in my view, there is no doubt that the deceased was struck by something heavy which caused the internal injuries leading to the demise of the victim. The same might have been done by the accused or any of the attackers as we have seen in the summary of the evidence herein above.

The offence of murder is proved where there has been proved an act causing death (actus reus) and malice aforethought. According to this case we need

*PHS Mwita.*

evidence establishing that the accused did strike the victim Chacha s/o Zakaria with the brick and no other person.

The Counsel for prosecution, Mr. Lugano Barnabas Mwasubila, Learned State Attorney in the final submission has submitted that the accused person was seen by PW1, PW2 and PW4 attacking and hitting the deceased with bricks and stones. The deceased decided to run away in order to save his life but other people who came at the compound of PW2 together with the accused person, ran after him and attacked and hit the deceased with the stones and bricks. As the situation became unbearable to him, the deceased sought refuge into the house of John Mwita. It is alleged that people and the accused person broke the door, picked him out and continued hitting him. The victim sustained severe injuries which culminated into his death.

In the submission the Counsel for the state has submitted that the witnesses PW1, PW2 and PW4 are credible and reliable witnesses as they named the accused person and his associates to the police officer Inspector Conrad Nchimbi. He cited the case of **Marwa Wangiti Mwita and Another Vs. Republic [2002] TLR 39** wherein the court held:

*"The ability of the witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability".*



In the submission the Counsel for the prosecution has stated that the accused person was directly involved in inflicting the fatal blows to the deceased by hitting him with bricks and stones aiming at causing injuries. He has cited the case of **Godfrey James Ihuya & 8 Others Vs. Republic [1980] TLR 197** where the Court held that:

*"To constitute a common intention to prosecute an unlawful purpose eg. to beat a so called thief as a result of which he is dead, it is not necessary that there should be consent agreement between the accused prior to the attack of the so called thief. Their common intention may be inferred from their presence, their actions and omissions of any of them to disassociate himself from the assault".*

He argued that the meeting as per PW2 and PW4 involved only five people. But after the arrival of Kesi s/o Hando, the accused, many people showed up outside the house of PW5. It is obvious, the accused invited his colleagues with common intention of inflicting blows to the deceased. He submitted that an attack in the course of administering "mob justice" which result in the death of the victim may, under the law of this country, constitute murder; and for the argument he cited the case of **Enock Kapela Vs.**



**Republic**, Criminal Appeal No. 150/1994 Court of Appeal of Tanzania at Mbeya (page 6).

The counsel submitted that according to the evidence tendered, the accused disappeared immediately after inflicting the blows to the deceased until when he was arrested on the 14/7/2020 Mpanda Bust Stand. He has cited the case of **Paul Elias Vs. Republic**, Criminal Appeal No. 7 of 2004 Court of Appeal of Tanzania at Mwanza (page 7) for the holding that:

*"The conduct of an accused person before or after killing also infer malice...it is also in evidence, and undisputed for that matter, that the appellant left the scene immediately after the killing. If he was innocent there was no need to hide. In our view, the totality of his conduct after the killing was not consistent with innocence".*

The Counsel, submitted that there was malice in the acts of the accused person. That can be inferred from the nature of weapons used by him and his colleague in attacking the deceased. He has cited the case of **Elias Seif Vs. Republic [1984] TLR 244** where the Court inferred malice from the weapons used and location of the injury inflicted. Also the case of **Paul Elias Vs. Republic** (supra) in the latter case it was held that:



*"Malice aforethought may also be inferred from the nature of the weapons used and the part or parts of the body where the alarm was inflicted. In this case a stone was used and was hit on the head, chest and abdomen which are vulnerable parts of the human body".*

The counsel has also submitted on the effect of the defence by the accused person. He argues that it has failed to shake the prosecution evidence and in some points the accused is admitting the testimony by PW2 and PW4. He even failed to cross – examine and that is the same as admitting. He has cited the case of **Bomboo Amina & Another Vs. Republic**, Criminal Appeal No. 320 of 2016, Court of Appeal of Tanzania at Arusha (unreported) and also the case of **John s/o Shini Vs. Republic**, Criminal Appeal No. 573 of 2016 Court of Appeal of Tanzania at Shinyanga (page 18) where the Court of Appeal of Tanzania held that:

*"It is a trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the Court to disbelieve what the witness said, as the silence is tantamount to accepting the truth".*



The Counsel also cited the case of **Mohamed Katindi & Another Vs. Republic [1986] TLR 134** where the Court held that:

*"It was on obligation of the defence Counsel in duty to his client and to the Court, to indicate in cross examination the theme of his client's defence so as to give the prosecution to deal with the matter".*

It is therefore in the view of the prosecution that the accused person committed the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2019.

The defence Counsel had the mission, as reflected in the prayer to the final submission, that he convinces this Court to dismiss the charge, acquit the accused person and set him free. The reason advanced is that the prosecution has failed to prove the case beyond any reasonable doubt as required by law. That the accused person did not commit the offence he is charged with.

The Counsel for defence has submitted arguing that it is the duty of the prosecution to prove the case beyond any reasonable doubt. He has cited, for the argument, the case of **Nathaniel Mapunda and Another Vs. Republic [2006] TLR 395** where it was held that:

*"In criminal charge the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt".*

He argues that the prosecution has failed to fulfil their duty and failed to prove the case to the requires standard.

As to the question, whether the accused person is the one who has committed the offence of murder, the defence counsel has submitted that considering the testimony of PW1, PW2 and PW4 and that of the accused in his defence, there is no any eye witness who has testified that he/she saw the accused person hitting the deceased with stones or bricks. Though PW1 testified that he saw the accused hit the deceased with the brick; why was that testimony different from other two persons who were also at the scene of event? He has argued that the evidence of PW1 is not credible. The counsel has submitted that in the strength of the case of **Nathaniel Alphonse Mapunda Vs. Republic [2006] TLR 395** that *"there must be credible evidence linking the appellants with offence committed"*.

According to evidence, the deceased was killed by a group of people, under the circumstances the accused did not kill the deceased person.

The Counsel for the defence submitted that in addition, PW4 testified that he was given names of those who were attacking the deceased by one

called Zakaria (Chacha's friend), that person was not called to testify in Court as the key witness who saw the people beating his friend. He has argued that Zakaria was a material witness to be called and testify in Court, and was not summoned by the prosecutor. The counsel for defence referred to the case of **Aziz Abdallah Vs. Republic [1991] TLR 9**, where in it was quoted with approval by the Court of appeal the case of **Mashimba Dotto @ Lukubanija Vs. Republic**, Criminal Appeal No. 317 of 2013 (Court of Appeal of Tanzania at Mwanza) and the Court stated:

*"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the Court may draw inference adverse to the prosecution".*

The Counsel for defence concluded that the arrest of the accused person was based on suspicion, and that *"the law is well settled that however strong might be, suspicion alone cannot be proof of the case against the accused"* citing the case of **Republic Vs. Emmanuel s/o Nengo and**



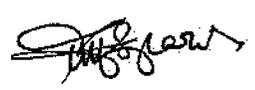
**Dotto s/o Elias**, Criminal sessions case No. 137 of 2016, High Court of Tanzania at Geita (unreported).

Therefore, the Counsel for defence prayed that the charges against the accused be dismissed and he be acquitted and set free.

I have had an opportunity of hearing this case from the first witness to the defence witness. I am therefore, in a position to determine as to whether the accused is guilty of the offence of murder or not. To answer the question, we have to determine first, whether the accused is the one who acted and injured the victim and if the answer is in the positive, then whether the accused person had any malice aforethought.

As it has been summarized herein above, the accused person came to be alleged to have been in conflict with the law when on the 28<sup>th</sup> June, 2020 he went to complain to the chairman about the victim's actions of seducing his wife Stella d/o Ameyya. In his testimony, he knew of the fact on the evening of that day when he came home from his work, as he said he is a turn boy in a Hiace which commutes between Mishenyi and Mpanda District Council.

When the event made known to the accused person, Chacha s/o Zakaria was already in conflict with Gabriel s/o Beatus (PW1) and he had



gone chasing him after he had, sort of, waylaid him on PW1's way home. It is clear from the testimony of PW4 Philipo Maswanya, that the two had their journey of conflict started in the noon time of the date of event, apparently while both of them were trying to gain access into love affairs with the wife of the accused. The scenario is better explained as where two unauthorized male persons were jealousy of each other over another person's wife, in this case the wife of the accused person; one Stella s/o Amenity.

When the accused went to the house of PW2, Maria Federiko Mlagi (PW2) was trying to protect his wife from '**love predators**'; Chacha s/o Zakaria and Gabriel s/o Beatus. According to the testimony of PW4, he discovered the scenario I have just presented after Chacha s/o Zakaria had apologized without disclosing what made him chase Gabriel s/o Beatus. That fact also was not disclosed during the testimony of PW1. The truth is, in short, in the afternoon of the material day Chacha s/o Zakaria passed by the house of the accused and saw Gabriel s/o Beatus sitting with accused's wife having conversation. He became jealousy hence all the misbehaving leading to the present case.



When I heard the evidence by the prosecution, in particular PW4 Philipo Mswanya, I had the opinion carried in the quote by William Penn that *'The Jealousy are troublesome to others but a torment to themselves'* or otherwise *"jealous is the only vice that gives no pleasure"* as said by Patrick Henry.

As to the question whether the accused is the one who caused the injuries to the victim, Chacha s/o Zakaria, I hesitate to give an affirmative answer. Only Gabriel s/o Beatus (PW1) was categorical in his testimony that he saw the accused picking a brick and throw it to Chacha s/o Zakaria. His mother who was present also observing the events unveiling was affirmative at first, in the examination in chief, and then she recanted her position during cross examination, then came back to affirm at the re - examination that the accused hit the deceased with the brick. In my view, she was hesitant and therefore not credible.

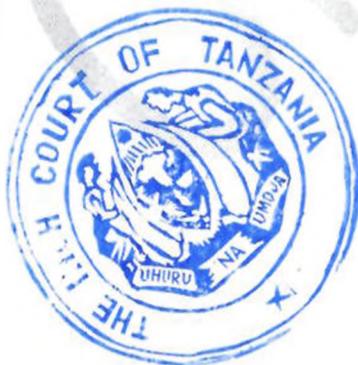
The only firm testimony is that of PW4 who said that the accused did not hit the deceased with the brick but he chased him together with other people. He was firm that he did not see the accused hitting the deceased with the brick.



Since it is doubtful whether the accused person hit Chacha s/o Zakaria with a brick or not, I find it is safe not to hold otherwise but in a negative way. In my view, that is the crucial question which determine the culpability of the accused. That being the position, we cannot hold the accused liable due to his complaint and what befell the deceased. After all, PW4 testified that Chacha s/o Zakaria ran away after hearing that they want to arrest him and remand him for his safety.

Under the circumstances the charge of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2019 leveled against the accused person has not been proved beyond reasonable doubt. The same is dismissed and the accused is acquitted forthwith. He should be released and set free unless he is lawfully being held for another lawful cause.

It is ordered accordingly.



  
**T.M. MWENEMPAZI**

**JUDGE**

**06/03/2023**