

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSION CASE NO. 45 OF 2022**

**REPUBLIC**

**VERSUS**

**BAHATI KALIMANZILA @ MBAGA.....ACCUSED**

**JUDGMENT**

9/5/2023 & 15/5/2023

**Mlacha, J.**

The accused, Bahati Kalimanzila @ Mbaga is charged of murder c/s 196 and 197 of the Penal Code, Cap 16 R.E. 2022. It was alleged that he murdered Yowasi William @ Mtula on 15/4/2022 at Kagerankanda forest within Kasulu district, Kigoma region. He denied the charges.

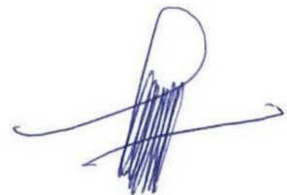
The prosecution called 5 witnesses of prove their case. The accused was the sole defence witness. It was the prosecution case that on 15/4/2022 at around 10:00 PM, PW1 Fedrick Meshack (40), PW2 James Wilhard (25), Chobaliko Filbert @ Chobanda and Yowasi William @ Mtula (the deceased) were at Kagerankanda fores at a place where they have set up their camp for cutting timber. The evidence of PW1 and PW2 show that they entered



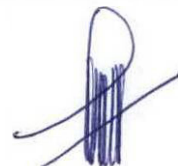
somewhere deep in the forest and cleared an area to create an open space where they set up their camp as a base for their activities. They built a small hut where they slept. There was the fire place and a place where they cooked food, all located in the open yard adjacent the hut. The fire place and the place where they cooked food were in in the open yard without a roof.

PW1 said that he was at the cooking area, cooking food for it was his turn so to do. PW2, Chobaliko and the deceased were at the fire place getting some heat in the cold night. PW1 and PW2 said that apart from the light of fire which was bright, there was also light from a solar panel which was installed at the camp. It had two bulbs which had a bright light.

Now, while four of them were there, the accused came. He is described as holding a stick on his left hand and a machete (panga) on the right hand. Both PW1 and PW2 said that they knew him very well as he lived nearby and used to visit them regularly. He used to come and eat food with them at the camp. PW1 knew him simply as 'Msukuma' but PW2 knew him in his real name of Bahati Kalimanzila @ Mbagha. PW2 said that he had stayed at the campy longer than PW1 and was more familiar to the accused.




It was the evidence of PW1 that the fire place was in a distance of 3 meters from the cooking place. PW2 shared the same view. It was the evidence of PW1 that while at the cooking place, preparing dinner for the group and while PW2 and the 2 others were seated at the fire place, the accused came holding a stick and a machete and greeted him. He then moved to the fire place and attacked the deceased with the machete. He cut him on the head and he fell down. He cut his legs as well. PW1 rose an alarm but nobody came because it was a bush area. There was no house nearby. The nearby house was that of the accused himself which was 200 meters from the camp. PW1 said that there was a bright light from the fire and the solar bulbs which could allow a person to see a snake passing on the ground. There was no any object between the fire place and the cooking area which could block him to see and identify the accused. He could identify him properly, he said. The accused run away with his weapons after committing the crime. He said that cutting of the deceased and the whole episode took about 10 minutes. PW2 had a similar story. He said that Bahati (the accused) came and greeted them. He started to greet PW1 and then moved to greet them with his stick and machete. They replied the greetings. He came in front of him in the direction of the cooking area. He saw him coming from that direction.



Yowasi, the deceased, was in front of him in the direction of the fire place. He could identify the accused properly as he was greeting PW1 and coming to them using the light of fire and the bright solar light. He saw him cutting Yowasi on the head and legs. There rose an alarm. The accused ran away with his stick and machete. They could not get assistance as people lived far away.

PW1 and PW2 decided that they should go back to the village. They made a phone call. A cyclist (bodaboda) responded to the call and came. They put Yowasi who had been seriously wounded on the bodaboda. PW1 stayed behind him to give him support. PW2 and Chobaliko followed them with bicycles. The bodaboda moved straight to the house of Mr. Yowasi where they met his wife. His wife called his brother, PW4 Jovinus William Mtula (46) to see what had happened. They took him to the police station for a PF3 and later to the hospital. He died at the hospital on 16/4/2022 at 9:00 Am as he was receiving treatments.

The body of the deceased was examined by PW3, Dr. Kagaga Daga (58), an Assistant Medical officer (AMO) of Kasulu Hospital. He observed the body from the head to the legs. He said that he saw 3 big cut wounds on the head which involved the skull which was fractured. Giving details, he said that he



saw a big cut wound on the rear side of the head (Kisogoni) which affected the near born of the head, a cut wound on the front area of the head and a cut wound on the lower side of the face, below the nose. He described the wound bellow the nose as big, very deep. PW3 went on to say that there was a cut wound on the right leg at the patella (the small bone ahead of the knee) which caused a fracture of the patella born. The left leg has a cut wound at the tibia bone (the big bone which runs in front of the leg from the knee downwards) which was broken. He concluded that death was caused by excessive bleeding due to the cut wounds. He tendered his Postmortem Examination Report which was received as exhibit P1.

PW5 F 7059 D/CPL Elias (40) was the investigator. He told the court the way he received the report, questioned witnesses and laid a trap to arrest the accused. He also moved and examined the scene of crime. He could not get the machete because the accused had disappeared with it.

DW1 Bahati Kalimanzila Mbaga (36) denied to be involved in the commission of the crime. He invited the court to discredit the evidence of prosecution witnesses. He said that he was arrested on 14/5/2022 after a quarrel with his fellow Sukuma. He was arrested by people who sent him to Kagerankanda police post where he slept. He was sent to Kasulu police

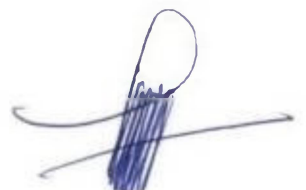


station on the other day and charged of wounding. He was later questioned and accused of murdering Mr. Yowasi. He went on to say that he had a conflict with James but they never happened to do anything bad to each other. He added that Sukuma and Waha have land disputes in the area. He suspected that this case might have been filed because of the land disputes. He challenged the evidence of PW4 and PW5 saying that it is hearsay evidence.

That marks the end of the summary of evidence brought before the court.

Next is an evaluation of the evidence and examination of the relevant law.

In a murder case like this one, the prosecution have to prove that the accused is the one who killed the deceased and that he killed him with malice aforethought. In establishing that the accused is the one who murdered the deceased, there are three elements are central; cause of death, identification and malice. There must be evidence showing that the accused was properly identified at the scene of crime. There must also be evidence showing that he had malice. Identification and malice aforethought have many precedents of this court and the Court of Appeal. I will try to examine the three areas closely starting with the death.



Death and cause of death were established by PW1, PW2, PW3, PW4 and PW5. They all said that Yowasi is dead. PW3 who is the doctor said that he died out of excessive bleeding resulting from the cut wounds. The accused did not object death or its cause. He only denied his involvement. The court will have to find out if the accused is the one who killed the deceased and if so, whether he did so with malice aforethought.

I will now move to examine principles involved in identification and malice. We have many authorities in these areas. The leading case in identification is the case of **Waziri Amani vs. Republic** [1980] T.L.R. 250. The court had this to say at page 251:

*"... that, no court 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 absolutely watertight."* (Emphasis added)

The court went on to say the following at page 252:

*"We would, for example, expect to find on record questions such as the following posed and resolved by him; the **time** the witness had the accused under observation; the **distance** at which he*

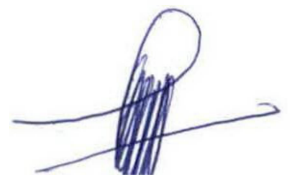


*observed him; the **conditions** in which such observation occurred, for instance, whether it was **day or night**-time, whether there was **good or poor lighting** at the scene; and further whether the witness knew or had **seen the accused before** or not. These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."*

In **Cosmas Alphonse vs. R**, Criminal Appeal No. 241 of 2007 (CAT Unreported), the court held thus:

*"It is trite law that where a witness is testifying about identifying another person in unfavourable circumstances like **during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable**. To do so, he will need to mention all the aids to unmistakable identification like proximity to the person being identified, the source of light, its intensity ...etc" (Emphasis added)*

In **Njamba Kulamiwa vs. Republic**, Criminal Appeal No. 460 of 2007 (unreported), the court made the following observations:





*"As is clear, from the above passage, **WAZIRI AMANI's** case just gave broad guidelines, and **it is for the trial court, in each case to assess and apply those guidelines, in the light of the circumstances of each case.** However, those principles were developed against the backdrop of an old and cherished principle that generally, it was dangerous to convict on the evidence of a single witness of identification where the conditions for such identification were unfavourable."*  
(Emphasis added)

In **Rajabu Khalifa Katumbo and 3 others v. R.** [1994] TLR 129, it was held thus: -

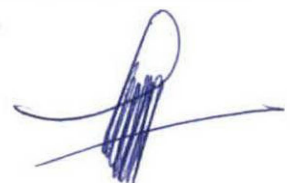
*"Although the offence was committed at night, there were two lamps in the corridor inside the house which facilitated the identification of the offenders. **The accused were known to the witnesses well before the day of the incident; the witnesses, therefore, were extremely unlikely to mistake them...**it is a cardinal principle that **the ability of a witness to name a suspect at the earliest opportunity** is an important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry".*

(Emphasis added)

See also, **Hando Hau @ Hau Petro vs. The Republic**, (CAT), Criminal Appeal No. 453 of 2018 and **Athumani Hamis @ Athuman vs. R**, Criminal Appeal No. 288 of 2009 (unreported).

Looking at the evidence of PW1 and PW2 and the circumstances under which the crime was committed, there is no doubt that the accused was identified properly in line with what is provided in the above authorities. The evidence shows that the accused was a regular visitor at the camp. Both PW1 and PW2 said that he used to visit and eat food with them. They knew him and the place where he lived, 200 meters from the camp. PW2 knew him by his names, Bahati Kalimanzila @ Mbagu. PW1 knew him as Msukuma. The accused did not deny the name of Bahati Kalimanzila Mbagu. He also agreed that he is a Sukuma. They named him soon on the following day to the police as being the one who killed the deceased.

Both PW1 and PW2 said that there was a bright light from the fire and solar bulbs. There was also nothing to obstruct them as the area was open. Further, the accused who was familiar to them and greeted them as he was entering in the house. He thereafter started the attack which took about 10



minutes. I think that the circumstances show a favourable identification. It is thus my finding and decision that the accused was properly identified.

One of the leading cases of malice is the case of **Enock Kipela vs. The Republic**, Criminal Appeal No. 150 of 1994 (CAT unreported). It was said as follows at page 7:

*"Usually, an attacker will not declare his intention 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 blow or 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 (7) the conduct of the attacker before and after the killing."*(Emphasis added)

See also **Mark Kasimiri vs. R**, criminal appeal no. 39 of 2017 and **Saimon Justine, Mbonea Mbwambo & another vs. Republic**, Criminal Appeal No. 53 of 2006 (CAT). In the latter case it was held thus:

*"... Malice aforethought has therefore been held to have been manifested by such acts as **the culprit's utterances before or after the event, the amount of force used, the nature and size of weapon(s) used, the part of the body to which the attack is directed, the conduct of the accused, the purpose for which the injury or grievous harm is inflicted etc.** But all these must be established by evidence".*

Looking at the type of weapon used (a sharp machete), the place where it was applied (the head, 3 times leading to fracture of the skull) and the legs (two times leading to fracture of the bones), the number of blows (five times), the amount of force (big leading to fracture of the skull and breaking of bones of the legs) and the conduct of the accused after committing the crime (he run away), one can say for sure that the accused intended to kill the deceased. He had no other intension than that of killing the deceased.

The accused denied committing the crime. He also said that the prosecution had no good evidence. Part of it is hear say. That he was arrested on allegations of wounding a fellow Sukuma only to be told that he had murdered the deceased. He also spoke of the existence of land disputes between the Sukuma and Waha in the area.



While admitting that the attack might have its base grudges arising out of land disputes or some other matters, I don't agree that what was said by the accused has injected any doubts in the prosecution case. There was good evidence showing the way he entered in the area and attacked the deceased. There was direct evidence of PW1 and PW2 in circumstances of enough light making the defence of the accused useless. He was also familiar to PW1 and PW2. Prosecution witnesses were also reliable unlike the accused whose demeanour left much to be desired. His defence was thus baseless and is dismissed.

All said and done, it is my finding that the prosecution have proved their case beyond reasonable doubt. The accused is found guilty of murder as charged and convicted accordingly.



**L.M. Mlacha**

**Judge**

**15/5/2023**



## SENTENCE

There is only one sentence for murder which is death by hanging. Personally, I don't want this punishment but my hands are tied by the judicial oath which I took.

I sentence you the said, BAHATI KALIMANZILA @ MBAGA to suffer Death by Hanging.



**L.M. Mlacha**

**Judge**

**15/5/2023**

**Court:** Judgment delivered in the presence of the accused, Ms Edna Makala state attorney and Ms. Mary Peter Milali for the accused.

Right of appeal explained



**L.M. Mlacha**

**Judge**

**15/5/2023**