

**Criminal Session Case No 1 of 2023**

**Republic**

**Vs**

**Barakaeli Emmanuel Ayo**

*(Confer Committal Proceedings in Preliminary Inquiry No 3 of 2023)*

*09/06/2023 & 16 /06/2023*

**JUDGMENT**

**BADE, J.**

The accused was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE 2002. The prosecution alleged that, on 31st May 2021 at Kikatiti Village, Arumeru District within Arusha Region, the accused murdered one Daniel Melau Sumari, the deceased. To prove the charge, the prosecution called a total of 4 witnesses, including a doctor who received the body of the deceased and did a postmortem on it. The defense side had one witness who was the accused person himself.

From the prosecution case, the adduced evidence was to the effect that the deceased person had gone to work on the farm in the early hours of the morning of 31st May 2019. He was accompanied by his grandchild one

Arnold Zephania Mollel who was 18 y/old at the time this crime was committed against his grandfather, who testified as **PW1**. He testified that while planting maize at the farm with his grandfather, suddenly Barakaeli appeared, he came holding a machete and a stick (the kind of stick that is used for grazing cows commonly known as fimbo). When he approached Mzee Melau Sumari, he picked a stone and threw it at Mzee, and when the Mzee fell, Barakaeli got his stick and started beating him up with it.

**PW1** states that he could not help and defend Mzee Sumari as he was too aggressive, so he ran back to the village and called his mother. The mother made noises, (ukunga), and to their aid, appeared the chairperson of Mlimani hamlet, whose name is Mtui. It is the chairperson who called the police and two other persons including a ward counselor, who had brought transport to ferry the victim and went to the Usa River Police to get a PF3. When they got back, they did not find the accused there. Then they took Mzee Melau Sumari to the hospital. Meanwhile, they left **PW1** to make a statement at the police station. **PW1** is positive about the identity of the attacker, Barakaeli Emmanuel Ayo because he has lived with him in the same village for quite a while and managed to identify him in court too. While being cross-examined, the witness explained that the deceased's family and theirs were

fighting over the farmland, which made him pass the first house on his way to get help since that was the house of Barakaeli family.

On his part, **PW2** Elyphas Asuraeli Mtui testified that he came to the scene of the incident because he received a phone call from the father of the accused one Emmanuel Ayo that his son had committed a crime attacking someone. He also says he is a neighbor of the Melau Sumari. On arriving at the farm, he found the deceased on the ground, and he explained that he was beaten by "heavy items" by Barakaeli Emmanuel Jackson @ Ayo. His both arms and legs were broken. He is the one who called the OC CID who then came and interrogated the victim, followed him to the station and issued a PF3, and rushed the victim to Tengeru Health Centre, The victim did not make it and passed away before getting to the hospital. At this point, he stated that they were instructed by the Police to take the body to Mount Meru Hospital Mortuary. He explained that the farm that the victim was in actually was not his own, it belonged to one Elia Ndewwa Ayo. He explained further that the reason he was at the farm of another is because the farm was being rented out to him for farming.

On cross-examination, he stuck to his story that Emmanuel Jackson Mrewa who is the father of the accused is the one who called him to inform him of

what had happened and positively identified the accused at the dock as Barakaeli since he too is his neighbor as a Hamlet chairperson.

Further, the prosecution called the doctor who undertook the autopsy of the deceased body. Dr. Lwitiko Mwaipopo **PW3** had observed while testifying under oath and in his report that the deceased had died as a result of poly-trauma. It was his testimony that he found out the body had multiple bruises outwardly, and the radius on the arms left and right were both broken, the same (which is a bone) was appearing outside. The tibia on both legs was also broken. The rib cage particularly ribs no 3 – 10 were all broken on the right-hand side. He concludes that the deceased died out of the multiple trauma he received which made him lose too much blood. In response to a question asked by the trial court as to why the post-mortem report does not have his name and practice license number, he responded that the report is filled on a standard form and it does not give room for any of these details.

Lastly, the prosecution had Samwel Ndewariyo Sumari who is a blood relative of the deceased as **PW4**. His testimony was to the effect that he was the one together with another relative (one Elishadai Sumari) accompanied by a police officer who introduced himself as **Afande Rishael** who went to identify the body so that the autopsy can be done on it.

Upon hearing the whole of the prosecution case and that of the defense, I think the issues needing to be determined are i) whether upon the closure of the prosecution case, there has been proved that the said death has occurred; ii) whether upon the closure of the prosecution case, there has been proved beyond reasonable doubt that the accused standing charge is the person who committed the heinous act in taking this old citizen's life; iii) whether an accused person had malice aforethought; iv) whether on the balance of probability, the accused has managed to raise a doubt in his favor on the basis of a plea of alibi to exculpate himself of any wrongdoing.

On the word go, I have to register the court's concern that there is no evidence from the investigators that have been put on trial. It is disturbing that there is no account by the prosecution of how the accused was arrested nor was there put in exhibit any of the weapons that were alleged to have been used to cause the trauma leading to the death of the deceased person.

the 1<sup>st</sup> issue, it is clear that the accused person has been charged with the offence of murder which is defined under **section 196** of the Penal code, [cap 16 R: E 2022], the section provides as follows;

*196. Any person who, with malice aforethought, causes the death of*

*another person by an unlawful act or omission is guilty of murder.*

Based on the above provision, it is pertinent that for the prosecution to sustain a conviction in a murder case, it is duty-bound to prove beyond reasonable doubt the two elements of the offense of murder which are malice aforethought; and the act itself, but more so, linking the said act of unlawfully taking of the life of the deceased person with the accused person.

There is no dispute that the Prosecution has managed to prove the death of Daniel Melau Sumari who was living at Nasholi - Kikatiti, the evidence which was firstly established by PW1 and then corroborated by the remaining 3 witnesses, PW3 being the Doctor who conducted the postmortem and then observed by PW4 at Mount Meru Regional Hospital, the postmortem report clearly shows that the deceased is not only dead but also his death was an unnatural death, but also the evidence and the circumstances of the case leave no doubt that whoever did the act was actuated by malice aforethought as defined under **section 200** of the Penal Code [Cap. 16 R.E. 2019], it is obvious under such circumstances the prosecution has managed to prove the death of the deceased.



The testimony of **PW1** is that the attacker came and first attacked the deceased with a stone, and when he fell, he started beating the deceased with the stick (fimbo), even though he also had a machete. The testimony of **PW3** is not revealing whether the polytrauma inflicted upon the deceased body could have been caused by what sort of weapon or object. While being cross-examined, he admitted to the dates differing on the report and the date that he testified to have received the instructions, identified the body, and conducted the autopsy because the form has been stamped on 11 October 2019 without having any explanation as to why the dates differ. So much for the prosecution side.

The 2nd issue draws this court's attention that the remaining significant aspect for consideration and determination in this case is who was responsible for the death. This Court has passed through the evidence of PW1, who observed that the Deceased was assaulted by the use of a stick and the stone, the fact which was corroborated by PW2 who adduced that the moment the deceased was interrogated by the OC CID at the scene of crime, he told the OC CID that he was hit by Barakaeli Emanuel Jackson by a heavy item. On the side of the defense, DW1 one challenged the said prosecution exhibits, pointing out that the said exhibits were not produced

before the court hence they should not be relied upon. It is the view of this court that, there was a need for the Prosecution to tender the said exhibits before the court so as to substantiate the fact that the deceased was hit by the said objects. In line with that, there is a contradiction observed, since PW1 mentioned the stone and the knife while PW2 said the Deceased when interrogated by OC CID, told him that he was hit by heavy objects. Under such circumstances without tendering the said exhibits in court, it is hard to assess the said objects as to how heavier they were. In an actual sense, any prudent person cannot consider a knife as a heavy object, but also the stone which has been mentioned to have been used to hit the deceased does not necessarily have to be heavy since it might fall under the category of gravel. The said heavy objects as reportedly mentioned by the deceased are more reliable than the stone and knife mentioned by the PW1. And this is logical because of the kind of injury that the accused is said to have sustained as both his legs, arms, and rib cage were all broken with bones protruding. Now since they were not brought in court as exhibits, they were not assessed in court to justify how heavier were the objects. This court subscribes to the position of the accused person, that since the said exhibits were not tendered in court, their evidential value is worthless to link the accused with the



commission of the said offense.

In the case of **Mgendo Paul and Another vs Republic**, [1993] TLR 220, the court made an observation with regards to what amounts to the proof beyond reasonable doubt as follows;

*"If the evidence is so strong against an accused as to leave only a remote possibility in his favor, which can easily be dismissed, the case is proved beyond reasonable doubt".*

As deliberated above, the Prosecution evidence lacks the quality of the strength that leaves remote doubts on the party of the defense, it has failed to achieve the conviction against the accused person.

On the 3<sup>rd</sup> issue, the issue concludes itself without looking much at it. Under such circumstances of this case as deliberated above, it is the considered view of this court that the prosecution has failed to establish the fact that the accused person had malice aforethought, since the said act with all the objects said to have been used, are not linked with the accused person to the extent of establishing his guilt.

In the case of the **People vs Njovu** (1968) ZR 132 it was persuasively observed in regard to malice aforethought that:

"to establish malice aforethought, the Prosecution must prove either that the accused had an actual intention to kill or to cause grievous harm to the deceased; or that the accused knew that his actions would be likely to cause death or grievous harm to someone."

In the case of **Ssekitoleko vs Uganda** [1967] EA 531, the Court observed that it is the duty of the prosecution to prove its case beyond a reasonable doubt, the burden does not shift onto the accused persons and they can only be convicted on the strength of the Prosecution case, not because of the weakness of the defense.

Surprisingly, the prosecution had called a total of 4 witnesses without there being any witnesses who testified towards the investigation of the case. It is as if this case was brought to court without ever being investigated. Neither is there any evidence regarding how the accused person was apprehended and arraigned. Obviously, there has been a dereliction of duty by the prosecution in their failure to call the witnesses; thereby not proving the case and creating reasonable doubt.

Be that as it may, the court was left with no option but to make a determination on the strength of the prosecution case as it is. In the case

of **Jonas Mkize vs R**, 1992 TLR the Court of Appeal made an observation and had this to say:

“.... In a criminal prosecution, the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, it is part of our law, and forgetting or ignoring it is unforgivable and a peril not worth taking”

Notwithstanding, the accused made a defense of alibi, giving his testimony as DW1. He stated that he was in Handeni, Tanga on 31<sup>st</sup> May 2019 where he had gone for his farming activities. He maintained that he had gone to get the tickets on 03/02/2019, and traveled on 05/02/2019 on Mapenzi ya Mungu Bus. He testified further that he had come back to Arusha Nasholi on 2<sup>nd</sup> September 2019, having bought his ticket on 1<sup>st</sup> September 2019 on a bus called Hajees. He tendered in the exhibit both tickets, which show his travel routes going and coming back.

Furthermore, he testified that he was apprehended on 03/11/2019 and remained incarcerated till 13/11/2019 being held at the Usa River police station. He further testified that he was apprehended by Askari Mgambo at home while he was tending to his farm. He further maintains while he was

not told why he was being held for all the time he was kept at the Usa River police station, he also had never been interrogated or his statement taken by the police. Neither was there any parade to identify him at any time while incarcerated till the time he was arraigned in Court on 13/11/2019.

No doubt that the defense had managed to raise a reasonable doubt with the defense of alibi as he had managed to show that he could not possibly have been at the incident when it happened. In any case, and corroborating the state of affairs on the investigation of the case, the accused was never interrogated or his statement taken for the whole time that he was held at the police station. In the case of **Daimu Daimu Rashid @ Double D Vs. R**, Criminal Appeal No 5 of 2018 it was held by the Court of Appeal that the trial court ought to ... to give the benefit of the doubt to the appellant/accused person when doubt have been raised.

In the upshot, the Prosecution has failed to prove its case beyond a reasonable doubt, while the accused had managed to raise enough doubts in the prosecution case that this court is left with no other option.

The accused person is hereby acquitted of all charges and released forthwith unless he is charged with and held for other lawful offenses.

Order accordingly.

**DATED at ARUSHA on the 16<sup>th</sup> June 2023.**



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**A. Z. BADE  
JUDGE  
16/06/2023**

Judgment delivered in the presence of parties in open court on **16<sup>th</sup>** day of **June 2023.**



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**A. Z. Bade  
Judge  
16/06/2023**