THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT TARIME

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 141 OF 2022

THE REPUBLIC v. CHACHA MWITA MOHERE

JUDGMENT

28.06.2023 & 06.07.2023

Mtulya, J.:

Mr. Chacha Mwita Mohere (the accused) was arraigned in this court for allegation of murder of **Mr. Matiko Bhosongo Mwita** (the deceased) contrary to section 196 and 197 of the **Penal Code [Cap. 16 R.E. 2019]** (the Penal Code). The incident is alleged to have occurred at **Nyakunguru Village within Tarime District in Mara Region** (Nyakunguru) on **22nd May 2019** (the fateful date).

According to the Republic, the accused was witnessed by Mr. **Marwa John Saiya** (PW1) during the incidence of attacking the deceased by use of *panga* hence he had killed the deceased with malice aforethought. In order to justify the facts of the case, the Republic had marshalled PW1 and clinical officer, **Jackson Pius Chacha** (PW2) to show that the killing of the deceased was associated with malice aforethought. In his testimony, PW1 had testified that he saw the accused attacking the deceased at the

sensitive part of the body neck by use of the sharp weapon *panga*. According to PW1 the cause of the attack was forceful opening of the main gate to the backyard of the rental house of Mr. Matiko by the accused which irritated the deceased. It is from the impatience of the situation, the deceased had moved to question the accused hence the accused had started to attack the deceased. In order to shield himself from the attacks, according to PW1, the deceased had strangulated the accused.

In explaining the circumstances of the scene of the crime, PW1 had testified that they were in usual evening conversations with his friend, the deceased on the bench at the compound of Mr. Matiko's house. According to PW1, after some chats with the deceased, he saw the accused forcefully pushing the gate to enter inside the compound, and after intervention of the deceased in asking questions and replies from the accused, the quarrel erupted and he moved to separate the two quarrelling persons, but he was also attacked by the accused at his hand and fingers. PW1 had testified further that he was attended at Nyamongo Hospital @ Sungusungu Hospital, but could not produce any evidence in Police Form No. Three (PF.3) to justify his allegation.

PW2 on other hand was marshalled by the Republic to testify on the source of the deceased's death. According to PW2, on 23rd May 2019, he examined the deceased's body at **Nyangoto Health Centre in Tarime District** (the health centre) and found a wound in his neck caused by a sharp object penetrated and affected blood vessels. In his opinion, the death of the deceased was caused by acute loss of blood. In order to authenticate his statement, PW2 had tendered a post mortem examination report of the deceased (P.1), which shows that: *excessive severe bleeding secondary to severe penetrative wound on the neck caused by sharp object leading to CPA. The source of death excessive acute blood loss.*

According to **Mr. Mutalemwa Kishenyi**, learned Principal State Attorney, the facts of the present case disclose killing of the deceased by the accused with malice aforethought. In his opinion, in the present case there are facts which are not disputed by the parties, namely: first, both PW1 and the accused were at the scene of the crime; second, PW1 was injured by the accused; third, the accused had died from unnatural death; and finally, the accused had killed the deceased by use of sharp weapon *panga* directed at the sensitive part of the body called neck. Mr. Kishenyi

thinks that the present case fits with the circumstances in the established precedent of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994, in terms of type of weapon used and where it was directed.

On the other hand, the defence side was called to reply the facts and evidences of the prosecution, and had brought one witness, **Mr. Chacha Mwita Mohere** (DW1), who had testified that on the fateful date, he was at the Grocery in the house of **Mr. Sinda Nyabutang'anya** (the landlord) and the deceased was a tenant in the house. According to DW1, the house was built by the landlord for business purposes and the landlord lives in the next village of Nyarero.

In his testimony, DW1 testified further that on the fateful date, several people had gathered for drinks and witnessed a fight of the deceased and his wife, **Ms. Bahati Magwega @ Nturu** (Ms. Nturu). According to DW1, he tried to separate them in search of peaceful resolution of the contest, in the presence of **Mr. Chacha Marwa** (Mr. Chacha) and **Mr. Choko Mwita** (Mr. Choko). However, the deceased had attacked the accused on neck and hands hence a fight erupted which had caused Mr. Chacha to attack the

deceased by knife and the accused attacked PW1 by panga in search of a way to exit the contest.

To corroborate his statement on injuries caused by the deceased, DW1 had tendered PF.3, which was admitted as exhibit D.1 in the case. The exhibit in brief shows the nature of complaint being: *cut wound on wrist joint and lateral side of the neck* and remarks shows that: *he was bleeding at the site where he was injured*. The exhibit finally shows that the accused was given anti-pain, wound's stitching and dressing. According to **Ms. Lilian Makene**, learned Defence Attorney, the facts and evidence in the present case shows nothing related to malice aforethought and the prosecution had failed to prove its case as per law in sections 110 and 111 of the **Evidence Act [Cap. 6 R.E. 2019]** (the Act) and precedent of **Joseph John Makune v. Republic** [1986] TLR 44.

In the opinion of Ms. Makene, the prosecution had failed to produce in this court both *actus reus* and *mens rea* of the offence of murder as eye witness PW1 had failed to testify on how and where the deceased was attacked by the accused. According to Ms. Makene, there are two issues to be replied by this court, *viz*: first, whether the accused killed the deceased; and if so, whether there was malice aforethought. Ms. Makene's opinion on the first

issue was to the effect that the accused did not kill the deceased, and even if this court finds he had killed, it must scrutinize the evidence of strangulation and fight caused by the deceased.

I have perused the facts and evidence in the present case and the indicated two (2) precedents cited by learned minds. The precedent of **Enock Kipela v. Republic** (supra), the Court of Appeal produced seven (7) circumstances which may be used to scrutinized *malice aforethought* on part of accused persons. The mostly quoted paragraph in the decision is found at page 6 of the judgment, that:

> *...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 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 attackers utterances, if any, made before, during or*

after the killing; and (7) the conduct of the attacker before and after the killing.

According to Mr. Kishenyi, this court may learn from the statement in respect of type of weapon used and part where the weapon was directed. In his opinion, the accused used *panga* and directed on the deceased's neck hence malice aforethought is established, whereas Ms. Makene contended that the case against the accused person was not established as per sections 110 and 111 of the Act and the precedent of **Joseph John Makune v. Republic** (supra). Section 110 of the Act regulates proof of existence of facts whereas section 111 of the Act provides for burden of prove for any one who allege existence of certain facts. The precedent in **Joseph John Makune v. Republic** (supra) on the other hand had resolved that:

> *The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. No duty is cast on the accused to prove his innocence. There are a few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on a balance of probabilities. But the present case did not involve any defence which fell*

within the known exceptions so as to require the appellant to prove it. Nor could it be said that the letter was a matter which was specially within the appellant's knowledge so as to place on him, in terms of section 114 (1) of the Evidence Act...The duty was clearly on the prosecution.

In the present case, two important witnesses who were involved in the alleged fight were not brought in the present case to corroborate materials produced by PW1 and DW1. The prosecution had declined to call important witness Ms. Nturu whereas the defence had escaped material witness Mr. Chacha. In the scenario like the present one, the court is placed into the trial as whether who is telling the truth between PW1 and DW1.

It is obvious that the materials registered by DW1 show that there were fights at two levels, between the deceased and Ms. Nturu on one hand, and the deceased, accused, Mr. Chacha on the other. Again, the conduct of the accused after the event shows that he followed all necessary steps in reporting the incident at the appropriate authorities of **Nyamwaga Police Station** and treatment at **Nyamwaga Dispensary**, as displayed in exhibit D.1.

Similarly, the evidence of PW1 shows that there was no fight or any other species of quarrels between the indicated contested parties and the event occurred at rental residential house, and not at the commercial house associated with grocery businesses. However, PW1 involvement in the saga leaves a lot to be desired. He testified to have been injured on hands and fingers without taking any appropriate course, including reporting the dispute to the police. It is also unconceivable to a reasonable person to appreciate a situation of forceful entry into the gate could have triggered such serious quarrels involving attacking and cutting of persons. In any case, PW1 has testified n this court that the deceased at one point in time had strangulated the accused in absence of any fight.

While I appreciate the precedent in **Goodluck Kyando v. Republic** [2006] TLR 363, on credibility and reliability of witnesses, but the present PW1 and DW1 brought surprises in the present case. According to the Court of Appeal, when this court is faced with confusions, it must resort to the totality of evidences produced on the record (see: **Enock Kipela v. Republic** (supra). In totality of the evidence registered in the present case, the accused had killed the deceased. However, the only question this

court is faced is: *whether the accused had killed the deceased with malice aforethought*.

The law regulating malice aforethought was enacted in section 200 of the Penal Code and was interpreted in the indicated case of **Enock Kipela v. Republic** (supra), which had produced the seven (7) tests in search of malice aforethought. However, the decision is silent on whether all the listed circumstances may be invited in a case.

Taking the tests in the precedent into the present case, the facts show that: (1) the accused used *panga* in attacking the deceased; (2) the accused exerted large amount of force in assaulting the deceased; (3) the accused had inflicted the attack at the sensitive part of the body neck of the deceased; (4) the accused had directed one blow to the deceased; (5) the accused had caused large wound to the accused; (6) the accused did not say any word, before, during or after the attack against the deceased; and finally, (7) the accused followed all legal steps after the attack against the deceased. He did not escape the liability. In fact, he went and reported the deceased at **Nyamwaga Police Station**.

In searching of malice aforethought and considering the totality of evidences produced in the instant case, it is difficult to hold that the accused had malice aforethought. The facts display existence of more than one view as to the accused's intention. According to the Court of Appeal, when there is a room for more than one view as to the accused's intention, the confusion is called doubt in criminal law and must be resolved in favor of the accused (see: **Enock Kipela v. Republic** (supra). In any case, it is unconceivable, to think of a situation where a forceful opening of a compound gate would have caused attacks by use of *panga*.

In my considered opinion, there must be more explanations which had caused the attacks, say exchange of words and fights. The facts in the present case are silent on exchange of words, but displays elements of fight. According to the Court of Appeal, where death occurs as a result of a fight, the court should convict accused for a lesser offence of manslaughter, not murder (see: **Jacob Asegelile Kakune v. Republic**, Criminal Appeal No. 178 of 2017; **Aloyce Kitosi v. Republic**, Criminal Appeal No. 284 of 2009; **Stanley Anthony Mrema v. Republic**, Criminal Appeal No. 180 of 2005; and **Moses Mungasiani Laizer @ Chichi v. Republic** [1994] TLR 222).

In the circumstances of the present case, I am satisfied that the prosecution had failed to prove malice aforethought as per required standard set in the precedent of **Enock Kipela v. Republic** (supra). I therefore hold that the accused had killed the deceased without *malice aforethought*. In the result, I convict the accused with a lesser offence of manslaughter contrary to section 195 and 198 of the **Penal Code**.

Ordered accordingly.

F.H. Mtulya

Judge

06.07.2023

This conviction order was pronounced in open court in the presence of the accused, **Mr. Chacha Mwita Mohere** and his learned Defence Attorney, **Ms. Lilian Makene** and in the presence **Ms. Damary Nyange**, learned State Attorney, for the Republic.

F.H. Mtulya

Judge

06.07.2023

ANTECEDENTS

Nyange: My Lord, for the Republic we have no previous criminal record of the accused. However, we pray for tough sentence against the accused. My Lord, the circumstances leading to the

offence, weapon used and area of attack, shows that the accused had wronged the deceased. My Lord, this Mara Region has a practice of *panga* cuts, The only way to reduce such offence is to sentence accused persons to serve long jail sentence. That is our prayer My Lord.

F. H. Mtulya

Judge

06.07.2023

MITIGATION

Makene: My Lord, the defence says that the accused may receive lesser sentence. We have six (6) reasons. First, this is the first offender. This is his first offence. Second, My Lord, is the circumstances of the case: there was a fight of the two contesting parties; the accused on his own volition went to police to report; the accused was also injured and tendered exhibit D. 1; the accused used only one (1) blow to the deceased; the accused has people who solely depend on him; He has a wife who had escaped and left children.

My Lord, the accused is also sick suffering from ulcers and pains to his wounds when there is winter. My Lord, the accused is aged 24 years only and can contribute to the economy of this country. My Lord, the accused was arrested on 9th October 2020

and as of today he spent two (2) years and eight (8) months in custody. My Lord, that us all for the defence. We pray for a lenient sentence.

F. H. Mtulya

Judge

06.07.2023

SENTENCE

I have heard antecedents of **Ms. Damary Nyange** and mitigations registered by **Ms. Lilian Makene**. However, the law as enacted under section 198 of the **Penal Code [Cap. 16 R.E 2019]** provides a sentence up to life imprisonment. The practice available at the Court of Appeal is that of twelve (12) years, depending on the circumstances of each case (see: **Ramadhan Omary v. Republic**, Criminal Appeal No. 83 of 2018). This court has considered killing of a woman by use of sharp knife attracts ten (10) years imprisonment (see: **Republic v. Ryoba Mwita Mseti**, Criminal Sessions Case No. 149 of 2022). However, in cited cases, there was no elements of a fight.

In our case, the accused used a sharp object *panga* and directed at sensitive part of the body. The use of sharp weapon

in killing individual person may attract between ten (10) to life imprisonment as per **Tanzania Sentencing Guidelines, 2023.**

Having considered all circumstance of the present case and noting the accused has spent almost three (3) years in prison custody, I sentence him to serve five (5) years imprisonment from the date of this order.

It is so ordered.

F. H. Mtulya

Judge

06.07.2023

This sentencing order was pronounced in open court in the presence of the accused person, **Mr. Chacha Mwita Mohere** and his learned Defence Attorney, **Ms. Lilian Makene** and in the presence of **Ms. Damary Nyange**, learned State Attorney, for the Republic.

F. H. Mtulya

Judge

06.07.2023