THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 179 OF 2022

THE REPUBLIC v. PETE MSONGO @ PATRICK

JUDGMENT

22.09.2023 & 25.09.2023

Mtulya, J.:

The Republic had arrested and arraigned **Mr. Pete Msongo @ Patrick** (the accused) in this court for allegation of murder of **Mr. Nyaganya Kisheri Mwita @ Charles** (the deceased) which is allegedly occurred at **Ryamugabo Village within Butiama District in Mara Region** (the crime scene) on 9th April 2020, contrary to section 196 and 197 of the **Penal Code [Cap. 16 R.E. 2019]** (the Penal Code).

According to the Republic, the accused was witnessed by **Mr. James Peter Msongo** (PW2) attacking the deceased by use of stick and he was arrested on 23rd July 2022 by **MG. 566207, Mr. John Elisha** (PW1) at **Kiabakari Mnadani** enjoying his *Machicha* local brew. The Republic also marshalled a police officer **G. 7535 D/Cpl. Richard** (PW3) and **Dr. Jaffari Hamis Majengo** (PW4) to testify on investigation of the case and production of the deceased's postmortem examination report respectively. The witnesses were

summoned to substantiate the allegation of the Republic that the accused had killed the deceased with malice aforethought.

According to PW2, on 9th April 2020 at night of 04:00 hours, he witnessed his father, the accused fighting with his best friend, the deceased at their home residence within Ryamugabo Village in Butiama District of Mara Region. In his testimony, PW2 stated that during the fight the accused took into his hands *mpini wa jembe dogo* and attacked the deceased on head to cause an injury to the deceased. According to PW2, he managed to identify the accused as the fight occurred in thirty (30) meters distance of average moon light which was shining to be able to identify the accused, and after the event, the accused went back for a shower and sleep at their home residence. In the testimony of PW2, the attack against the accused had followed stone attacks on lower part of the accused's mouth (lower chin).

Regarding the extent of the attack and wound to the deceased, PW3 was summoned to testify in the case and has described it as serious attack to cause severe bleeding. According to the accused's post-mortem report, admitted in the case as exhibit P.1., the nature and size of the wound is: *cut wound of the parietal region approximately 6cm Length X 2cm Width X 15cm depth*, and death

was caused by: *haemorrhagic shock of severe bleeding secondary to cut wound at parietal region.*

The Republic had also brought in the case witness PW3 and PW1 to display the incident of killing had happened and the accused was arrested at Kiabakari Mnadani. According to PW3 the accused had escaped his home residence on 9th April 2020 and his children were taken care of the local leaders and later were handed over to their grandmother. On the other hand, PW1 had testified that the accused was arrested at Kiabakari Mnadani within Butiama District of Mara Region when he was enjoying his local brew *Machicha* and was brought to Kiabakari Police Station for necessary police procedures.

In defence, the accused contested the materials registered by the prosecution witnesses contending that the accused is not his friend and he does not know him, and in any case, he is not aware of the killing incident at his home residence on the night hours of 9th April 2020. According to the accused, from 9th April 2020 to the day of his arrest at Kiabakari Mnadani on 23rd July 2022, he was present at his residence cultivating maize and selling maize products in several markets within Butiama District and went at Kiabakari Mnadani on 23rd July 2022 for selling maize products and buying home use commodities, but was arrested for reasons of declining payment of maize products levies.

However, during cross examination, the accused stated that on 9th April 2020 he was sleeping at his residence with his wife, Rehema William and their two children namely James Pete Msongo (PW1) and Elias Pete Msongo, and that he was living at his home residence with his wife and the two children for the whole period from 9th April 2020 to the day of arrest 23rd July 2022. The accused also testified to have seen relatives of the deceased's during the period of stay at his home residence in Ryamugabo Village in Butiama District. On the question why he did not call any villager or his family members to testify for him in this serious case, the accused had testified that he cannot call persons to testify in a fictious event of death of the deceased fabricated by the Republic.

After registration of all relevant materials, the learned minds of the parties were summoned to interpret the materials with regard to three (3) issues: first, whether there was any unnatural death of the deceased; second, whether the death of the deceased was caused by accused; and if the two first questions are answered in affirmative, whether there was malice aforethought.

According to **Mr. Yesse Temba**, learned State Attorney, who had prosecuted the case for the Republic, the deceased had expired and his death was unnatural caused by the accused with malice aforethought. In order to substantiate his submission, Mr. Temba

stated that PW3 had testified that the deceased had expired and tendered P.1 to show that the death was unnatural. Mr. Temba submitted further that in the present case, eye witness PW2 had testified to have seen the accused attacking the deceased by use of *mpini wa jembe dogo*. In the opinion of Mr. Temba, PW1 did not identify the accused, but recognised as per decision in **Jumapili v. Republic**, Criminal Appeal No. 110 of 2014.

According to Mr. Temba, the accused had escaped his home residence after the killing of the deceased and in this court, he testified to be present at his residence with family members between 4th April 2020 and 23rd July 2022, but had failed to produce any of the family members to support his allegation. Regarding malice aforethought, Mr. Temba submitted that there are six (6) circumstances which display the accused had malice aforethought, namely: first, accused attacked the deceased on back head; second, he used big stick; third, exerted large force during the attack; fourth, escaped his residence and decline to produce reasons of the escape; fifth, he has been evasive and produced general denial of the allegation; and finally, the accused has admitted exhibit D.1 without reading in court to know its contents.

In order to back up his submission, Mr. Temba has asked this court to peruse precedents of the Court of Appeal in **Enock Kipela v.**

Republic, Criminal Appeal No. 150 of 1994; **Kitigwa v. Republic** [1994] TLR 65; and **Mboje Mawe & Three Other v. Republic**, Criminal Appeal No. 86 of 2020. In closing his submission, Mr. Temba submitted that there are minor contradictions, which were displayed in the course of hearing of the case. In his opinion, minor discrepancies on details of the matter may be ignored as witnesses are prone to memory due to passage of time.

On the other hand, Mr. Evance Njau for the defence, thinks that the Republic has failed to discharge its duty of proving the case beyond doubt as all witnesses produced in court had weaknesses. According to Mr. Njau, PW1 has arrested the accused without identifying himself to the accused and did not cite the offence of which the accused was prosecuted. Regarding PW3 and PW4, Mr. Njau submitted that they did not produce any evidence to show the accused had killed the deceased. In the opinion of Mr. Njau, PW2 and PW3 have produced contradictory evidences as PW2 had testified on stick whereas PW3 testified on cut wound, which cannot be caused by a stick.

Similarly, Mr. Njau submitted that the evidence of PW2 cannot be relied to convict the accused. According to Mr. Njau, there were several faults and contradictions produced by PW2, namely: first, in his testimony PW2 testified on fighting between the accused and

deceased, and weapons stick and stone, whereas in his witness statement (exhibit D.1), he mentioned fighting and use of *panga*; second, he testified that after the fight the accused had remained at his home residence, whereas in D.1 he stated that the accused had left his residence after the fight; and finally, PW2 could not possibly identify the accused at 04:00 hours in thirty (30) meters with an average clouds. In the opinion of Mr. Njau, the evidence of PW2 is questionable and leaves a lot of doubts that may be resolved in favor of the accused. Finally, Mr. Njau submitted that the accused had testified in this court that he does not know the deceased and has been in his home residence from 4th April 2020 to the time of arrest on 23rd July 2022.

I have perused the record of present case in the testimony of PW2 and exhibit D.1 produced in this court during the hearing of the case. The testimony of PW2 shows that he claimed to have seen his father, the accused at night hours of 04:00 hours fighting with the deceased in a thirty (30) meters distance in the average moon shining, and that after the fight the accused took shower and slept whereas exhibit D.1, in brief shows that:

> *Nakumbuka mnamo tarehe 09.04.2020 muda wa sa 04:00 hrs...tulisikia watu wanapigana kwa nje, ndipo...tulipoamka na kusimama mlangoni na kukuta*

baba yangu aitwae Peter Musongo anapigana na Nyanganyi Kisheri na walikuwa wanakatana mapanga...waliendelea kugombana pale nyumbani na kupelekea Nyanganyi Kisheri kuanguka chini na kufariki...baada ya hapo baba yangu alimvuta Nyanganyi Kisheri ambaye kwa sasa ni marehemu...sababu kubwa ya ugomvi wao mimi siufahamu...mara baada ya baba yangu kufanya tukio hilo aliondoka kuelekea eneo la mlimani...majira ya 16:00hrs askari polisi walituchukua na kutuhoji kuhusiana na tukio hilo.

From the testimony of PW2 and his statement in exhibit D.1, two (2) discrepancies are obvious, namely: first, weapons *mpini wa jembe dogo* and *panga*; and second variance of what transpired after the fight, as to whether the accused had taken shower and slept or escaped to the mountainous region. According to Mr. Temba, the indicated discrepancies are minor and PW2 was affected by right memory due lapse of time, whereas Mr. Njau thinks that the discrepancies are major to lower the credibility and reliability of PW2. The law regulating contradictions and discrepancies show that:

Contradiction in the evidence of a witness effects the credibility of the witness and unless the

contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence.

This thinking was pronounced by the Court of Appeal in **Sahoba Benjuda v. Republic**, Criminal Appeal No. 96 of 1989, and has received a bunch of precedents in support of the move (see: **Kibwana Salehe v. Republic** (1968) HCD 391; **Rashid Ally v. Republic** [1987] TLR 97; **Mohamedi Bakari v. Republic** [1989] TLR 134; **Wilfred Lukago v. Republic** [1994] TLR 189; **Mohamedi Said v. Republic** [1995] TLR 3; and **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007). It is also certain and settled that discrepancies cannot be avoided in cases as are affected by time, level of education and understanding of a witness (see: **Chrizant John v. Republic,** Criminal Appeal No. 313 of 2015).

In the present case, the issues is whether the indicated discrepancies are minor and do not go to the root of the matter, in consideration of the other facts. In looking at the facts in isolation, the indicated discrepancies may be said as major discrepancies as *mpini wa jembe dogo* cannot be similar to *panga*. Similarly, the testimony that the accused after the fight had taken shower and

slept, is distinct with the escape in mountainous region. However, reading the record in totality, the discrepancies are minor. This is because the major issue in the present case is whether the accused had attacked the deceased to death. The reply from the eye witness PW2 and exhibit D.1 show that the accused had attacked the deceased to death. I think, in my considered opinion, exhibit D.1 was brought in the case to support the move of the prosecution that the fighting incident had actually occurred and PW2 has witnessed it. The question whether it was stick, *panga* or *mpini wa jembe dogo* is immaterial under the circumstances of the present case.

I am aware Mr. Temba had complained that D.1 was not read before the court hence must be expunged from the record. It cannot be expunged as this court has no such powers to do so. It is *functus officio*. The exhibit may be expunged by our superior court, the Court of Appeal. This court may wish to disregard or decline to act on exhibit D.1 as per directive of the Court of Appeal in **Sahoba Benjuda v. Republic** (supra). However, I have held that the indicated contradictions are minor that cannot affect the general materials produced on record.

That is the directive of the Court of Appeal to scrutinize materials on record and consider the facts of the case in totality (see: **Mawazo Anyandwile Mwaikwaja v. Republic**, Criminal Appeal

No. 455 of 2011). This court has been following the directive without any reservations (see: **Agness Doris Liundi v. Republic** (1980) TLR 46; and **Frank Onesmo v. Republic**, Criminal Appeal No. 147 of 2019). In any case, PW2 had mentioned the accused person in the earliest possible on the same day at 16:00 hours when he contacted police officer F.6875 D/Cpl. Festo. The practice available in the Court of Appeal shows that the ability of a witness to name a suspect at the earliest opportunity is all important assurance of his reliability (see: **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39 and **Onesmo Kashonele & Others v. Republic**, Criminal Appeal No. 225 of 2012).

In the present case, the accused had denied knowing the deceased, disputed involvement in fighting with deceased and was present at his home residence as from 9th April 2020 to 23rd July 2022, when he was arrested for reasons of product levies at Kiabakari Mnadani. From the materials produced by the accused during hearing of the matter, it is obvious that he declined to reply the raised facts against him. Instead, he decided to opt for general or total denial of the allegation.

The available practice in precedent shows that evasions and lies on part of an accused person do not in themselves prove the facts alleged against him. They may, if on material issues, be taken into

account along with other matters and the evidence as a whole when considering accused's guilty (see: **Pascal Kitigwa v. Republic** (supra) and **Mboje Mawe & Three Others v. Republic** (supra). In the present case, during cross examination of the accused by Mr. Temba, he stated that he had been meeting with the deceased's relatives in the village sometimes between 9th April 2020 and 23rd July 2022. However, during examination in chief he testified that he does not know the deceased and the alleged death is fictious invented by the Republic.

I understand Mr. Njau during final submissions had complained on identification of the accused in thirty (30) meters stay of PW2 in moonlight of normal shining. The peculiar nature of the present case is that PW2 is a son of the accused and stated what he has seen on the day. In my considered opinion, this was not an identification of the stranger human person. It was recognition of the father by his son. On my own evaluation of the materials registered in this case, I find this to be a straight forward case in which the accused was recognized by PW1 who knew him. This was clearly a case of recognition rather than identification. It has been observed severally by the Court of Appeal that recognition is more satisfactory, more assuring and more reliable than identification of a stranger (see: **Kenga Chea Thoya v. Republic,** Criminal Appeal No. 375 of 2006;

Nicholaus Jame Urio v. Republic, Criminal Appeal No. 244 of 2010; and **Mussa Saguda v. Republic**, Criminal Appeal No. 440 of 2017).

In the final submissions for and against the case, Mr. Temba submitted that there is malice aforethought in the present case and had produced six (6) situations to justify his statement, whereas Mr. Njau had declined to register any material on the subject. The Court of Appeal in 1992 had set a standard practice on applicability of section 200 of the Penal Code which regulates malice aforethought in murder cases. The Court had listed a total of seven (7) circumstances to assist courts in determining malice aforethought (see: **Enock Kipela v. Republic** (supra). The circumstances are cited 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.

In the present case, the accused attacked the deceased's back side of the head to cause *cut wound of the parietal region approximately 6cm Length X 2cm Width X 15cm depth*; he used *mpini wa jembe dogo*; third, exerted large force in one blow; and after the attack the accused escaped the scene of the crime and left the deceased helpless.

However, the Court in the precedent of **Enock Kipela v. Republic** (supra), after listing the conditions at page 6 of the judgment, it went further and placed two (2) important clauses in the judgment: first, at page 5 of the judgment, it stated that that each case must be decided on its own peculiar facts; and second, at page 6 of the judgment that in totality of the evidence on record, there must be no room for more than one view as to the accused's intent (malice aforethought). Finally, the Court had resolved that: *if there is doubt on the intention (malice aforethought) of the accused, the doubt is to be resolved in favor of the accused.*

In the present case there is vivid display of a fight between the accused and the deceased, no words were recorded before, during, or after the attacks and the fights had occurred at the accused's residence. It can easily be said the accused had contributed to his death.

Similarly, the law as always been that where there is evidence of a fight it is not safe to infer malice aforethought, unless there are very exceptional circumstances. There is a bunch of precedents of our superior court on the subject (see: **Stanley Anthony Mrema v. Republic, Criminal Appeal No. 180 of 2005**; **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).

This court has been following the move without any reservations (see: **Republic v. Chacha Mwita Mohere**, Criminal Session Case No. 141 of 2022 and **Republic v. Samwel Saulo @ Ikula**, Criminal Session Case No. 58 of 2016. According to the Court of Appeal, where death occurs as a result of a fight, this court may convict accused for a lesser offence of manslaughter, not murder (see: **Jacob Asegelile Kakune v. Republic** (supra); **Aloyce**

Kitosi v. Republic(supra); **Stanley Anthony Mrema v. Republic** (supra); and **Moses Mungasiani Laizer @ Chichi v. Republic** (supra).

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

It is so ordered.

F.H. Mtulya

Judge

25.09.2023

This Judgment was pronounced in open court in the presence of the accused, **Mr. Pete Msongo @ Patrick** and his learned Defence Attorney, **Mr. Evance Njau** and in the presence of **Mr. Tawabu Yahya Issa**, and **Ms. Evangelina Ephrahim Mukarutazia**, learned State Attorneys, for the Republic.

F.H. Mtulya

Judge

25.09.2023

ANTECEDENTS

Tawabu: My Lord, the accused was convicted for manslaughter. My Lord, we have no previous record of the accused. However, we pray this court to consider the **Tanzania Sentencing Guidelines of June 2023** at page 37, which provides for sentence of manslaughter. My Lord, the directives in that page is distributed into three (3) levels. My Lord, as per evidence, this case falls in a high level of manslaughter.

My Lord, there is use of serious force as presented by PW4. My Lord, the deceased was attacked on the head. The accused intended to kill or cause grievous bodily harm. My Lord, the event had occurred in front of a child. This is a violation of child rights. This action cannot be celebrated in our communities.

My Lord, this accused had escaped the scene of the crime and left the deceased helpless. My Lord, section 198 of the Penal Code provides for maximum sentence of life imprisonment. My Lord, we pray the accused be sentenced to life imprisonment.

That is all my Lord.

F.H. Mtulya

Judge

25.09.2023

MITIGATIONS

Njau: My Lord, the defence says that the manslaughter in this case is a lower level. My Lord, the accused was in self defence as the deceased started to attack the accused by use of a stone on his chin. My Lord, the weapon used was not dangerous. It was not a prepared weapon for killing. My Lord, the accused had no malice aforethought. It was the deceased who went to the accused's residence. My Lord, it was the deceased who had followed his death. My Lord, we pray for low level manslaughter because the incident had occurred in a fight. My Lord, the defence prays for a low level manslaughter which attracts conditional discharge up to four (4) years. My Lord, we pray for conditional discharge for the following reasons:

1. He is the first offender;
2. He is a father and has family in which PW2 belongs;
3. He is a young person who can serve this nation;
4. He has been in custody in a more than a year; and
5. He has learned a lot in this year while in police custody.

My Lord, we pray for a lenient sentence. That is all my Lord.

F.H. Mtulya

Judge

25.09.2023

COURT

I have heard the antecedents produced by learned State Attorney, **Mr. Tawabu Yahya Issa** and mitigations registered by **Mr. Evance Njau,** for the defence. The law enacted in section 198 of the Penal Code provides for a sentence up to life imprisonment. The practice in the Court of Appeal in manslaughter cases shows that a sentence up to twelve (12) years may be imposed (see: **Ramadhani Omary v. Republic,** Criminal Appeal No. 83 of 2018). This court has resolved killing by use of a knife to attract ten (10) years imprisonment (see: **Republic v. Ryoba Mwita Mseti,** Criminal Sessions Case No. 14 of 2022).

However, the Judiciary in Tanzania has produced the **Tanzania Sentencing Guidelines of 2023,** to have consistence in sentencing accused persons who are found guilty in similar offences. For accused persons who are found guilty of manslaughter by use of dangerous weapons attract sentence of

ten (10) to life imprisonment, as it is considered as a high level manslaughter.

Having said so and noting the accused has spent one (1) year in police custody, I hereby sentence the accused person to nine (9) years imprisonment from the date of this order, 25th September 2023.

It is so ordered.

F.H. Mtulya

Judge

25.09.2023

This Order was pronounced in open court in the presence of the accused person, **Mr. Pete Msongo @ Patrick** and his learned Defence Attorney, **Mr. Evance Njau**, and in the presence of **Mr. Tawabu Yahya Issa** and **Ms. Evangelina Mukarutazia** for the Republic.

F.H. Mtulya

Judge

25.09.2023