

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL JURISDICTION

CRIMINAL SESSION NO. 50 OF 2021

REPUBLIC

VERSUS

FAHAMU ^{S/o} KAUZENI @ BABA SAMWELI

14/08/2023 & 23/08/2023

JUDGMENT

MWENEMPAZI J.

The accused named herein has been arraigned in this Court and charged with the offence of Murder contrary to Section 196 of the Penal Code, [Cap 16 R.E 2019]. It is alleged that on the 3rd day of August, 2021 at Zimba village within Sumbawanga District in Rukwa Region the accused, did Murder one MTELANDA S/O MSEBE. On the 6th March, 2023 when the information was read over and explained to the accused person, he denied to have committed the offence. That stance was maintained when the facts prepared under Section 192 of Criminal Procedure Act, [Cap 20 R.E 2022] were read over and explained to him.

At preliminary hearing the accused admitted his name and that he was arrested for allegations of committing the offence of Murder Contrary to Section 196 of the Penal Code, [Cap 16 RE 2019]. That is in accordance to the record of the Court dated 6th March, 2023.

According to the evidence tendered in Court, the accused used to work as a casual labourer in the farms belonging to John Kahindi. John Kahindi is the husband of Juke d/o Charles (PW3). Normally, the appellant would stay at their homestead for the period he was working in their farms. This time around, the period when the event subject of this case happened, he was staying at the residence of John Kahindi. He went to collect his money as a salary for working in the previous cultivation season that ended in June. During the night he would sleep in one room with MTELANDA S/O MSEBE, the deceased.

Juke Charles is the wife of the owner of the homestead. She testified here in Court as PW3. They reside at Zimba Village and on the material date, the 3rd day of August, 2020 she was sleeping in one room with her children Wande, Holo, Mwonge and Mwocha. The accused, whom she referred to him as Baba Samweli, was sleeping in another room with Mtelanda s/o Msebe. On the night of the day, she testified, a door of the room they were sleeping was forced open, Baba Samwel entered the room. He was

holding a torch on one hand and an axe (Shoka Ulaya) on the other hand. He asked for a phone, but the witness told him that she doesn't have any, then Baba Samwel cut her on the head, left side, slightly above the left eye; on her hand, front side below the shoulder and forearm. PW3 was able to escape and ran away. The assailant shifted to another victim, Holo, whom he started to cut her on various parts of her body.

PW3 testified that when she was attacked, she had already identified the assailant as Baba Samweli. She testified that she knows him for a long time, though he was holding the torch still she was able to identify him and that was confirmed when he asked him: '*Baba Sameli what are you looking for?*' He said he wants a phone.

She testified that after she had escaped from the room, she raised an alarm seeking for help. After sometime, people responded by coming and the assailant had left taking with him an axe, flour, bicycle which was dark in colour make 'Bambucha' because it has no crossbar on the frame. He also took a hen.

The witness testified that she came back after people had convened, went to the room where the assailant was sleeping with MTELANDA S/O MSEBE. There, she found Mtelanda had been hacked on various parts of

the body, blood has splashed out on the room and the victim was lying dead on the ground.

According to Dr. Gabriel Matei Somo, who testified as PW2, he testified that he is the one who examined the injured women on the day they were attacked on the same night when he was called at the health centre (Mtowisa Health Centre) he works as well as conducted a Post Mortem Examination of the deceased's body. It was on the early morning of 4th August, 2020. The call was for him to attend two people, females who had been injured. He remembered the name of one woman, Holo. They had injuries caused by a sharp object. The injuries were big and deep.

One of the two female patients had a wound measuring 5cm length and 2cm deep. He treated them and filled a PF3. The same was that of Holo Masasila. It was admitted as exhibit P5. The general physical examination showed the lady had multiple cut wound and bruises caused by an assault with sharp object. Her body was covered with blood stains. The wounds were on the head, chest and upper limbs.

The same doctor was later called to accompany the police to the scene of event so that he can conduct post mortem examination of the dead body. According to his testimony, in a preliminary examination he saw the deceased had severe wounds and they seemed to have been caused by

a sharp object. The wounds were over 7cms long and deep. The findings of the doctor were that cause of death is severe bleeding secondary to cut wound which basically it caused haemorrhagic shock. In the examination the skull was not intact and also main and deep blood vessels were cut. Since this is an abnormal death, the questions to be dealt with are who is the person who caused injuries leading to the death of the victim(deceased) and whether he had malice aforethought.

In the evidence tendered, we have the testimony of Mrs Juke Charles (PW3). She testified that she saw Baba Samweli entering the room they were sleeping and attacked them. She managed to identify him as she knew him and also heard his voice and more so she even asked him questions. '*Baba Samweli unatafuta nini*' meaning '*Baba Samweli what are you looking for*' (my translation). The assailant, in this case Baba Samwel replied, "I want a phone." When she said she has no phone, he immediately attacked her and when she managed to escape, he turned to, and attacked Holo. A PF3 has been tendered by PW2 who is a doctor who treated them. Indeed, Holo as well as testimony of Juke Charles PW3 show that the two sustained injuries due to the hacking with an axe by the assailant.

PW3 also when he returned from where she had took refuge to save her life, she found people have convened at her house. She went and found a similar ordeal has befallen MTELANDA S/O MSEBE. The latter however was not lucky as the two ladies. He lost his life.

Among the persons who responded to the alarm was a neighbour known by the name Lulenganije s/o Jilala (PW4). He testified that he heard the screams and or alarm made by Wande; that is PW3's daughter. He also participated to alert other neighbours and who showed up at the scene of event together with himself. He testified that at the scene of event, he found blood has splashed out and there was a young man who has died. His body was in the house near the door.

He called the village chairman of Zimba village one Florence Felex Maufi (PW6).

PW4 was a Militiaman (Mgambo) and under the leadership of PW6 they joined force with other militiamen and started to search for the assailant. It was easy, somehow for them, as they were informed by PW3 that the assailant had taken with him a flat tyred bicycle belonging to John Kashindi and also, he took flour. It happened that the flour was in a bag with a hole, thus it was spilling out of the bag. It therefore left a special mark; a trail of the flat tyre and flour spilling out of the bag. They were

able to know that the assailant made for the way heading to Mawenzusi village. They called the leaders in the village and joined force to look for the assailant. The assailant was later in the morning of the day, the 4th day of August, 2020 apprehended near Mawenzusi village. He was found having in his possession a bicycle, an axe, a bag of flour and a hen. The bicycle and an axe were identified to be the properties of the owner of the house he was staying which now is the scene of the event the subject of this case. Police officers at Mtowisa Police Station were informed and they went at the scene where the suspect had been arrested. The items mentioned above together with a hen and packaging bag white in colour were found in the possession of the suspect. The same were seized and a certificate of seizure was filled. It was also tendered in court by PW1 Wycliffe Bright Chambi Assistant Inspector of Police, who then was at the rank of Police Countable. The Seizure certificate was admitted during hearing as exhibit P1. The accused or suspect and Florence Felex Mauifi (PW6) signed in the said seizure certificate confirming that the suspect was found with the items.

We had a question running in the background, who is the perpetrator of the abnormal/unnatural death of MTELANDA S/O MSEBE. It has been shown that it was not an accident but the deceased had been hacked

using a sharp object, more probably, an axe, the weapon which was seen by PW3 and used to attack them and now in the possession of the accused or suspect when he was being arrested.

It can be inferred from the evidence that PW3 saw baba Samweli who entered into their room, he had a torch and they had conversation she named him to the people and clarified how he left due to missing items at their home.

By following the trails, the militiamen apprehended him at Mawenzusi. The items mentioned by PW3 has been positively identified that they were taken from PW3's homestead. It can thus be safely said the perpetrator of the death of MTELANDA S/O MSEBE is the person who they were sleeping together in the same room. He has been positively identified by PW3.

In addition to that the person, suspect of causing death and now the accused was also found in possession of the properties a bicycle and an axe which belonged to PW3's husband. By virtue of the doctrine of recent possession, the accused is the perpetrator and or responsible with the death of Mtelanda s/o Msebe.

In his defence the accused denied that he was involved in causing death of one MTELANDA S/O MSEBE. His account of events is that he was at Mawenzusi village at his home and a group of people went there started beating him causing injuries on his head, at the forehead and the occipital area, left forehead and left foot on the lateral side near a small finger. They then forced him to board a police car where he was taken to Mtowisa Police station. There he was ordered to sign by imprinting his right thumb print on a document given to him by the police; his explanation therefore signed to save his life. He did not understand the contents but his name only.

He was also wondering how could PW3 identify him at the scene of crime if he was holding a torch towards her. It must have impaired her from a clear and definitive vision of the assailants. He also wondered where was a hen, white packaging bag (shangazi kaja) and flour which the witnesses allege they were found with him and recorded in the seizure certificate.

The accused prayed that this Court finds that he is innocent and release him from the prison so that he can go home to take care of his family.

In the defence he did not deny that he was working at Zimba Village as a casual labourer. He however denied that the evidence touches him as the perpetrator of death of Mtelanda s/o Msebe. He later however, lost grip

of the defence during cross examination and promised not to repeat again such acts he did to Mtelandu s/o Msebe. That also accompanied with admission of the correctness of the statement recorded at the police. At this point we need to know what actually happened from the horse's mouth.

The accused in his own words when recording a cautioned statement, exhibit P4 said: I quote: -

"Nakumbuka tarehe 2/8/2020 na nilitoka kijijini Mawenzusi na Kwenda Kijiji cha Zimba nyumbani kwa Mzee John s/o Kahindi kwa lengo la kuja kuchukua fedha ambazo nilikuwa namdai baada kufanya kazi ya kuvuna mahindi na arizeti mwezi wa 07/2020 na hii ilikuwa ni mara yangu ya tatu Kwenda hapo nyumbani kwa Mzee John. Mara ya kwanza ilikuwa Mwezi wa 01/2020 nilienda kufanya kazi ya kupalilia mahindi mara ya pili ilikuwa mwezi wa 07/2020 ambapo nilienda kuvuna mahindi na mara ya tatu ndio tarehe 2/8/2020 ambapo nilifika mida ya saa 15:00hrs na nilipofika sikumkuta Mzee Johi bali nilimkuta mke wake JUKE D/O CHARLES na bibi NANA D/O KULWA na mtoto

HOLO D/O MASASILA Pamoja na mchungaji wa ng'ombe- aitwae MTELANDA S/O MSEBE na Watoto wengine wadogo baada ya kupokelewa nikamueleza mama Juke d/o Charles kuwa nimefuata hela yangu Tshs. 150,000/= niliyofanya kazi ya kuvuna mahindi na arizeti akaniambia mzee hayupo amesafiri subiri akirudi nikakaa pale ilipofika usiku waliandaa chakula tulikula baada ya tuliingia kulala mimi nililala sehemu moja na MTELANDA S/O MSEBE. Tarehe 03/08/2020 baada ya saa 13:00 Hrs tulipokula chakula cha mchana nikaondoka na Kwenda kunywa pombe Zimba kijijini nilirudi pale nyumbani majira ya saa 16:00 Hrs na baada ya kurudi nikakaa tu bila shughuli yeyote mpaka ilipofika majira ya saa 21:00 hrs baada ya kula chakula cha usiku tukaingia kulala na mimi nikama kawaida nikalala nyumba ya uani na MTELANDA S/O MSEBE na weingin ambao ni JUKE D/O CHARLES, NANA D/O KULWA, HOLO D/O MASASILA na hao Watoto wengine wakaingia kulala kwenye nyumba nyingine lakini kabla ya Kwenda kulala nikamwambia mama JUKE D/O CHARLES kuwa anipe fedha kidogo wakati

tunamsubilia mzee lakini alikataa nikamwambia basi kama hana hela basi nifanye nae mapenzi pia akakataa ndio walivyoingia kulala nikachukua shoka na kumkata MTELANDA kichwani nikawafuata akina JUKE walimolala nikiwa nimeshika tochi nikamwambia JUKE anipe simu akasema hana kwenye mkono wa kulia baadae HOLO alitaka kunizuia na fimbo nae nikamkata na shoka kwenye paji la uso na sehemu zingine si kuona ni sehemu gani ila nilishushia shoka (mara) zaidi ya 03 baada ya hapo walikimbia nikachukua simu (m) aina ya tecno mkoba uliokuwa na nguo, fedha Tshs. 2400/= nilizozikuta ndani ya mkoba, unga wa ugali kama sado mbili Pamoja na baiskeli bambucha rangi ya dark blue baada ya kuchukua vitu hivyo niliondoka na kuanza kurudi nyumbani Mawenzusi kupitia njia ya Msia na ilipofika majira ya saa 6:00 hrs tarehe 4/8/2020 nikiwa bado niko njiani nikiwa nimemaliza kupanda mlima nilikamatwa na sungusungu idadi yao sikujua walikuwa wangapi baada yah apo walinifunga nikono Kamba ilipofika majira ya 7:00hrs polisi walifika na afari wakanichukua na kuniletqa hapa kituo cha polisi

*Mtowisa na nilikamatwa nikiwa na vitu vyote
nilivyokuwa nimebeba.."*

The wording in the cautioned statement speak loudly than what it has been testified by some of the witnesses. It is a principle in law that the best evidence is that which comes from the accused himself. In the case of **Jumanne Issa and Imani Kisanga Vs. the Republic (Criminal Appeal No. 54 of 55 of 2021 [2022] TZCA 328 (10th June, 2022)** it was held that: -

"Everything being equal, the best evidence in criminal trial is the voluntary confession from the accused himself".

In this case we have three scenarios. **One**, the accused was identified during the incident of an attack of the two ladies Juke Charles (PW3) and Holo d/o Msasila. Although the assailant was holding a torch and directing it on various parts of the room, the witness PW3 testified that she was able to identify him and commenced a conversation. She asked baba Samweli what was he looking for? Baba Samweli answered that he wanted a phone. Upon PW3 responding that she has no phone, he commenced the attacks using an axe.

Two, PW3 named the suspect to the militiamen and they commenced a search whereby upon follow up the suspect was arrested and also was found with the items he took from PW3 homestead. The said items were seized and a document certificate of seizure was signed and tendered in Court as exhibit P1. The accused and the village chairman signed on the document.

Three, the accused in recording a cautioned statement has narrated in a clear and concise manner what happened commencing on the 2nd August, 2020 when he went there up to the time of arrest in the morning of 4th day of August, 2020. In fact, his account of the events has corroborated the testimony of PW3, PW4 and PW6.

Under the circumstances, I find that there is no doubt that the accused is the one who hacked MTELANDA S/O MSEBE as well the two surviving ladies hence he is the one who killed the victim.

In the case of **Anthony Kinamila and Enock Anthony Vs. The Republic (Criminal Appeal No. 83 of 2021 [2022] TZCA 356 (16th June, 2022)** the Court held that:

*"In a charge of murder like the one in the instant case,
it is trite that the prosecution (s) required to prove all*

the ingredients of murder in order to win a conviction thereof. The said ingredients which the prosecution must prove beyond reasonable doubt are:

- (i) That the deceased is really dead;*
- (ii) That the death was caused by someone unlawfully;*
- (iii) That there was malice aforethought and*
- (iv) That the accused person directly or indirectly took part in the commission of the murder”.*

Up to this stage we have no doubt that really MTELANDA S/O MSEBE died unnatural death and it was the accused who killed him. The question is whether he did that with malice aforethought. Section 200 of the Penal Code, [Cap 16 R.E 2019] provides for what it amounts to malice aforethought. The same provides as follows: -

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

- (a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.*

- (b) *Knowledge that the act or omission causing death will probably cause the death of, or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by inference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- (c) *An intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
- (d) *An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit an offence;*

In the case of **Enock Kipela Vs. the Republic** it was held 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 utterance, if any made before, during or after the killing and*
- (7) *The conduct of the attacker before and after the killing”.*

In this case, the testimony of PW2 Dr. Gabriel Matei Somo will assist us. He testified that the deceased was estimated to be aged between 10 – 13 years old. The body had severe wounds caused by sharp object. The wounds were over 7cms long and deep. The main and deep vessels were cut. Exhibit P6, a Post Mortem Examination Report shows there were multiple cut wounds and the skull also was not intact. That caused severe bleeding leading to haemorrhagic shock. Obviously, the assault was fatal meaning huge force was applied many times which caused the fracture of the skull and severed main blood vessels. PW3 testified that the accused

used an axe (shoka ulaya). Even the accused himself in his statement recorded the facts.

Under the circumstances, the accused, in killing the victim, had malice aforethought. It is established by looking at the weapon (an axe), number of blows causing multiple cut wounds, the same were deep, showing he used huge force to assault the victim. That, by applying principles in section 200 of the Penal Code, [Cap 16 R.E 2019] and the principles in the case of **Enock Kipala versus the Republic** it is established without a flicker of doubt that the accused had malice aforethought.

Therefore, all the ingredients of murder have been established and I therefore find that the accused person FAHAMU S/O KAUZENI @ BABA SAMWELI guilty of the offence charged and I hereby convict him with the offence of murder contrary to section 196 of the Penal Code, [Cap 16 R.E 2019].

It is ordered accordingly.


T.M. MWENEMPAZI

JUDGE

23/08/2023

SENTENCE

Section 197 of the Penal Code, [Cap 16 R.E 2019] is very clear, that the offence of murder has only are punishment. Thus, I hereby sentence the accused person FAHAMU S/O KAUZEN to suffer death by hanging.



T.M. Mwenempazi
T.M. MWENEMPAZI

JUDGE

23/08/2023