THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY AT TARIME)

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 22 OF 2023

THE REPUBLIC

v.

MARWA NGORI MWITA @ LUCAS MWITA

JUDGMENT

13.12.2023 & 15.12.2023

Mtulya, J.:

This court was invited today to interpret the meaning of the words *malice aforethought* as enacted in section 196 of the **Penal Code [Cap. 16 R.E. 2022]** (the Penal Code). In a plain language, malice aforethought means intention to cause death to a person. However, in murder cases, it is more than intention to cause death. It is a specific intent, express or implied, to deprive human life. The words *malice aforethought* were unknown in statutes until 1389, during the reign of **King Richard II** in England when the **Pardon of Offences Act 1389** was enacted to introduce the indicated words.

The question as to why it happened during the mandate of King Richard II is another long story, which this court may not wish to endeavour and narrate. However, the purpose of the enactment was to distinguish killings emanated from specific intent and unintentional killings or acts intended to cause grievous harm. It is this thinking of

the English people which was brought in our country after trials in New Delhi, India. It was ferried in our country by the same English people during British mandate via **Tanganyika Order in Council 1920** and currently displayed in sections 195 and 196 of the Penal Code.

Since then, the distinction and boundaries were put in place under section 200 of the Penal Code to distinguish killing with specific intent and other killings of human persons, and the line was drawn to distinguish the crime of murder in section 196 of the Penal Code from the offence of manslaughter enacted under section 195 of the Penal Code.

However, the problem of distinguishing murder from manslaughter offences still persisted and it came to the practice that manslaughter was not seen as an offence in the Penal Code. Subsequent to the confusions in distinguishing murder and manslaughter and enactment of section 200 of the Penal Code, the Court of Appeal (the Court) in Full Court was invited on 10th June 1999 in Mbeya Region to resolve a murder case originated from Ikwete Village within Njombe District in Mbeya Region in the precedent of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994.

In resolving the murder contest in the precedent, the Court had listed down seven (7) criteria as standard practice in assisting this

court to be able to distinguish the dual offences. The recorded conditions were displayed 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 precedent of **Enock Kipela v. Republic** (supra), the evidence in this court displayed that:

> *...the evidence in the trial court in the instant case, proved that the appellant used a big stick, which wielded with both hands, and delivered three blows, on the head and chest. The deceased died instantly. There is, on the totality of the evidence on record, no room for more than one view as to the appellant's intent.*

However, in the indicated precedent of **Enock Kipela v. Republic** (supra), after listing the conditions at page 6, the Court moved further to place two (2) important clauses: first, at page 5 of the judgment, that *each case must be decided on its own*

peculiar facts; and second, at page 6 of the judgment, that *in the 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 instant case, the parties are not in contest on four (4) issues, namely: first, the death of **Mr. Matutu Marwa Wambura** (the deceased); second, his attacker, **Mr. Marwa Ngori Mwita @ Lucas Mwita** (the accused); third, use of weapon knife in attacking the deceased's thigh; and finally, the incident had occurred at **Nyarwana Village within Tarime District in Mara Region** (the crime scene) on 30th March 2017.

However, the parties are in contest on whether the accused had killed the deceased with malice aforethought. The Republic thinks that the accused attacked sensitive part of the body and escaped the scene of crime leaving the deceased without any assistance, whereas the defence thinks that the cause of death was *Gongo* species of traditional liquor and fear of police force.

The materials brought in the case by **Augustino Marwa Wambura** (PW2) show that on 30th March 2017 at 20:45 hours at the crime scene he witnessed the accused and deceased standing

together next to a bicycle in front of a local brew *Gongo* selling Bar having conversations. PW2 had testified that he did not hear the contents of the conversations as he was about seven (7) meters from the dual, but witnessed the accused abruptly attacking the deceased with knife at the thigh and escaped the crime scene. As PW2 could not get the reasons of attacks from the accused, he asked the deceased on the same, but the deceased could not be able to produce any, as he was screaming for pains. PW2 testified further that, he had rushed in search of vehicles to ferry the deceased to hospital unsuccessfully and on return, he found him dead. According to PW2, the incident of attack was reported to the Nyarwana Village Chairman, **Mr. John William** and police authorities in Tarime.

The police authorities in Tarime District visited the crime scene and did their three (3) traditional roles, *viz*: first, interrogation of witnesses, sketching map of the crime scene, and ordering post-mortem examination. **Police officer F. 6486 D/Sgnt. Hamis** (PW3) was engaged in the first dual functions of the police and the third was conducted by medical doctor, **Dr. Deogratias Elias Nyanza** (PW1). PW3 had testified that he was engaged in investigating the case and sketching the map of the crime scene and did the same. In order to justify his roles, he cited police investigation file

TAR/IR/1281/2017 on the murder of the deceased and tendered sketch map of the crime scene in Exhibit P.2.

PW1 on his part stated to have examined the deceased's body and recorded post-mortem report of the deceased which showed that the accused had expired from loss of blood emanated from a big wound at his proximal part of the thigh sized 4cm in length and 5cm width and entered into femoral artery and veins. To justify his testimony, PW1 had tendered the post-mortem report of the deceased as Exhibit P.1, which shows the source of death as: *massive blood loss*.

The defence on its part had brought one witness, the accused himself (DW1) without any exhibits. According to DW1 on 30th March 2017 at around 17:00 hours, he went at Nyarwana *Gongo* Selling Bar and had ordered a *Gongo* specie of Drink and ordered three (3) bottles marked Konyagi for drinking. *Gongo* type of drink, according to PW2, it has no TBS (without standard) and may change person's behaviors. As usual, according to DW1, in *Gongo* selling places, friends and colleagues share the pleasure, and on his part he cherished the practice. He invited **Mr. Marwa Tuhuru**, **Mr. Chacha Mang'ari** and **Mr. Marwa Mkwabi** to share the drink, and accordingly shared.

DW1 testified further that at around 18:00 hours, the deceased also had joined them in enjoying the drink, without any limit by usual behaviour of buying and sharing. According to DW1, the pleasure of drinking went up to night hours and were fully drunk and started exchanging words which led to a fight. In his testimony, DW1 stated that the knife belonged to the deceased and the deceased was the first one to attack him and he retaliated as part of self defence, and stabbed the deceased when they were down wrestling. Finally, DW1 testified that he admitted the offence and narrated the whole saga since his arrest at Kipasuka Ward Offices, before police station and justice of peace at Tarime Urban Primary Court at Tarime (the primary court).

The Republic enjoying legal services of **Mr. Lusako Mwaiseke**, learned State Attorney was of the view that the facts of the present case show that the accused had malice aforethought to murder the deceased as there are three (3) circumstances which justify malice aforethought, namely: first, he used knife to stab the deceased; second, he directed the knife at perilous part of the body; and finally the accused had escaped the crime scene and left the deceased without any assistance.

The defence on the other hand thinks that all that happened because of drinking *Gongo* and fear of the police. According to the

defence the accused was drunk which caused a fight and he escaped because he feared police force of Tarime District. I understand during hearing of the case several questions were asked and answered. However, of interest are those related to the understanding of ordinary or reasonable person on whether snakes, sheep, goats and cows when attacked on tail or legs what will happen. A reply may not be necessarily from this court as any ordinary or reasonable may give a rational answer to the question.

In the instant case, there are two (2) distinct materials produced by the parties. PW2 shows that the incident had occurred outside the Bar whereas DW1 had testified that the incident had occurred inside the Bar when they were having their *Gongo* drinks. PW2 testified further that he could not get the reasons of the attacks from both the accused and the deceased as the accused had escaped the crime scene and deceased could not talk. On the other hand, the accused testified that the reason was *Gongo* alcohol species of drink.

This then puts this court on trial as it was not at the crime scene and the dual PW2 and DW1 have produced two distinct versions of the saga. Regarding reliability and credibility of witnesses, the Court has already indicated that in the precedent of **Goodluck Kyando v. Republic** [2006] TLR 363, that witnesses are

entitled to credence and trust, unless there are good reasons to disbelieve them.

I am aware that the accused had mentioned **Mr. Marwa Tuhuru**, **Mr. Chacha Mang'ari** and **Mr. Marwa Mkwabi**, who are material witness on his part to corroborate his evidence, but declined to call them. According to the Court, failure to call material witness to corroborate party's evidence may move a court to draw an adverse inference against the party (see: **Wambura Marwa Wambura v. The Republic**, Criminal Appeal No. 115 of 2019 and **Stanley James @ Mabesi v. Republic**, Criminal Appeal No. 115 of 2022).

Similarly, the Republic had declined to cross examine the accused on the indicated confession recorded at the police station and extra judicial statement recorded at the primary court. According to the Court failure to cross examine a witness on crucial issues is regarded as accepting them to be true and correct (see: **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2001 and **Martin Misara vs Republic**, Criminal Appeal No. 428 of 2016; and Mawazo **Anyandwile Mwaikaja v. D.P.P.**, Criminal Appeal No. 455 of 2017).

In that situation, the safety course for the Republic was to corroborate its case well by registering the dual documents in this

case for the court to learn the contents of the versions and deliver justice (see: **Bushiri Mashaka & Three Others v. Republic,** Criminal Appeal No. 45 of 1991; **Republic v. Massanja Karume @ Mohamed & Another**, Criminal Sessions Case No. 13 of 2018 **Republic v. Mokiri Wambura @ Makuru**, Criminal Sessions Case No. 70 of 2022).

In the present case, this court is denied some facts to deliver justice to the parties. However, practice shows that it is the duty of this court to deliver justice from the facts presented to it for determination. In the present case, this court is invited to resolve a question: *whether the attack of the accused to the deceased by use of a knife directed at the thigh part of the body displays malice aforethought*. I indicated at the outset some of the questions registered in this case and related to animals as to whether when they lose their tails or legs what will happen to them.

I think, in my considered opinion, a reply will depend on each particular person. However, a reasonable person would ask whether death can be easily obtained from a stab to animal tail or leg. At any standard that would be displaying a want to cause grievous bodily harm to the animal. In our case, PW2 testified that he witnessed the accused and deceased standing next to a bicycle and had conversations. In such a standing situation, any

reasonable person would ask where is the easiest and possible areas of attack in human body by use of a knife to cause death. Is it at the thigh, stomach or head, and to a person with specific intent to kill. In my opinion, as from the facts registered by PW2, it is difficult to establish specific intent to cause murder to the deceased.

At least the facts of DW1 on existence of the fight caused by *Gongo* drinks can be easily appreciated. The facts produced by DW1 regarding *Gongo* drinks and fights are partly supported by the timing of the event and location, which are not in dispute. The event took place at 20:45 hours next to *Gongo* selling point, which shows the deceased was at wrong place at incorrect time. Both PW2 and DW1 have testified that the Bar is well known by the villagers, including the deceased, for *Gongo* selling and PW2 had testified that *Gongo* kind of drink, when swallowed may change behaviors of human person.

I am aware the type of stab and conduct of the accused after the attacks may display malice aforethought. However, in the present case it was one stab of knife directed at the thing and accused had testified to have escaped the scene of the crime and his residence for fearing reprisal from the police authorities, which may be understood. I understand from the evidence of PW1 and

Exhibit P.1 which displayed big wound and massive loss of blood. However, the part of the body which the accused directed his blow invites a lot of uncertainties at to the specific intent of the accused.

Similarly, there is no record to show utterances of the accused before, during and after the attack. DW1 had testified that there were exchange of words before the fight erupted, but was silent on the species of words uttered before the attack. It was unfortunate that the prosecution had declined to cross examine him on the kinds of words exchanged by the accused and the deceased. In the circumstances of the instant case, it is not easy for this court to clench the specific intent of the accused.

The available practice in the Court shows that when all relevant materials have been registered and considered in totality, *there must be no room for more than one view as to the accused's intent* (malice aforethought) to hold him responsible for murder. The Court has insisted that: *if there is doubt on the specific intent of the accused, the doubt is to be resolved in favor of the accused* (see: **Enock Kipela v. Republic** (supra). In the instant case, the whole saga invites several interpretations.

In any case, it is unconceivable to any reasonable person, to think of a situation where two (s) village mates to display normal conversations while standing and abruptly one of them stoop down

and attack another on his thigh. In my considered view, there must be more explanations on what had caused the attacks against the deceased. The facts in the present case are silent on the contents of conversations. However, the record shows exchange of words and fight in a *Gongo* selling Bar.

The Court has already resolved that: *where death occurs as a result of a fight, the court should convict accused for a lesser offence of manslaughter, not murder*. There is in place a bundle of precedents in support of the move (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). This court has also been following the course (see: **Republic v. Chacha Mwita Mohere**, Criminal Sessions Case No. 141 of 2022).

In the circumstances of the present case, I am satisfied that the prosecution has failed to prove *malice aforethought* as per required standard set in the precedent of **Enock Kipela v. Republic** (supra) hence I hold that the accused had killed the deceased without *malice aforethought*. In conclusion, 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

15.12.2023

This Judgment was pronounced in open court in the presence of the accused, **Mr. Marwa Ngori Mwita @ Lucas Mwita** and his learned Defence Attorney, **Mr. Tumaini Kigombe** and in the presence **Mr. Lusako Mwaiseke,** learned State Attorney for the Republic.

F.H. Mtulya

Judge

15.12.2023

ANTECEDENTS

Mwaiseke: My Lord, for the Republic, we say this court may sentence the accused in accordance to the **Penal Code** and **Tanzania Sentencing Manual**. My Lord, this court may send a lesson to other persons who use knife in attacking sensitive parts of the body. My Lord, the death of the deceased has caused loss to his family and this nation. We pray for a stiff sentence My Lord. That is all My Lord.

F.H. Mtulya

Judge

15.12.2023

MITIGATION

Kigombe: My Lord, the defence says that the accused may receive lenient sentence. My Lord, we have reasons to say that:

1. The accused has been in police custody for more than a year;
2. The accused is the first offender;
3. The accused has been admitting the offence since his arrest. He admitted the offence four (4) times, namely: first, before **Ward Executive Officer** at **Kibasuka Ward**; second, **Tarime Urban Primary Court at Tarime**; Third, **Tarime Central Police** and finally, in this court, but the Republic had declined his offer to lesser offence. My Lord, the accused is the offender who regrets on what has transpired. This kind of offenders need to be considered in lenient sentences. My Lord, there is a case of **Bernadeta Paul v. Republic** [1992] TLR 97 on the subject;
4. The circumstances of the offence was at the *Gongo* selling Bar and there was a fight between the accused and the deceased; and
5. The accused had attacked the deceased once and on the thigh. This is not a dangerous area, My Lord, like head, chest or stomach.

My Lord, even the behaviour of the accused shows that he was searching for the harmony in his society. He went at his village

for that and was arrested. My Lord, we pray for a lenient sentence to the accused person. That is all My Lord.

F.H. Mtulya

Judge

15.12.2023

Court: Sentencing Order shall be delivered in ten (10) minutes. Parties are ordered to wait in this open court. It is so ordered.

F.H. Mtulya

Judge

15.12.2023

COURT RESUMES

Mwaiseke: My Lord, we are ready for the Sentencing Order.

F.H. Mtulya

Judge

15.12.2023

Kigombe: My Lord, we are also ready.

F.H. Mtulya

Judge

15.12.2023

Accused: I am also ready My Lord.

F.H. Mtulya

Judge

15.12.2023

SENTENCE

Mr. Marwa Ngori Mwita @ Lucas Mwita (the deceased) was arraigned in this court for allegation of murder of **Mr. Matutu Marwa Wambura** (the deceased) contrary to sections 196 and 197

of the **Penal Code** [Cap. 16. R.E 2022]. After registration of all relevant materials, the accused was found guilty to the lesser offence of manslaughter contrary to sections 195 and 198 of the **Penal Code**.

However, before sentencing the accused person, this court had invited the learned minds in **Mr. Lusako Mwaiseke** for the Republic and **Mr. Tumaini Kigombe** for the Defence. According to Mr. Mwaiseke, the accused is to be sentenced in accordance to the law in **Penal Code** and **Tanzania Sentencing Manual.** In his opinion the accused may receive stiff sentence as he used knife to stab the deceased at sensitive part of the body thigh, which caused loss of human person to his family and this nation, whereas Mr. Kigombe thinks that the accused may receive less sentence as he cooperated four (4) times in different authorities from Kibasuka Ward Executive Officer, Tarime Police Station, Tarime Urban Primary Court at Tarime and in this court during plea taking; he is a first offender and has been in custody for more than a year. According to Mr. Kigombe all that shows the accused is regretting of what has transpired hence may receive lenient sentence as per decision in of **Bernadeta Paul v. Republic** [1992] TLR 97.

I have heard the parties in this case, and considered both the antecedents and mitigations. However, the law as enacted in section 195 of the Penal Code was followed by its sentence in

section 198 of the same Penal Code. The law in section 198 may attract up to life imprisonment.

However, today we have the **Tanzania Sentencing Guidelines 2023** (the Guidelines), which has categorised the offence of manslaughter into three (3) levels, of high, medium and low, as it is reflected at page 37 of the Guidelines. The use of dangerous weapon knife is pegged at the high-level manslaughter.

In the circumstances, those who are found guilty of manslaughter by use of knife are placed at high level and can be imprisoned from ten (10) years to life imprisonment. We have done so on 27th June 2012 in the precedent of the **Republic v. Ryoba Mwita Mseti** Criminal Session Case No. 149 of 2022. In the case, Mr. Ryoba Mwita Mseti had attacked the deceased with knife on stomach several times to cause death of the deceased and was sentenced to serve ten (10) years imprisonment.

The present accused had attacked the deceased on thigh and only one (1) time, he has already spent more than a year in custody pending for his trial and has been admitting and confessing the offence at four (4) authorities of this State. Practice shows that accused of this nature may receive less sentence (see: **Juma Mniko Muhere v. Republic**, Criminal Appeal No. 211 of 2014; **Hassan Charles v. Republic**, Criminal Appeal No. 329 of 2019; and **Juma Simba @ Machoke v. Republic**, Criminal Appeal No. 117 of 2022).

The Guidelines on the other hand shows that maximum sentence should only be imposed when the offence comes close to the worst of its type and should rarely be imposed on first offender (see: Item (f) and (l) in **General Principles of Sentencing** as reflected at page 2 and step 1 in **Sentencing Process** as reflected at page 16 of the **Guidelines**).

Having said so, I am moved to sentence the accused to six (6) years imprisonment from today to discourage persons who may wish to take the same course of action against others. Any killing of human person, whether in the form of murder or manslaughter of whatever level, may attract a huge sentence.

It is so ordered.

F.H. Mtulya

Judge

15.12.2023

This Sentencing Order was pronounced in open court in the presence of the accused, **Mr. Marwa Ngori Mwita @ Lucas Mwita** and his learned Defence Attorney, **Mr. Tumaini Kigombe** and in the presence of **Mr. Lusako Mwaiseke**, learned State Attorney for the Republic.

F.H. Mtulya

Judge

15.12.2023