

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA SUB - REGISTRY)

AT SONGEA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 08 OF 2023

THE REPUBLIC PROSECUTION

VERSUS

MARTIN EMMANUEL MDOWE @ ANKO ACCUSED

JUDGMENT

Date of last Order: 09/10/2023

Date of Judgment: 12/12/2023

U. E. MADEHA, J.

It is worth considering the fact, the accused person who is none other than Martin Emmanuel Mdowe @ Anko, stands charged with the offence of murder contrary to sections 196 and 197 of the *Penal Code* (Cap. 16, R. E. 2022). It was alleged by the prosecution that, on 9th August, 2022, at Dar Pori area in Lunyele Village within Nyasa District and Ruvuma Region, the accused person unlawfully killed a child who was known as Claudy William Mwafyela.

It is important to note the fact that, when the information was read the accused person denied to have committed the offence. In a bid to prove the charge against him the prosecution paraded nineteen witnesses and tendered five (05) exhibits. The admitted exhibits were: the chain of custody records (exhibit P1), the deceased clothes and the accused clothes (exhibit P2 collectively), the certificate of seizure of seizing the accused clothes (exhibit P3), the certificate of seizure of seizing the deceased clothes (exhibit P4) and the sketch map of the crime scene (exhibit P5).

The evidence given by the prosecution side can be briefly narrated as follows: **PWI WP 1152 DC Teddy**, a christian and a resident of Kilosa Village in Nyasa District, in her sworn testimony told this Court that her working station is at Mbambabay Police Station and she has eight years of working experience as an investigator of criminal offences and she is the exhibits keeper. On 9th August, 2022 she was at home at Kilosa Village in Nyasa District and she got a phone call from Inspector Ahazi, who told her that there was murder incident and a young man was killed at Dar Pori Village. In the morning of the 10th day of August, 2022, she met her fellow officers who are: - Inspector Ahazi, DC Elia, DC Hope and the police driver called Arbogast and they started a journey to Dar Pori Village. Upon

arriving at Dar Pori Village she started her duties by drawing a sketch map of the crime scene. On 11th August, 2022 after completion of the investigation process she went back to Mbambabay Police Station. Inspector Ahazi gave her an exhibit which related to the murder case so that she could preserve it in the exhibits' room.

She recorded the chain of custody records and put them in the exhibit room. PW1 identified the chain of custody and the accused's and deceased's clothes. The chain of custody records was received as exhibit P1. In particular, PW1 identified the accused's clothes, which are a pair of sneakers or "*Raba*"; a red T-shirt and one trouser black in color. Also, PW1 identified the deceased's clothes, which were a yellow trouser and a blue sweater bound with the green T-shirt. The deceased's underwear was blue and white and she prayed to tender them as exhibit and they were admitted as exhibit P2 collectively and the accused and his advocate did not object on the tendering of the accused's and the deceased's clothes.

On the other hand, **PW2 (Insp. Ahazi Dickson Mbinile)**, a Christian, in her sworn evidence told this Court that he is Police Officer with ten years working experience, he stated that his working station is at Mbambabay Police Station in Nyasa District. He went on stating that on 9th

August, 2022 during evening hours, while at his working station at Mbambabay Police Station he received a phone call from Tingi Police Station informing him that, there was a child who was badly burned by fire and he was sent at Mbinga District Hospital. He gave them the duty to take care of the burnt child, identify the place where he was burnt, and arrest the accused person and they acted accordingly and took the accused person to the Police Station. While they were together with the assistant inspector of Tingi police station, they prepared an investigation team of five (05) people who are: DC Hope, D/CPL Nyabwise, D. Teddy, D. Elia and the driver.

After preparing a team of investigators, they altogether went to Tingi Police Station, where they found the accused had already been arrested and the accused person is none other than Martin Emmanuel Mdowne @ Anko. At that particular time, he received terrifying and shocking news that; the burnt child had died. PW2 testified further that he went to the scene of crime with the accused person and they went into the house where the accused was living and they came to know that the deceased was called Claudy William Mwafyela and he was a Primary School student

at Dar Pori Village. He also came to know that the deceased was living with his grandmother called Maua.

PW2 told this Court that, on the incident day the accused was wearing a red T-shirt, the sneakers or "*Raba*" marked with white color and had three white lines on each Raba and a red belt buckle and a black trouser. He added that in his investigation, he found out that the deceased and the accused were living in the same house and on the incident date they were together. They went to the accused room to conduct a search they managed to get parts of exhibit P2, which is a black color-trouser make jeans, one (01) pair of "*raba*" red T-shirts and were seized after filling the certificate of seizure.

PW2 further identified the accused clothes, by its colours the white lines and the red line; in the accused's shoes, red T-shirt and a black trouser. He also identified the accused and the certificate of seizure. Lastly he prayed to tender it as an exhibit. The accused and his advocate had no objection and the certificate of seizure of seizing the accused's clothes was admitted and marked as exhibit P3. PW2 also he identified the certificate of seizure, seizing the deceased's clothes by using his signature.

and handwriting and he prayed to tender them as an exhibit and it was admitted as exhibit P4.

He added that exhibits P2 collectively, exhibit P3 and exhibit P4 were given to Detective Teddy who is the exhibit keeper to preserve them and he signed on the chain of custody which was also signed by Detective Teddy. PW2 testified further that he was the one who recorded the accused's caution statement, but the accused denied to have committed the alleged offence.

On her sworn evidence, **PW3 (Neema Joseph Mng'ong'ose)** a christian and doctor from Mbinga Hospital, in her sworn testimony told this Court that, she conducted the Post - Mortem Examination on the body of the deceased and she discovered that the deceased's body had been burnt and his appearance had developed blisters. As a matter of fact, the cause of death was a fire in which he had been cremated. She added that, after examining the deceased's body she prepared the Post - mortem Examination Report. PW3 identified the Post-mortem Examination Report by using her signature and handwriting and she prayed to tender it as an exhibit in Court. Since the defence side has no objection on the admission

of the Postmortem Examination Report was admitted and marked as exhibit P5.

PW4 (Maua Mtama Mahenge), a christian and resident of Dar Pori area in Lunyele Village and in her sworn testimony she told this Court that, she know Emanuel Martin Mdowe @ Anko, who is the accused person since he was her tenant. She added that, the accused is well known and he is a fan of *Simba Sports Club*, and he is popularly known as "*Anko*". She added that the accused rented her house on May 2, 2022 and he told her that he was coming from Mozambique and he was engaged in mining activities at Lunyele Village.

She testified further that the deceased was her daughter's son who is known as Tabu and she lives at No. 3 area in Mozambique. She added that she has been living with the deceased who was burnt to death. She added that the accused person was very close with the deceased and they use to call each other as Anko.

She went on stating that before the incident date, the accused took the deceased and went together into the bush and she warned the accused not to take the child again without notifying her. The accused person replied that there was no problem since he knew the deceased since they

were living together at No. 3 street in Mozambique. After that, she took her child and told the accused person not to take the child again. Then on the other day, the accused took the child called Claudy and went to pick guavas with the deceased and that was the accused's habit of taking the child without informing her and she gave him a notice to find another house but before taking any initiatives, on 9th August, 2022, the deceased was found to be badly burnt by fire.

He added that on the incident date, she woke up early in the morning and prepared her child and she dressed him in a blue underwear, a yellow trouser with black stars like flowers, green T- shirt and a blue and red sweater. After that she gave the child a breakfast. Basically, after she had finished giving him those things he took them to the neighbor's sister, who is called Stella, so that she could take care of him for that day because she only knew that on the material day, she would be late to be back at her house.

In the same way, she left and went to the place where she used to work. Then, when she returned home, she went to Stella and did not find his grandson. On the same note, she was informed that the child, Claudy William Mwafyela, was with "*Anko*" Martin Emmanuel Mdoe, who is the

accused in this case. She knew well that the accused, Martin Emmanuel Mdoe, rented a room in her house, and Stella told her that "*Anko*" left with the child while wearing yellow trousers with black stars and a blue sweater.

Similarly, the accused was wearing a red T-shirt with the *SIMBA* mark on the T-shirt. After that, he got a phone call from the doctor at Dar Pori Dispensary he told her that due to her child's condition, she should hire a motorcycle and go to the hospital. She acted immediately, by boarding the motorcycle and went to the dispensary located at Dar Pori area in Lunyele village. Just after she has had arrived at the hospital, she finds that her grandmother's son was burnt, and the doctor advises him to take the child to Mbinga District Hospital as they were not able to treat him due to the level of fire with which he has been burnt.

Again, she took further steps of hiring a car and immediately took the burnt child up to the nearby hospital because he was badly injured around the buttocks, chest, stomach and along the neck. Upon hiring a car to take her to the hospital, she had to call her mother who Tabus Boscos whereby she told her that there was an emergency case as her child had been burnt by fire. So, she kindly asked her to follow her quickly to Mbinga-Mjini Hospital.

On her way, she met a car with the village leaders whereby she explained the conduct of the accused and whatever had happened to her child. She also explained to them that the last person to be with the child that is Claudy William Mwafyela is obviously none other than; the accused person. Actually, before arriving at the hospital, they passed at the Tingi police post, where they were given the PF3. So, they went to the hospital and the doctor could continue with the treatment. Meanwhile, at the hospital they were told to stay outside. At the same point, the mother of the child that is; Claud had arrived. Unfortunately, the doctor called them whereby he informed them that the child had already died. Similarly, on 10th, August 22, she was called to the hospital in order to identify the deceased's body. As a result, they handed over the deceased's body (Claudy William Mwafyela) for the burial ceremony.

On her party, **PW5 (Stella Lazarus Mbunda)**, a resident of Dar Pori, in Mpepo ward and Nyasa District and a Christian, in her sworn testimony told this Court that she knows Claudy William Mwafyela who resided with PW4 who is her aunt. She also knows Martin Emmanuel Mdoe @ Anko as a tenant of PW4, he rented a room at her aunt's house. She went on telling this Court that, on 7th August was as Simba Day and up to

19:30, PW4 was not at home and he was informed that he went to the meeting and the deceased was at his home. Then, she ordered the deceased to go home and prepare hot water for bath. Later on, she found the deceased being accompanied with the accused person. She asked them on where they were going and she was told that they were going to find guavas. Since it was already night time, she ordered them not to go and she ordered the deceased to go with her to watch a football match since it was Simba Day. When she informed PW4 on what she was told about the deceased and the accused, she was surprised to hear that they were going in the bush to take guavas on that particular night.

On 9th August, 2022, during morning hours she was at home and PW4 asked her to take care or look after her grandson (the deceased) since she was going for her daily activities and she agreed. During noon hours, the accused passed at her home and took the deceased. They went together at PW4's house where the accused was living in a rented room. At 14:00 hours, PW4 was back and she asked for the deceased and she told her that the deceased was at PW4's home with the accused person.

PW5 testified further that, on the material date, the deceased was wearing a yellow truck with blue stars and a blue sweater and the accused

was wearing a red T – shirt chartered Simba, a black and dirty trouser, shoes which had three white strips and red colour.

In the evening hours of she heard that, the deceased had been burnt. She added that she well knew the accused and he was very close with the deceased who used to call the accused "*Anko*". He insisted further that for the last time the deceased was with the accused and she identified exhibits P2 collectively, the clothes which the deceased and the accused was wearing on the material date.

PW6 (Tabu Bosco Mwaurambo), a resident of No. Tatu Street in Mozambique and a christia, in her sworn evidence told this Court that on 9th August, 2022 she was at Number Tatu Street in Mozambique. She went on testifying that, the deceased was her son and he was born on 9th September, 2017 and he had five years at the time he was killed. She added that the deceased used to reside with his grandmother (PW4) at Dar Pori in Lunyele Village where he was schooling but during holidays he lived with her.

She went on stating that on 9th August, 2022, the deceased was with his grandmother (PW4) at Lunyele Village and at arrond 17:00 hours, she receive a phone call informing her that the deceased was burnt by fire. She

decided to go at Dar Pori and when she arrived, she was told that the deceased was sent at Mbinga Hospital. When she arrived at Mbinga Hospital, she was asked on the father of the decease and she was ordered to sit outside the hospital. Later on, she was informed that her son was no long alive. After receiving such terrible and shocking news on the death of her son, she was sent to the morgue for identification of the body. On the morning of the next day, they were given the body for burial ceremonies.

PW7 (Shabani Mazoea Luambano), a secondary school student and a muslim after been affirmed, he told this Court that, on 9th August, 2022 at around 15:00 hours he was at Dar Pori area playing football in the street's playing ground. He remembers that he was playing with Ismail Omary, Issa, Wilson and Maneno. While at the playing ground, the accused who was accompanied with the deceased passed there and the accused asked to be given the ball to play.

Initially they denied him but later the accused promised them that if the ball will be worn, he will pay them money and he shown them the money and gave it to the deceased. Then the accused was given the ball and started playing a popular game known as '*dana-dana*'. When he was

satisfied, the accused left the playing ground being accompanied with the deceased.

During evening hours of that day, he heard that the deceased was burnt and he knew both the accused and the deceased before the material date. PW7 went on stating that on the material date the deceased was wearing a yellow truck that was decorated with black stars and a blue sweater and the accused person was wearing a red t-shirt that had the name of Simba written on it and a trouser that was black and dirty, rubber shoes of an unknown colour which had three white stripes and red chatter. PW7 also identified the accused who was at the Court dock and exhibit P2 collectively.

PW8 (Nortugela Angelus Kawonga), a twenty-eight (28) years-old businesswoman and a christian, in her sworn testimony testified that she resides at Dar Pori in Lunyele Village. On August 9, 2022, at 14:00 hours, she was at home at her grocery store which is in her residential compound. While at home the deceased came being accompanied by a man who he never knew before and the deceased used to call him 'Anko'. The deceased was wearing a yellow truck that was decorated with black stars and a blue sweater and the accused person was wearing a red t-shirt

that had the name of Simba written on it and a trouser that was black and dirty, rubber shoes of an unknown colour which had three white stripes and red chatter.

The accused person asked for a drink and paid the money and started drinking. Then the accused asked for a juice for the deceased but she told him that he is not selling juice and she was asked to go and buy in the nearby shop. She went and bought juice which was given to the deceased. Later on she found the accused taking a fire match and lit in his cigarette and started smoking.

Then, she left them and went to her neighbor's house to buy chicken meat. She bought one piece of chicken meat and returned to her business as usual. Upon arrival at his grocery, the accused (Anko), asked him where she had bought that piece of chicken. She told him that she bought from her neighbor's house. He asked for the price of one piece of chicken and was told that it costs TZS. 4,000.00 for a piece. After that, he kindly asked her to go and buy him a piece of chicken meat and he gave her TZS. 5,000.00. When she came back with the piece of chicken meat the accused refused to receive since he was not satisfied with its size and he asked for his money and he was given.

She added that, the accused person departed at her home with the deceased and she never knew where they went. In the evening hours, she heard that the child who was with the accused had died and later on she was informed that the accused was suspected to have killed the deceased and he was arrested. PW8 identified the accused clothes and the deceased clothes (exhibit P2 collectively) and the accused who was at the Court dock.

PW9: Anna Edmund Komba, a peasant aged forty-three (43) years old and a christian, in her sworn evidence stated that, she resides at Dar Pori area at Lunyele Village. She added that one of her daily activities is selling chicken meat. On 9th September, 2022, at around 14:00 to 15:00 hours, her neighbour (PW8) went at her home and bought a piece of chicken meat.

Later on PW8 came and wanted to buy another piece of chicken meat and she was sent by the accused. However, when she returned, the accused denied to receive the piece of meat bought by PW8 and he demanded for his money and he was given. The accused and the deceased went at her home and the deceased used to call him *Anko*.

Furthermore, she testified that he knew the accused person since he used to see him passing on the road near her home and he was living at PW4's house where he rented a house and the deceased was living at PW4 who was her grandmother. The deceased was wearing yellow trousers with black star flowers around his trouser for the most part and a blue sweater and the accused was wearing a red T- shirt and trousers made of black and colored rubber shoes with three white belts and a red ribbon.

Later on, she heard that the child who had passed by with 'Anko' had been set into fire and he burnt. She heard that the deceased was burnt between 15:00 to 16:00 hours in the evening. That is to say; one to two them. PW9 identified exhibit P2, which is the accused and the deceased's clothes and the accused person who was at the Court dock.

PW10 Elia Jafari Christian, a christian and resident of Dar Pori in Lunyele Village in his sworn testimony, testified that he lives at. He has engaged in mining activities. He is also a mineral trader and miner. On 9th August, 2022, he was at Dar Pori busy with his daily activities. Suddenly, he heard sound of a child crying asking for help. He quickly responded by going where the sound of the child was coming from. He met him and found he has fire in his body and the petrol oil smell was coming from him. The fire was still burning he served the child by pouring sand on it.

and went to look for help from other people. Later on he was assisted by Angel, Dr. Willy and the child was sent to the Village Dispensary.

Then he asked the child on his name, the child told him that he is called Claud. Then asked on what has happened on him, he told him that Anko has set him on fire. PW10 managed to identify the deceased's clothes (exhibit P2).

PW11 (Angel Nsasu Mwabwanga), a Christian and resident of Dar Pori area in Lunyele Village in her sworn testimony, she told this Court that on 9th August, 2023, during evening hours she was on the way from Mozambique to Dar Pori area in Lunyele Village. While on her way she saw a child who was burnt with fire in his body. Since the child's body was on fire, she served him by pouring sand in his body to put off the fire. She asked the child's on what has happened and he told her that Anko poured him with oil and set fire on his body.

The child was burnt from his head to stomach and he was wearing the yellow trouser and a blue sweater. She tried to undress the child but she failed since the child's clothes were burnt and tight to the body. She took the child to the nearby Village Dispensary where the clothes were removed from the deceased's body. PW11 identified the Claudy's clothes exhibit P2. Lastly, she said that the clothes identified belong to Claudy

William Mwafyela. During evening hours when she was shocked to hear that the child she served to rescue with fire incident had died.

PW12: William Tisiani Ndimbo, a christian and a resident of Lunyele Village in Mpepo Ward, Nyasa District on his sworn evidence stated he is professionally he is a Clinical Officer and his duty station is at Lunyele Village Dispensary, located at Dar Pori area within Nyasa District. On 9th August 2022, he was at his working station and she was informed by PW11 that there was a child who was burnt by fire at the intersection of the road between Dar Pori and No. 3 area towards Mozambique. He immediately, responded and decided to hire the motorcycle and went directly to the scene of the crime. Upon arriving at the scene of the crime, he saw a child who had been badly burnt in the face and stomach. At the moment, he failed to recognize the child who was burnt because on his face he was badly injured by fire burns. The child was bitterly crying and talking about being burnt by fire and he mentioned Anko to be the one who had burnt him with fire.

Upon arriving at the dispensary, he took a razor blade and started cutting the child's clothes because the clothes were attached to the body skin. He asked PW11 who was the relative of the child? But she has no answer and his fellow Doctor told, Gaston Kihaule told him that the child

was the grandchild of Mama Maua (PW4). Then, Dr. Gaston Kihaule informed PW4 and she came at the Village Dispensary to see her child. Later on, they referred the child to Mbinga Hospital for treatment since he was badly burnt.

Consequently, he had preserved the clothes he had taken off from the child who is none other than Claudy William Mwafyela, put them in a plastic bag, and informed the village government that the child had been burned and that he was the owner of those clothes, which were partially burned.

Then, he gave PW4 a referral whereby she went to Mbinga District Hospital for more treatment. On 10th, August 2022, he was at the working place at the Lunyele dispensary, whereby the investigator of criminal crimes from Nyasa arrived at the dispensary from Nyasa Police Station.

Eventually, he arrived in order to take the deceased's clothes. After taking the statement they gave him the certificate of seizure for seizing the deceased's clothes.

At the end of the day, they wanted him to sign the certificate of seizure of seizing the deceased's clothes. PW12 identified the seizure certificate by using the name of the police officer, who is Inspector Awazi. He stated that the seizure certificate has his name, and in the third

paragraph of the certificate of seizure, they listed the deceased victims, which are the green T-shirt which was burnt, the blue-sweater, and the deceased's underwear.

Also, he asserted that; he signed the certificate of seizure which he managed to identify (exhibit P4). He also identified the deceased clothes which is part of exhibit P2 and added that, on the material date the clothes were smelling petrol oil and they suspected the deceased was burnt by using petrol oil.

PW13 (Gaston Kiaule), a christian and resident of Dar Pori area in Lunyele Village within Nyasa District, in his sworn testimony told this Court that he is a Medical Attendant at Dar Pori in Lunyele Village Dispensary. As a Medical Attendant, his duties is to attend patients. On the incident date he saw the deceased when he was attended by PW12 at their working station, at Lunyele Village Dispensary. He saw the deceased body badly burnt by fire and he was wearing clothes that had been burnt.

As a result, when they cut off his clothes that had been burnt on his body, they found that the child that had been thoroughly burnt by fire. Consequently, was burnt in the stomach, head, neck, and around the face area. When the child's mother arrived, she was able to identify the child; she identified the child as the child of Kagele's family, who is called Maua.

After noticing that, she called his grandmother (PW4). The grandma's child arrived at the dispensary immediately; she was given a referral to go to another hospital that is Mbinga District Hospital.

Respectively, the transfer was sought so they left with the child who is known as Claudy William Mwafyela. It is true that, they continued to take care of the deceased's clothes. Besides, the clothes burnt were blue underwear, a blue sweater, a green T-shirt, and yellow trousers. To put in a nutshell, PW13 identified the deceased's clothes which were exhibited as exhibit P2 collectively.

PW14 (Willy Kabuliwazi Ngalawa), a christian and a Village Chairman of Lunyele Village, in his sworn evidence testified to the effect that; on 9th August, 2022, during evening hours, he was with the Village Executive Officer of Lunyele Village and he received a phone call from PW12 who informed him that there was a child who had been badly burnt by fire. While on the way to the scene of the crime, they met with the motorcycle carrying the burnt child whereby they were heading towards the Village Dispensary. He stopped the motorcycle and he was told that they suspected the accused to be involved in burning the child with fire.

After receiving such information, as a village leader, he knew how and where to start from. They went into the house where the accused

rented a house. Once they arrived, they met with the accused who was very shocked of seeing them. They arrested the accused and sent him to the Village Office where they find a militiaman to send the accused at Tingi Police Station and it was already 20:00 hours.

After that, he got information that the burnt child; Claudy William Mwafyela, had died. On 10th August, 2022, while at the Village Office, Police Officer asked him to accompany them to the scene of crime. The scene of crime was at the road intersections and he led the Police Officers to draw the sketch map of the scene of crime and he signed on it. He identified the sketch map of the crime scene by using his signature and he was able to identify the accused person who was standing at the Court dock.

PW15: Conso Aloyce Ngulo, a christian and militiaman of Lunyele Village and a resident of Dar Pori area, in his sworn testimony he told this Court that, on 9th August, 2022, he was at Mozambique and he received a phone call from PW14 who informed him that, there was a man who was arrested and he was at Lunyele Village Office. He was asking for assistance since there were many people at the Village Office and they wanted to set fire on the Village Office in order to kill that person who they suspect to have burnt the child.

When he arrived at the Village Office at around 20:00 hours, he found many people gathered and they were eagerly waiting to kill the accused person who was inside the village office claiming that "... *ukiua kwa upanga utakufa kwa upanga*", that is to say; a tooth for a tooth or Tit for Tat is a fair play.

Since there were many people surrounding the Village Office, who wanted to kill the accused, he used his military technique to rescue the accused and he took him up to Tingi Police Station. P15 also informed this Court that, while at the Village Office he was told that the accused person burnt a child called Claudy William Mwafyela and he managed to identify him as the one at the Court dock.

PW16 (F. 6985 Detective Sergeant Nyabwise); a christian and a Police Officer working at Tingi Police Station, in his sworn evidence told this Court that he is investigator of criminal offence and he has sixteen years experience. On 9th August, 2022, at around 19:45 hours while at his working station, he received a complaint of one child having burnt by fire and he was in the arms of PW4. They arrived at the police station complaining that her child named Claudy William Mwafyela, had been burnt with fire.

In the first place, he saw the; head, face, and neck were in very bad condition. After seeing such things, he quickly prepared the PF3 so that the child could be taken to the hospital because he was in very bad condition. It is a fact that, after the accused had been arrested, he opened the case of grievous harm. No doubt that, the accused had been brought by the militiamen of Lunyele Village, and PW15 had arrived with the accused at the police station.

As much as the incident is concerned, the accused who did set fire on the deceased's body that is, Claudy William Mwafyela, is none other than; Martin Emmanuel Mdowe @ Anko.

Notably, he received the accused at the police custody around 22:00 hours in the night for the offence of grievous harm. At that particular time, the accused refused to have committed the alleged offence. Basically, the accused said that he was living together with Mama Maua (PW4), and they were living together with the burnt son. To cement it, the accused person who was brought to the police station was actually the one who is now sitting at the court dock.

PW17 Julius Henry Iresha, a christian and resident of Dar Pori area in Lunyele Village, in his sworn testimony told this Court that, he is a Hamlet Chairman of Dar Pori area and he has been in that position for nine

years. On 10th August, 2022, he was called by the Police Officer at Tingi Police Station for interrogation on the incident that happened on 9th August, 2022. When he was at the Police Station he was asked to go together to the accused person's room. When they arrived at the accused's room, the accused was shocked, and they found him there. In the process of investigating; the police entered Martin Mdowe @ Anko's room without anything in their hands. They searched the accused's room, and inside the room they found a pair of black trousers, a red T-shirt, rubber shoes that had three white colors, and a red Nike chatter belt.

Again, after seizing the accused's property, they took the things seized and left them with the accused. While they were searching in the accused's room, he was standing on the door and watching everything and whatever that was going on with the accused. In short, the accused was there in his own room. It is true that, the police officers conducted a search in the accused's room, who is none other than; Emmanuel Martin Mdowe @Anko. On the same note, the police gave him the certificate of seizure for seizing the accused clothes whereby he signed on it.

It is a fact that, PW17 recognized the seized clothes, which were admitted in court as exhibit P2 collectively. He saw a rubber shoe and the accused clothes taken from the accused's room, which were a red-colored,

T-shirt with a Simba mark and a rubber shoe with triple drawings and the red-colored mark. PW17 identified the certificate of seizure of the accused clothes, which was exhibited as exhibit P3.

PW18 (G. 2749 DC. Elia) a christian and Police Officer from Mbambabay Police Station in his sworn testimony told this Court that he works as the investigator of criminal offences and he has the experience of eight years. On 16th August, 2023, he received information from Assistant Inspector Ahazi (PW2) that he wanted him to go with the investigation team to Lunyele Village and they were required to pass through Tingi Police Station. In particular, the accused, Martin Emmanuel Mdowe @ Anko, was already arrested. He went to the crime scene in order to draw the sketch map of the crime scene. Actually, he was directed by PW14 in drawing the sketch map and after drawing the sketch map of the crime scene he signed and P14 also signed. PW18 identified the sketch map of the crime scene by using his handwriting and his signature. Finally, he prayed to tender it as an exhibit in court. It is important to note that, the defence side has no objection to the tendering of the sketch map of the crime scene it was admitted and marked as exhibit P5.

The last witness to be paraded by the prosecution side was **PW19 (Bahati Kumburu Kinyahi)**, a christian of Lunyele Village who works in

mining extraction at Dar Pori area in his sworn testimony he testified that, on 9th September, 2022, he was at his cite looking for the minerals as he always does. When he had a snap, suddenly someone came and informed him that there was a child who had put on fire and he was badly burnt. Then, they together went with him to the scene of the crime and saw the child who had been burnt. They found Dr. Elia and her sister Angel. Thus, they had to pour sand to the burnt child in order to put off fire as a fire extinguisher. It is important to note that, they found the child at the crossroads leading to Tanzania. The child was burnt on the chest, face, and ears. Again, they can see clearly that he has been burnt. Basically, when he was asked, he said that he had been burnt by Anko using the petrol oil. These were the words of the innocent burnt child. Notably, the child was taken to the nearest dispensary. The child was wearing the colorful clothes, which were; yellow trouser with black stars and a blue sweater. Inside the clothes, he was wearing the green T-shirt. PW19 recognized the deceased's clothes.

At the closure of the prosecution case, this Court found the prosecution evidence has established a prima facie case against the accused person. The accused was given a chance to give his defence

evidence and he opted to defend himself that is to say; he had no witness to call.

In his defence, the accused person (DW1), christian in his sworn evidence, told this Court that, he is working as a minor at Dar Pori and he is a tenant of Mama Maua (PW4) from 7th day of May, 2022. Before that he was engaged in mining activities in Mozambique which is a nearby country from Dar Pori. He added that, in PW4's house there are four other tenants and they live with their landlord (PW4) in the same compound but in different apartment.

The accused went on stating that he is surprised to find that his cautioned statement was not tendered by the prosecution and he is wondering to find he is called Anko, since he has never used such name in his entire life. He testified further that, on 9th August, 2022, he never went to work since there was no electricity.

To add to it, he took the proof of four (04) people who had called him at noon. Among the four (04) people, he remember one person called Kaburi Wazi. he actually saw him and his colleagues. Thus, he recognised him by his face. Surprisingly, they took him to the village government and started beating him. Finally, they took him to Tingi Police Station where he was interrogated and later he was charged with the offence of murder.

Strange as it may sound, he was accused of killing an innocent boy called Claudy William Mwafyela but he never knew that person at all.

The accused testified further that he never killed the deceased and it is not correct that on the material day he was wearing the red T-shirt that had been written "Simba", a black trouser. He added that, it is true that he was wearing a red T-shirt, but it was not the one that has been admitted in Court as exhibit P2. He asked this Court to allow him to use exhibit P2, to wear and show it fits his body. His prayer was granted and the Court was adjourned for a while for the sake of his privacy.

When the Court resumed its session, the accused was wearing the clothes and the shoes and they fit him properly as if he was born wearing them. Those clothes are none other than the red T-shirt type of 'SIMBA' chatter, sneakers popularly known as 'raba' shoes that are actually dirty and the colour is unknown and dirty black trousers and he agreed that they were his clothes. Generally, this was the evidence given by the prosecution and defence side.

With respect to the available evidence, there is no doubt that Claudy William Mwafyela is dead, and his death was not natural. The cause of death was fire, which was set in his body. It is my view that for the conviction of murder to stand according to Section 196 of the Penal Code

(Supra), considering the fact that the prosecution relied on circumstantial evidence, the prosecution has to prove the following: **One.** Whether the circumstantial evidence, along with other factors, proves the accused guilty of murder beyond a reasonable doubt. **Two,** whether the prosecution proved malice aforethought. **Three,** whether the killings amounted to murder.

To start with, whether the prosecution proves the guilt of the accused person based on circumstantial evidence, it needs to build a strong and coherent case that convinces the court of the accused's guilt beyond a reasonable doubt. The issue is whether the available circumstantial evidence can prove beyond reasonable doubt that the accused person is guilty of the offence of murder. To prove that, the accused person is guilty of the crime of murder based on the available circumstantial evidence, what is needed is to build a strong and coherent prosecution case that convinces the court of finding that the accused person was the one who committed the offence ie as looking at the historical background of the case, the chain of custody and the corroborative evidence which can help to build a coherent narrative evidence in order to prove the case based on the circumstantial evidence.

As far as I am concerned in this case here, I have to look at the available evidence to find whether the prosecution side has proved the offence of murder against the accused. In that regard, PW4 testified that on August 7, 2023, before the incident, the accused person had taken the deceased to an unknown place, something that made her grandmother (PW4) search for him. Unfortunately, she could not see him; he was nowhere to be seen. Having not seen him, since the accused was staying in the same house with them. He was able to return home with the child, and when questioned, he said that the child knows him because he is staying at the number three mine street. At once, PW4 warned the accused to avoid the habit of taking the deceased to his duties.

To add to it, the second thing that I am looking at is that the evidence shows that PW7 is a child who was playing football with his friends on a playground, and on the date of the incident, he managed to see the deceased and the accused person while they were walking on the playground and in the street on 9th August, 2023, at around 15:00 hours in the afternoon, that the deceased was found burned between 15:00 hours and 16:00 hours.

For that reason, the prosecution evidence proved that the accused was with the deceased in the street for a few hours before his death. Apart

from that, PW8 businesswoman (who owned a grocery at Lunyele village) saw the accused person with the deceased, and they left her shop around 15:00 hours in the afternoon. He sold him a beer, and baby Claudy William Mwafyela was given juice by the accused. She served the deceased child with juice which was bought by the accused. Additionally, they were also able to go to PW9's house as the accused and the child to buy a piece of chicken meat. Here you can see that the accused person was seen hanging out with the deceased without the consent of PW4, who is the deceased grandmother, and without the consent of the owner of the child. They also told the court that, the deceased was wearing a yellow trouser with black star spots and a blue sweater the clothes which PW4, the grandmother of the deceased testified that she dressed her grandson on that date.

It is worth considering the fact that, the clothes that the accused person was seen wearing and that the deceased was wearing which was exhibited as exhibit P2 collectively, were mentioned by five prosecution witnesses PW4, PW5, PW7, PW8 and PW9 as the accused was seen wearing a red T-shirt with the logo of Simba, white "raba" with three white stripes, and a red-colored belt passed through the rubber. Also DW1 the accused person testified that he wore a red T-shirt on the incident date. They also told this Court that the deceased was wearing a yellow trouser

with black star spots and a blue sweater. Therefore, looking at the witnesses, they could see the accused and the deceased walking around the street wearing those rubber shoes. Above all, PW5, PW7, PW8, and PW9 testified that PW4 has dressed her grandson in those clothes, which are a blue sweater, blue underwear with white stripes, and a green T-shirt.

Eventually, it is confirmed that PW2 and PW17 who conducted search and witnessed the search at the accused's house where the clothes and the shoes of the accused person were seized in the accused room and admitted during the trial exhibit P2 collectively and its certificate of seizure being admitted as exhibit P3. This piece of evidence also is collaborated by the testimony given by PW10, PW11, PW12, PW13 and PW14 who testified that, on the material date they saw the deceased wearing the clothes mentioned by PW4, PW5, PW7, PW8 and PW9.

In my opinion, having considered carefully the evidence, I find even the accused person admits that, on the material date he was wearing the clothes and shoes named by PW7, PW8 and PW9.

In her testimony, PW8 told this Court that, when the accused person was taking a drink at her grocery, she saw him to be in possession of a match which he used to lit a cigarette. In their testimony; PW10, PW11,

PW12, PW13 and PW14, who saw the deceased with burning fire, the body of the deceased was smelling with petrol oil.

According to the testimony given by PW3 a doctor from Mbinga Hospital and the records found in exhibit P1 (Post-mortem Examination Report), the deceased was badly burnt by fire on the face, head, neck and stomach and that was the cause of his death.

Therefore, having taken into consideration to the evidence given by PW5, PW7, PW8 and PW9, there is no doubt that, the accused person was the last person to be seen with the deceased. The accused was seen to be with the deceased shortly before the deceased was found to be set on fire.

Looking at the evidence on record, I find the testimony given by nineteen prosecution witnesses and five exhibits that were admitted in this case, they corroborates each other. The testimony given by PW5, PW7, PW8, PW9 and that given by PW2 and PW17 who went to make search on the accused's room are enough to come into conclusion that, the accused person was the one who set fire on the deceased body.

Even the conduct of the accused person after the incident: that he was shocked and became afraid when he saw the Police Officers who arrested him are relevant facts to prove that he was the one who killed the deceased.

No wonder, this shows that the accused was with the deceased shortly before his death. If you carefully look at all the exhibits tendered by the prosecution side, the accused persons had received them all. Generally speaking, the prosecution side was able to establish the chain of custody.

On my side, I insist that, though the evidence given by the prosecution witnesses have managed to connect to the fact in issue to prove that the accused person was the one who set fire to the deceased' body. Moreover whether the accused caused death with malice aforethought, Reference is made to section 196 of *Penal Code* (supra) which states that;

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

Thus, for the offence of murder to be proved, one of the essential element to be proved is malice aforethought. According to section 200 of the *Penal Code* (supra), malice aforethought can be proved by the intention to cause death or grievous harm to a person whether such person is the person who actually killed or not or acting with knowledge that the act or omission causing death will probably cause the death or grievous harm or an intention to commit the offence.

In murder cases, establishing "malice aforethought" is a crucial element. Essentially malice aforethought means the intent to kill. Obviously, in proving the presence of malice aforethought, the prosecution needs to prove the following: motive, intent, premeditation, and circumstantial evidence. Starting with motives and evidence; in order to establish the accused motives against the deceased, the prosecution presented the following evidence: **Firstly**, the accused had arranged to meet at the house of PW4, where the deceased is her grandson resides. In addition, there was one day the accused had taken the deceased person and went to walk with him in an unknown place, and PW4 looked for his grandson and could not see him. So, he had brought him back around 20:00 hours in the night. No doubt, that was on 7th, August 2022. She warned the accused not to take Claudy William Mwafyela again. The accused was able to reply that he took him because he knows this child from when they were No. 3 in Mozambique at the border of Tanzania, and he also knows his mother. PW4 warned the accused not to take him again but he did take the child without the permission of the owner. **Secondly**, he went with the child to buy beer and the deceased child bought juice for him to drink, so they were able to go to PW9's house to buy a piece of chicken meat and

eat there. The more important thing is that, the accused was seen wearing black trousers and a red T-shirt with Simba print.

Also, he was also seen wearing shoes like rubbers that are colored with three white stripes and one big red chatter, and the child's clothes were yellow trousers and a blue sweater. Therefore, PW4, PW5, PW6, PW7, and PW8 had seen the accused on the incident date walking with the child wearing those clothes in various areas. PW6 was playing football with his colleagues when he saw the accused on the day of the incident passing by with the deceased with five thousand (5,000) shillings. Notably, the issue here is that the accused was seen with this child between 15:00 and 16:00 hours. On the same note, was eating chicken meat with the child at PW8's house, so the prosecution has been able to establish bad motive of the accused against the deceased. In this case, the accused is a person last seen with the deceased before the death of the deceased. Therefore, it establishes a bad motive that this child was not given what made him to take the deceased. No wonder, he had rented a house there at PW4's house so that he could carry out that evil intention easily, and one's enemy is the one in your house. Also, the accused was in possession of a lighter match that he used to light his cigarette while drinking beer in the grocery store room that day together with the deceased.

In such circumstance, I find the prosecution has proved that the accused person has bad motive against the deceased. The accused's acts of renting a room in the house of PW4, moving with the deceased and buying him juice and chicken meat was the means of carrying out his bad motive of killing the deceased. Also, from the testimony given by PW8, the accused was in possession of a match in his pockets. All these conducts of the accused person proves that there was malice aforethought to kill the deceased. See the decision of the Courts in the case of **Juma Zuberi v. R** (1984) TRL 249, in which the Appellant was liable for causing death of the child in terms of S. 203 (e) of the *Penal Code* (supra) because the child was in his custody and he abandoned her in the bush.

In the case of **Aman Shaban v. R** Criminal Appeal No. 4 of 1981 (unreported), the Court stated that:

"Although in this case only a decapitated skeleton of a human being was found near the area where the appellant is alleged to have been seen viciously attacking and chasing PASCAL, we think that the finding of the human remains near the scene of the attack is one strong circumstance which the learned trial Judge was entitled to consider, together with other circumstances, in deciding whether the appellant was involved in the unexplained disappearance of Pascal or not. Furthermore, we are of

the humble view that once one accepts the evidence of PW2 and PW3 and accept the fact of finding a bicycle near the scene where it is alleged Pascal left by bicycle there can be no doubt that these are cogent and compelling facts upon which the trial court properly inferred that Pascal was dead and the appellant murdered him."

In the above cases the accused persons were involved in the disappearance of the deceased because they were the last person to be seen with the deceased. Thus, all been said and done, I am of the view that the accused person was the one involved in the killing of the deceased.

On the issue of whether the killing amounted to murder, reference is made to the case of **Samweli s/o Henry @ Juma v. Republic**, Criminal Session Case No. 12 of 2010, which gives the useful guideline on how to determine malice aforethought. The Court of Appeal of Tanzania while deciding the above case, it made reference to the case of **Said Ally Matika@ Chumila v. Republic**, Criminal Appeal No. 129 of 2005 and **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994, in which it was stated that:

"...including the following (1) 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 was directed on: (4) the number of the blows although one blow may, depending upon the facts of the particular case, be sufficient for this purpose (5) the kind of the injuries inflicted (6) the attacker's utterances if any made before during or after the killing: and (7) the conduct of the attacker before and after the killing;"

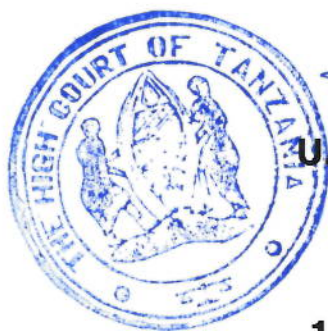
In this case, I am inclined to adopt the above guidelines in determining the existence of malice aforethought. With all due respect to the testimony given by PW10, PW11, PW12 and PW13, the available evidence shows that the deceased's death was due to the petrol fire set into his body. On the kind of injuries inflicted, the testimony given by PW10, PW11, PW12 and PW13 shows that the deceased was badly burnt. Also, PW3 testified that the burnt wound led to the deceased's death. Moreover, the conduct of the accused person before and after the incident as explained above, clearly shows that he intentionally killed the deceased.

Moreover, it is the duty of this Court to examine the defence evidence and find whether there are major contradictions that can be resolved in favour of the accused. To the best of my knowledge, I have considered the the defence evidence in which the accused generally denied to have involved in the killing of the deceased.

Having reckoned the testimony given by all prosecution witnesses, the combination of all events stated by the prosecution, if considered together, I find they irresistibly directs that the accused person intentionally killed the deceased, one Claudy William Mwafyela.

Therefore, I am satisfied that the prosecution side has managed to discharge its duty of proving the case beyond all reasonable doubt as it was stated in the case of **Alli Ahmed Saleh Amgara v. Republic** (1959) EA 654. They have proved all the essential elements of *actus reus* and *mens rea*. The available evidence proves that the accused person killed the deceased person intentionally. The killing was actuated by malice aforethought. Thus he committed the offence he stands charged with and this Court finds him guilty for the offence of murder contrary to section 196 of the *Penal Code* (supra) and he is convicted accordingly.

DATED and **DELIVERED** at **SONGEA** this 12th day of December, 2023.



A handwritten signature in blue ink, appearing to read "U. E. Madeha", is written over the text of the judge's name.

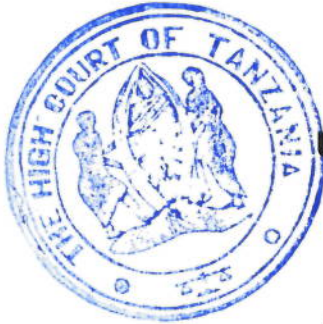
U. E. MADEHA

JUDGE

12/12/2023

Ms. Esther Mfanyakazi (State Attorney for the Republic)

It is a serious offence. I pray that a stiff punishment should be meted out to deter others from committing similar offences.



A handwritten signature in blue ink, appearing to read "U. E. Madeha", written over the name printed below.

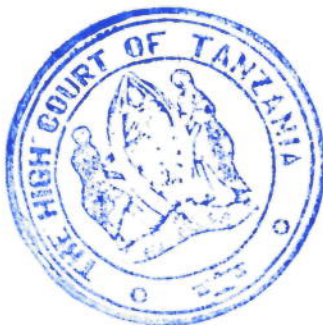
U. E. MADEHA

JUDGE

12/12/2023

Mr. Frank Kapinga (the learned advocate for defence side).

The law has prescribed only one sentence for the offence of murder. I pray for the Court to use its discretion power in sentencing the accused.



A handwritten signature in blue ink, appearing to read "U. E. Madeha", written over the name printed below.

U. E. MADEHA

JUDGE

12/12/2023

SENTENCE:

Under section 197 of the *Penal Code* (supra) there is only one sentence for the offence of murder. That is the sentence of death. I hereby sentence the accused to suffer death by hanging.




U. E. MADEHA

JUDGE

12/12/2023

COURT: This judgment is read through virtual court in the presence of Ms. Esther Mfanyakazi, the learned State Attorney for the Republic, the accused person and Mr. Frank Kapinga, the learned advocate for defence side. Right of appeal is explained.




U. E. MADEHA

JUDGE

12/12/2023