IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB- REGISTRY]

AT ARUSHA

CRIMINAL SESSIONS CASE NO. 03 OF 2023

(Originating from the P.I Case No 14 of 2022, at the District Court of Arusha at Arusha)

REPUBLIC

VERSUS

1. ABDUL JUMA SHOMARI

2. MRISHO ALLY MBEGU

BADE, J.

JUDGMENT

The accused persons stand charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E 2022. The charge sheet alleges that, on the 3rd Day of May 2022 at CCM Sinoni Area, within the city, District and Region of Arusha, with malice aforethought jointly and together did cause the death of one Francis Herman. When the charge was read and explained to the accused persons, they entered the plea of not guilty, hence the matter was scheduled for a trial.

The trial of this case proceeded without the aid of assessors vide the provisions of section 265 (1) of the CPA as repealed by section 30 of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022 which

makes it no longer compulsory for a trial of this nature to be conducted with the aid of assessors.

During the trial, the Republic was represented by Ms. Lilian Kowero, Carolyne Kasubi, and Mr. Donald Mahona learned State Attorneys whereas the accused persons were represented by Mis. Witness Airo and Victoria, learned counsels.

In supporting the charge against accused persons, the prosecution paraded a total of five (5) witnesses supported by two exhibits P1 a post-mortem report, and P2 map of the crime scene. On defence side, the accused persons had one witness each.

It was the prosecution's case that on 03/05/2022 at night some community guards were patrolling the street of Sinoni near the CCM office premises. Those community guards included the now-deceased person, PW2, one Lukumay and one Joachim. While patrolling they heard noises from the place where people were watching a football match. Upon entering the place, they found 1st accused having khat. PW2 went outside to inform his fellow about people chewing khat inside, which is illegal. They decided to apprehend the 1st accused, but before they could do so, he came outside and went to the other side to use the bathroom. The deceased followed him and asked him why he was

chewing khat knowing it was illegal, he responded that they were chewing it since it was fun as they were watching a football match. Deceased apprehended him and wanted to take him to the police station. The 1st accused asked permission to call his relative to inform of his pending arrest, but upon being let to make the call, he called his fellows. Meanwhile, the guards proceeded to attempt to take him to the police station, but suddenly as they were walking, they saw a mob of youth coming, including Omary @ Kichwaa and the 2nd accused. They stopped on their heels, and the mob got to them asking where they were taking the 1st accused who was their relative, so they started a fistfight. They observed that the mob was growing bigger and they decided to let go of the 1st accused.

The mob started throwing stones and the deceased ran after the mob which included the 1st accused, when they reached CCM premises they slowed down and waylaid the deceased. All of a sudden, the 2nd accused came forth and grabbed the hands of the deceased from behind, while Omary threw a knife, which was caught by the 1st accused who used it instantly to attack the deceased. He stabbed the deceased in the lower back near the thigh and lower stomach area. Omary stabbed him once again while saying that they would find them and finish them all.

Meanwhile, **PW2** related that he was hiding and had called his fellows to come and rescue them as they were being overcome by the mob. They rushed the deceased to the hospital but upon reaching there he shortly died.

A chairperson of the Olmokea Sinoni had informed OC CID of Arusha (**PW1**) about the incident and went to the scene of the crime together with **PW4.** Reaching the scene of the crime he finds a crowd of people including some members of the community Police Guards. They mentioned Omary, the 1st accused, and the 2nd accused as the persons who stabbed the deceased. **PW3** a doctor conducted a post-mortem over the body and found out that there were two wounds one at the left-hand side of the thighs, lateral proximal part of the left thigh. That the injury had penetrated deeply into the inguinal area extending to the femoral area. The other injury was on the right-hand side, left iliac crest, which was also deeply penetrative way into the right inguinal area, which in his opinion, was both caused by a very sharp object. His further general observation was that the left wound had destroyed the stricture of the inguinal area, which means there was severe blood loss since the vessels were ruptured, and all the nerves and the lymph nodes were messed. The wound inflicted on the left side also had the same effect as

the one on the right. It was his opinion that the cause of death was haemorrhagic shock through a major loss of blood as a result of the wound and the destruction of the vessels in that area of the body.

On the defence side, the accused persons offered a general denial. The 1st accused admitted having been on the scene of the crime on the fateful day but denied any involvement in the commission of the crime. The 2nd accused offered a defence of alibi, explaining that on a fateful day, he was at his mother's house in Senevune with his family for Eid and special Eid prayers where he spent the night.

Upon hearing the whole of the prosecution case and that of the defence, I am convinced that the issues for determination are:

i) Whether there was death of the deceased;

ii) Whether it was proved beyond reasonable doubt that the said death was a result of the accused persons' doing which resulted in the unlawful ending of the deceased life.

iii) Whether the taking of the deceased's life was with malice aforethought;

It is trite law that the prosecution bears the burden of proving the case. The law further states that the standard of proof is beyond reasonable

doubt and the accused person bears no duty of proving his innocence. His duty is only to raise reasonable doubts in the mind of the Court. It is also a legal requirement that any reasonable doubt left by the prosecution's evidence should be resolved in favour of the accused person.

In answering the 1st issue, the accused persons have been charged with the offence of murder which is defined under section 196 of the Penal Code, [Cap 16 RE 2022] that:

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

Based on the above provision, it is pertinent that for the prosecution to sustain a conviction in a murder case, it is duty-bound to prove beyond reasonable doubt the two elements of the offence of murder which are malice aforethought and the actus reus itself, and inherently important, the linking of the said act of unlawful taking of the life of the deceased person with the accused person, see Court of Appeal in **Antony Kinaila and Another vs the Republic**, Criminal Appeal no. 83 of 2021.

The evidence of **PW2**, a community guard who was patrolling together with the deceased, and that of **PW3**, a doctor who testified

that the relatives of the deceased positively identified a body as that of Francis Herman @ Rasta established beyond doubt that Francis Herman is not only dead but also his death was unnatural since he had become deceased because of the infliction of multiple penetrating incised wounds (the stab wounds) resulting into a haemorrhage shock. The admitted Exh P1 is descriptive of the correctness of the findings in the postmortem examination report.

Regarding the 2nd issue, whether it was the accused persons who in fact, caused the death of the deceased, going through the prosecution witnesses, it is **PW2** who testified that he witnessed the assault which resulted in the murder of the deceased Francis Herman. According to his testimony, he was in hiding while witnessing the assault. Before this Court can enter conviction solely based on the evidence of **PW2** it shall satisfy itself that his identification of accused persons is water-tight and no possibility of mistaken identity left behind, bearing in mind that the incident happened at night involving an angry mob of about thirty people according to testimony of **PW2**.

The Court of Appeal of Kenya in the case of Wamalwa and Another vs Republic [1999] 2 EA 358, stated that:

"The Court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of an offence fleetingly and under stressful circumstances."

So, in this case the witnesses visually identified the accused persons as the persons stabbing the deceased while at the commotion. It becomes pertinent to inquire if there were a big mob, how a person who is hiding away can be said to have witnessed the accused person stabbing the deceased? The issue of visual identification was discussed numerous times by the Court of Appeal. In the case of **Waziri Aman vs Republic, [1980] TLR 250,** it was held that:

"Evidence of visual identification is of the weakest kind and most unreliable. No Court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight".

The Court proceeded to hold that:

"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have

properly resolved the issue unless there is shown on the record a carefully and considered analysis of all surrounding circumstances of the crime being tried. We should for example, expect to find on record questions such as the following posed and resolved by him: the time the witness had accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not".

In the case of **Abwene Lusajo vs The Director of Public Prosecutions,** Criminal Appeal No. 461 of 2018 CAT at Mbeya quoted with approval in the case of **Cosmas Chaula vs Republic,** Criminal Appeal No. 6 of 2010 (unreported) which held that:

"..... it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such suspect to a person whom he first reports the matter to him/her before such a person is arrested. The description should be on attire worn by a suspect, his appearance,

height, color and/or any special mark on the body of such a suspect".

Looking at the evidence on the record vis a vis the stated principles regulating identification, the question posed is can it be safely vouched that the accused persons were positively identified?

In response to a question from cross-examination, **PW2** had described precisely the place the incident took place and also was adamant about moving the scene where it was a well-lit area ostensibly to impress on the evidence that he had been able to see over the deceased being stabbed by the 1st accused person after the 2nd accused person threw the knife into the hands of the 1st accused person.

According to the evidence the incident happened at nearly midnight and it was a commotion that involved about thirty people. So the evidence of **PW1** and **PW2** testifying that there were electrical bulbs around the Anglican church and the CCM office premise is pivotal in putting it through that there could not be any mistaken identity as there was enough lighting. See Court of Appeal in **Baya S/O Lusana vs Republic**, Criminal Appeal No 593 of 2017. Moreover, **PW2** knew the accused persons before the incident, and he was able to describe them at the earliest opportunity when he reported the incident to the police

and his statement was taken. This is also crucial because there was an attempt by **PW2** and the deceased to arrest the 1st accused person who was found chewing khat while watching football prior to the incident.

Description of the accused persons at the earliest opportunity was important because the incident not only happened at mid-night but also involved a mob of people which could make it more difficult for someone to see exactly who was involved in the stabbing, bearing in mind that **PW2** was hiding while the incident took place. This correlates with the holding in the case of **Wangiti Marwa Mwita and others vs Republic** [2002] TLR 39 where the Court of Appeal stated:

> *"The ability of the witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court into inquiry."*

PW2 who was with his fellow guards had his story supported by **PW1** who testified that when they reached the scene of the crime, they found other members of the community guard who mentioned to him that Omary @ Kichwaa who is still at large together with the accused persons are the ones involved in the stabbing. Meanwhile, **PW5** who apprehended the accused persons upon receiving information of their

whereabouts also not only supports the reporting of the incident and the mention of the persons who were responsible for the attack on the night of the incident; which suffices "the earliest opportunity" principle, but also identifies the accused persons being the persons whom he apprehended, predicating their late arrest to the fact that the accused persons had evaded their apprehension. He explains further that one more accused person who had been mentioned is still at large.

In their defence, the 1st accused person admitted being at the scene of the crime while denying taking part in the ensuing affront and assault. He also controverted the account of how he was arrested. **DW2's** account while credible, is worthless as she could not account for the actions of her son while out and about.

Meanwhile, I am alive to the position of the law that conviction is possible on the evidence of a single witness, except the court needs to be cautious that such a witness must be credible, and the evidence should be approached with all caution giving due consideration to the factors which affirm, and those that detract from the credibility of the witness. In treating the evidence with caution, the probative value of the testimony of a single witness is expected not to be equated with that of several witnesses.

So, while it would be assumed unsafe to rely on the only eye witness who testified in court, I find the admission by the 1st accused person of being at the crime scene is independently supportive of **PW2's** evidence, particularly because not only was he initially caught abusing drugs which meant he was in direct contact with the deceased and **PW2**, but he is said to be the one who called for his fellows to come forth. Meanwhile, as held in the case of **Mawazo Anyandwile Mwaikwaja vs R**, Criminal Appeal No. 455 of 2017 (unreported), apart from demeanor, the credibility of a witness may be determined by coherence in his testimony and that of other witnesses. I find the single eyewitness **PW2** quite credible, and his evidence believable.

Conversantly, I am not convinced that the accused persons do not know each other as they purport to impress, or that the 1st accused person detracted from getting involved in the mob action that ensued. This is not to mention the fact that on giving the notice of alibi, the 2nd accused person was expected to have done so at the earliest possible opportunity, practically during committal when the accused first becomes aware of the charges against them. It makes sense that once a person becomes aware of the charge, they will come out and proclaim their alibi, which is the essence of giving notice. Otherwise, it becomes an

afterthought. As it happened, the 2nd accused person's notice was provided during the hearing of the case just before the closing of the prosecution's case.

The law is very clear that prior notice has to be given before defence of alibi is raised as provided under section 194 (4) of the Criminal Procedure Act, Cap 20 RE 2022 thus:

> Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.

In proscribing the consequence of not furnishing the prosecution with notice, Section 194 (6) is clear that where the accused raises a defence of alibi without having first furnished the prosecution with notice, the court may in its discretion accord no weight of any kind to the said defence. Also in the case of **Director of Public Prosecutions vs Nyangeta Somba & 12 Others** [1992] TZCA 30 the Court of Appeal held that where an accused person intends to rely upon an alibi in his defence, he shall give to the Court and the prosecution notice of his intention to rely on such defence before the hearing of the case, stating the rationale behind giving such notice as to enable the prosecution to

verify the truth of the alibi particulars and if necessary, assemble evidence in rebuttal, insisting that the same should be given before the main hearing.

In another case of **Kubezya John vs Republic,** Criminal Appeal No. 488/2015, interpreting subsection 6 of Section 194 of the Criminal Procedure Act the court has a discretion to accord no weight to such defence if it wishes.

In due regard to the position of the law, I am duty-bound to either give regard or accord no weight to the defence of alibi. While I feel compelled to regard the same and have duly considered the raised defence, I am not convinced by it while being fully aware of the fact that the accused person had no duty to prove his alibi defence as was held in **Sijali Kocho vs Republic** [1994] TLR 206. Nevertheless, in the circumstances of this case, the alibi issue does seem like an afterthought as it was never laid out during cross-examination of the prosecution witnesses **PW2** or **PW5**. In any case, it defeats prudence that the 2nd accused person did not ask **PW2** and **PW5** any questions that would lay bare his claimed absence from the crime scene or prolonged stay at his mother's house or his not being apprehended immediately after the commission of the incidental crime.

On the other hand, all the defence witnesses contradict the details of how the accused persons were apprehended. **DW1** put it through that the 1st accused person was apprehended while coming back from work as he awaited to board a motorcycle to go back home. **DW3** on the other hand testified that the 2nd accused person was apprehended in the area where he was waiting for passengers to ferry ('kijiweni'), while **DW2 and DW4** explained that they were called by someone from the said work area of the 2nd accused / someone who had been with the 1st accused person to be informed of the said arrest. This is in direct controversy of the facts as testified by **PW5** that the accused persons were both arrested through an ambush of the bar in Seinevuno on the night of 23/07/2021. None of them cross-examined the witness or brought forth any person who witnessed their said arrest in the respective areas as they alleged.

While it is a principle of law that the accused cannot be convicted based on the weakness of their defence but rather the strength of the prosecution case, it is not without cause that the Court is persuaded to ignore this version of the story against the one put forth by the prosecution's **PW5**. In my view, I find **PW5** to be credible since in the course of the investigation, they were tipped off on the presence of the

accused persons at a specific place and time, having evaded apprehension for quite a while despite knowing their identities. And while being cross-examined, none of the accused persons controverted **PW5's** testimony in any material respects, including the dates of the arrests, the manner of the arrests, and the persons arrested. This court has taken due regard to the testimony of the **PW5** including the probabilities and improbabilities inherent in the evidence of this witness concerning his duties and responsibilities.

In my view, since the defence side had heard the material testimony of the witness on how he had affected the arrest of both the accused persons, it would have been expected that this narration would be controverted with a key witness, bearing in mind that the accused persons both related that they had not only been arrested during daylight, but also in the presence of other persons; which makes me wonder would it not be prudent to call persons who witnessed their said arrests, especially considering the fact that it is in evidence that close relatives of the accused persons were both called to testify and each one spoke of being informed of their loved ones arrests by some other person.

In the case of **Samwel Japhet Kahaya vs Republic,** Criminal Appeal No. 40 of 2017**,** The Court of Appeal seated in Arusha held that:

> *"..... the failure to summon some of the important witnesses would have prompted the trial court to draw adverse inference since if a party to the case opts not to summon a very important witness he does so at his detriment....."*

In the final analysis, the court can base its findings on the evidence of a single eye witness as I have found that such evidence is substantially satisfactory. Also, there is corroboration which consists of independent evidence meaning separate evidence that supports the evidence of the **PW2**, rendering his evidence more probable including that of **PW5**, especially in reporting the incident, as well as the candid admission of the **DW1** being present at the scene of the crime. My saying so confirms the finding that the case of the prosecution has been proven beyond reasonable doubt. Of course, this cannot be done in isolation, this court has considered the totality of the evidence before it including that of the defence. In the case of **Magendo Paul & Another vs Republic** [1993] TLR 220 the Court of Appeal approvingly quoted Lord Denning's passage in **Miller vs Minister of Pensions** [1947] 2 All ER 372 that:

"The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence, of course, it is possible but not in the least probable the case is proved beyond reasonable doubt."

Having analyzed and responded to the first two issues affirmatively, I now turn to consider whether the taking of the deceased's life by the accused persons was with malice aforethought, which is the other ingredient of the offence of murder as per section 200(a), (b) and (c) of the Penal Code, CAP 16 R.E 2022.

According to **PW3** Doctor Elibariki Samson Karuwa, the deceased was stabbed and cut with a sharp object. His evidence indicated in **Exh P1** an admitted post-mortem report that the deceased had two cut wounds which were classified as deeply penetrative. On the face of it, the classification of the injury would be one that is serious enough to point to the fact that the aggressors intended to end the life of the deceased as the two wounds one at the left-hand side of the thighs, lateral proximal part of the left thigh which penetrated deeply into the inguinal area extending to the femoral area. The other injury was on the right-

hand side, left iliac crest, which was also deeply penetrative way into the right inguinal area. He observed the effect it caused on the body entailed the destruction of all the structures of the inguinal area, which caused severe rapture of the major blood vessels as well as all the nerves and the lymph nodes. Similarly, the wound inflicted on the left side had the same effect as the one on the right causing a major hemorrhagic shock through loss of a lot of blood with imminent death.

In any case, the intensity of the inflicted wounds can not be taken without the context of an intention to kill expounded by the fact that it was caused by a deadly weapon used in a vulnerable part of the body. It is quite obvious that her injuries were a result of an overt act by his assailants to put into action their intention to kill him. See The Court of Appeal of Tanzania in the case of **Enock Kipela vs Republic,** Criminal Appeal No. 150 of 1994 (Unreported) where the kind of weapon used, the type of inflicted wound, the force in the infliction of the said assault, area of the body assaulted, the attacker's utterances and the conduct of the attacker after the assault can all be inferred in imputing malice aforethought. In my considered view, the accused persons did assault the deceased with malice aforethought as imputed in the way the attack

was carried out as analysed above, and hence the issue is answered affirmatively.

From this deliberation, I am satisfied that in view of the evidence adduced by the prosecution against the accused persons, the case against them has been proved beyond reasonable doubt. I accordingly find both the accused persons Abdul Juma Shomari and Mrisho Ally Mbegu guilty of the charge of murder contrary to Section 196 of the Penal Code and convict them both accordingly.

It is so ordered.

DATED at **ARUSHA** on this 12th day of **December 2023**

A. Z. BADE
JUDGE
12/12/2023

SENTENCE

During the sentencing hearing, the learned counsel for the accused persons tried to convince and establish that the convicts are young persons who are depended upon by their families. Having considered all of these arguments, I am of a settled mind that the determination of the fact that the convicts stabbed the deceased twice while holding his

hands so that he would not be able to defend himself, is an utter show of brutality and manifestly malicious.

The republic urged the court to be stern because of the offence they had committed; stabbing the deceased on a sensitive part of the human body, they used a sharp object to stab the deceased thus causing deeply penetrative injuries that caused the death of the deceased, and so they prayed that the accused person be meted put with serious and severe sentence to act as a deterrence to other members of the public in doing such an act.

This is bearing that the actions of the deceased have caused the ending of the life of a community guard while on duty, whilst protecting the lives not only of people like them but also their own relatives and making their localities safe for all citizens.

I take cognizance of the guidance by the Court of Appeal as put in the case of **Benard Kapojosye vs Republic, Criminal Appeal No. 411 of 2013** (unreported) observing:

"We must point out that, sentiments aside, sentencing has a crucial role to play in the criminal justice system. In sentencing, the court has to balance between aggravating factors, which tend towards increasing the sentence awardable and mitigating factors, which tend towards exercising leniency. The sentencing court should also balance the

particular circumstances of the accused person before it and the society in which the law operates". Also see **Katinda Simbila @ Ngwaninana vs R, Criminal Appeal No. 15 of 2008** (unreported).

While this principle should guide the sentencing by the court, under the circumstances of this case though, the convict has been found guilty of the offence of murder contrary to section 196 of the Penal Code, [Cap 16 R.E 2019]; and the punishment for the offence is under section 197 of the Penal Code, [Cap 16 R.E 2019], which is death by hanging; this court is precluded from pronouncing any other sentence as such to the accused persons upon conviction.

Sadly, young persons who could contribute to the welfare of their families and the nation end up being condemned to death. I hope that the same would serve as a deterrent other with reckless and aggressive tendencies and delinquencies that cost lives.

In the same vein, I do sentence both the convicts to death by hanging under section 197 of the Penal Code, [Cap 16 R.E 2019].

It is so ordered.

A. Z. BADE
JUDGE
12/12/2023

Judgment delivered under my Hand and Seal of the Court in open Court this **12th** day of **December 2023** in the presence of the accused persons, and their advocates and the State Attorneys.

A. Z. BADE
JUDGE
12/12/2023

The right to appeal is hereby explained, that the same can be preferred to the Court of Appeal.

HIGH COURT OF TANZANIA

A. Z. BADE
JUDGE
12/12/2023