

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

CRIMINAL SESSION CASE NO. 30 OF 2023

THE REPUBLIC

VERSUS

HASHIMU CHARLES KAVEVA

JUDGMENT

Date of Last Order: 29.02.2024

Date of Judgment: 19.03.2024

A.E. Mwipopo, J.

Hashimu Charles Kaveva, the accused, is indicted in this Court for murder offence contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2022. The particulars of the offence in the information show that on the 09th day of May 2019, at Sawala Village within the Mufindi District and Region of Iringa, the accused person murdered Steven Kalinga. The information was read over to the accused person, who denied killing the deceased. The Court recorded that the accused person pleaded not guilty to the offence. The prosecution case was opened, and the prosecution brought four witnesses

and one exhibit to prove the case. The accused person testified on oath in his defence.

The evidence adduced by the prosecution's evidence revealed that Steven Kalinga, the deceased, was attacked by three persons around 18:45 hours on the 09th day of May 2019 at Njiapanda Hamlet in Sawala Village, within Mufindi District. Renato Athumani Chumi (PW1) testified that on the 09th day of May 2019, while at Njiapanda Hamlet in Sawala village, he witnessed the incident of three people attacking Steven Kalinga, the deceased, while playing a bao game with Stanley Kibiki. PW1 said he was watching the bao game when three unknown people holding machetes attacked Steven Kalinga. After seeing the attack, PW1 ran away and hid. PW1 said the attackers covered their face with face mask (mzula). He called Anosisye Tweve, Sawala Village Executives Officer, informing her about the incident. Later on, he returned to the scene of the crime. The deceased was taken to Lugoda Hospital. He went to Kibao Police Post, where he was restrained as a suspect. PW1 said he knew about the land dispute between Charles Kaveva and Steven Kalinga. Charles Kaveva is the father of Hashimu Kaveva.

In cross-examination, PW1 said that he was among the suspects in the killing of the deceased, and the police arrested him and was under restraint for 4 months before he was released.

Andowise Tweve (PW2) is Sawala Village Executive Officer in Mufindi District. Her testimony is that on the 09th day of May, 2019, while at her residence, she received a phone call from PW1 informing her there was a person in his hamlet who was attacked by three people with machetes. PW2 went to the scene of the crime using a motorcycle and found Emiliana Kalinga and Joseph Kalinga, relatives of Steven Kalinga, had already arrived at the crime scene. PW2 saw Steven Kalinga was bleeding and had injuries in the head. Steven Kalinga was crying in pain, but he was talking. Steven Kalinga told PW2 that Hashim Kaveva and two other people in his company attacked him with a machete. PW2 informed the Kibao Police Post about the incident. Police told PW2 to take Steven Kalinga to the hospital first. They found a car and took Steven Kalinga to Lugoda Hospital. The doctors received Steven Kalinga and proceeded with treatment. After a quarter of an hours, doctors informed relatives of Steven Kalinga that Steven Kalinga is dead.

PW2 said Steven Kalinga and Hashim Kaveva had a conflict over the distribution of money obtained from selling trees planted by Hashim Kaveva into Steven Kalinga's land. The accused did not pay the amount agreed to by the deceased after selling trees. PW2 failed to settle the dispute and sent the matter to the police. PW2 said there is another conflict between Steven Kalinga and the parent of Hashim Kaveva about the land ownership. The said conflict was taken to Court. The Court delivered its decision in favour of the deceased. The Mufindi District Commissioner and the village council handed the land in dispute to the deceased. The land disputes appeared to be settled even though the Kaveva family seemed unhappy with the decision. Hashim Kaveva was present during the incident as he had not been staying in the village for long time. After the incident, Hashimu Kaveva disappeared from the village. The deceased was attacked a few days after the District Commissioner had resolved the conflict. Also, it was just one day from the date the accused and PW1 were released from police custody for the dispute of selling trees.

In cross-examination, PW2 said that it was already dark when she arrived at the scene of the crime, and she used a torch to see the injuries which the deceased sustained. She was approximating when she received

information about the incident from PW1 and when she arrived at the crime scene. She did not see who attacked the deceased.

Emeliana Joseph Kalinga (PW4) testified that on the 09th day of May 2019, around 18:45 hours, while at her residence, she was told by a child that she was needed on the road by someone. While on the way, accompanied by the child, PW4 met with Chang'a, who told her someone wanted to see her on the road. PW4 asked the child and Chang'a to take her to the person. They led her to where the deceased was. She saw the deceased lying down on the ground covered in blood and had injuries. She said the deceased was her brother. The deceased told her that he was attacked by Hashim Kaveva and two people in his company who used machetes. PW4 called for help, and people gathered. The car came to the crime scene, the deceased was boarded into the vehicle, and they took the deceased to the Lugoda Hospital. Inside the car, the deceased was saying that Hashim Kaveva had fixed him, which she understood meant Hashim Kaveva had killed him. They arrived at Lugoda Hospital, and the deceased was carried inside. The deceased died after 15 minutes.

PW4 said that she knew the disputes between the accused person and the deceased over the payment of money they agreed to divide after the

accused sold the trees he planted on the deceased land and the land dispute between the deceased and the accused father. The land dispute ended after the Court decided the land belonged to the deceased. Hashim Kaveva was residing with his parents at Njia Panda Hamlet in Sawala Village. After the incident, Hashim Kaveva disappeared. Police told PW4 they arrested Hashim Kaveva in 2022 at Dar Es Salaam.

In cross-examination, PW4 said that she was not present when the accused person attacked the deceased. PW1, Julius Kisakwaji Kaveva, Danny Mwagala and Charles Kaveva were arrested as suspects in the killing of the deceased. PW4 used a torchlight from the child's torch when she was going to the crime scene as the night started to approach, and her vision was not good. PW4 was shocked when she heard PW1 saying that he was present when the deceased was attacked he was recording his statement at police. PW1 told the police that the people who attacked the deceased covered their faces with clothes. Thomas Msigwa inherited the land dispute between the deceased and Charles Kaveva.

It was Dr. Conrad Ugonile (PW3) who examined the deceased body for the cause of death on the 10th day of May, 2019, around 13:00 hours, at the Mortuary of Lugoda Hospital. Police officers and deceased relatives,

namely Joseph Kalinga, Apha Kalinga and Eliya Kalinga, identified the body to be that of Steven Kalinga. The deceased body was covered with blood and had injuries caused by sharp objects in the head, face, right shoulder and hand. PW3 was satisfied that Steven Kalinga was dead as his brain reflexes, heart and lungs were not working. He said the deceased cause of death was haemorrhagic shock secondary to severe bleeding caused by injuries. PW3 tendered report on post-mortem examination report (exhibit P1). Exhibit P1 revealed that the cause of the deceased death was haemorrhagic shock secondary to severe bleeding.

In cross-examination, PW3 said that he didn't know the person who killed the deceased. The deceased had cut wounds caused by a sharp object. He does not see the weapon that caused the deceased injuries. The wound in the mouth between the upper lip and the nose was 8 cm long. The injury didn't prevent the deceased from talking. He was of the opinion that the deceased died 19 hours before the examination. This was the end of the prosecution's case.

The Court found the prosecution's case was made, and the defence case was opened. Hashimu Charles Kaveva (DW1), the accused person, testified that he had a conflict with the deceased about the amount of money

they should divide after the trees he planted on the deceased land were harvested. They agreed that he should pay the deceased 600,000/= by instalment as he have already used 1,000,000/= shillings he obtained after selling the trees. DW1 said he paid 400,000/= shillings, and only 200,000/= shillings remained. He said he was not present at Sawala Village on the 09th day of May 2019, when the deceased was killed. He travelled to Bagamoyo with the lorry where he was working as a turnboy, and on the 09th day of May 2019, they arrived there. The car was unloaded at Bagamoyo Port, and they went to Dar Es Salaam to carry cargo to Mufindi. DW1 said he received a phone call from Ally Chaula that there was a murder incident at Sawala Village. The driver also received a phone call that there was a murder incident at Sawala Village. They started a journey from Dar Es Salaam to Mufindi on the 10th day of May 2019.

DW1 said on the 10th day of May 2019, his mother called and told him that the Kaveva family was suspected in the murder incident that occurred at Sawala Village. She asked him not to return to Mufindi District as all family members would be arrested in connection to the murder incident. DW1 said they arrived at Mafinga on the 11th day of May 2019, and he get off the lorry. After two days, he went to Songea, where he worked for a contract with TFS

for eight months. Then, he went to the Lupembe area in Njombe Region. He got a job as a supervisor for timber lumbering activities. He stayed at Lupembe for one year. He got information that all members of his family had left the village. DW1's father, Charles Kaveva, was arrested in September 2019 at Mbeya as a suspect in the death of Steven Kalinga. Also, Julius Kaveva (uncle) and Dany Mwagala (brother-in-law) were arrested in connection to the deceased death. Chungu and another person were arrested in connection with the death of the deceased. Charles Kaveva was charged at Resident Magistrates Court for murder officer. He stayed in custody for one year before he was released in 2021.

DW1 said a police officer arrested him for killing the deceased on the 26th day of December 2022 at Maguluweni Street in Dar Es Salaam. He stayed at Chang'ombe Police Station for three days before being transported to Iringa as the case was at Iringa Police station. He recorded his statement on the 14th day of January 2023. He was taken to Court on the 17th day of January 2023 and sent to prison. DW1 said he did not know the person who killed the deceased.

In cross-examination, DW1 said that he was in Bagamoyo with the lorry on the 09th day of May 2019. The driver of the car was Frank Mgya.

On the 09th day of May, 2022, he was with Frank Mgya. On the 10th day of May 2019, he was travelling from Dar Salaam to Mufindi by the lorry carrying the load of his boss Nico Fox. His mother asked him not to return to Sawala village after the incident. He did not get information that he was suspected of being responsible for killing Steven Kalinga. Several times, he returned to Sawala Village. His father resides at Njiapanda Hamlet in Sawala Village, and he resides in his father's house when he is in the village. He does not know the reason for the deceased to mention him as the person who attacked him. His father, Charles Kaveva, was ordered by the District Commissioner to leave Mufindi District and went to live in Mbeya. This was the end of the defence case, and the defence case was closed.

The counsels for the Republic, Sauli Makoli and Hubert Ishengoma, State Attorneys, prayed to file their final written submission. As a result, the defence counsels, Steward Ngwale and Edrick Mwinuka, also prayed to file their final written submission. In their final submission, the counsel for the Republic submitted that PW2 and PW4 testimony shows that the deceased informed them that it was the accused person who attacked him immediately after the incident. PW1, who was at the crime scene, testified that the incident occurred around 18:45 hours, meaning sufficient light was available.

PW1 did run away after seeing three people attacking the deceased. Even if PW1 did not manage to identify the attackers, the accused person was identified by the deceased, and he mentioned the accused person to PW2 and PW4 when they reached the crime scene. The Court may act on dying declaration as it was held in **Romanus Kabogo vs. Republic**, Criminal Appeal No. 62 of 1998 and **Hemsi Nzuunda and Two Others vs. Republic**, Criminal Appeal No. 34 of 1995, which were cited with approval in the case of **Republic vs. Shinoni Nkwabi**, Criminal Session Case No. 114 of 2016, High Court at Mwanza, (unreported).

The state attorneys averred that the Court could act upon a dying declaration if it is satisfied that the declaration was made, if the circumstances in which it was made give assurance to its accuracy, and if it is, in fact, accurate. They believed that the dying declaration made by the deceased (Steven Kalinga) was corroborated by what has been adduced by PW1, PW2, and PW4. Also, DW1 admitted to the existence of family conflicts in his evidence. PW2 and PW4 confirmed the conflicts. The act of the deceased to name the accused as responsible early after having been attacked corroborated the dying declaration, as it was held in the case of **Ngaru Joseph and Another vs. Republic**, Criminal Appeal No. 172 of

2019, High Court of Tanzania at Mbeya, (unreported), and **Marwa Wangiti Mwita vs. Republic [2002] T.L.R. 39**, the Court of Appeal of Tanzania at Page 18. The deceased named the accused person as responsible for PW2 and PW4 earlier after they arrived at the crime scene. Even in the absence of the deceased as a witness, the prosecution proved the case. In **Shabani Said Likubu vs. Republic**, Criminal Appeal No. 228 of 2020, the Court of Appeal held that the law recognizes that there are instances where charges may be proved without victims of crimes testifying in Court, such as in murder where the victims are deceased.

On the accused defence, the state attorney said that the accused (DW1) raised the defence of alibi that on the date of the incident, he was at Bagamoyo Pwani region with another person called Frank Mgaya, a car driver. Frank Mgaya was not called to testify. DW1 said on the 10th day of May 2019, he was travelling from Dar Es Salaam to Mufindi while carrying the cargo of his employer, Nico Fox, on the lorry driven by Frank Mgaya. However, the employer was not called to testify. The defence of alibi raised by the accused person was contrary to section 194 (4) of the Criminal Procedure Act, Cap 20 R.E. 2022. The accused person had a duty to prove the facts that he was not at the crime scene during the incident.

On their part, the defence counsel submitted that the prosecution bears the burden of proving a criminal charge against an accused, and the standard of proof thereof is beyond a reasonable doubt unless the law provides otherwise (which is not the case in the matter at hand). This is the spirit underlined under Section 3(2) (a) of the Evidence Act, Cap. 6 R.E. 2019 and the holding by the Court of Appeal of Tanzania in the case of **Hemed vs. Republic [1987] TLR 117**. The law further states that an accused person bears no duty to prove his innocence. His duty is only to raise reasonable doubts in the mind of the Court. It is also a legal principle that any reasonable doubts the prosecution evidence leaves should be resolved in favour of the accused person.

The defence counsel said there is no dispute that the deceased (Steven s/o Kalinga) is dead, as it was proved by PW.3 (Dr. Conard Ugonile), who examined the deceased body and confirmed it in his post-mortem report (Exhibit P1). On the question as to whether the accused is responsible, the counsel said the evidence of PW2 and PW4 is based on the statement altered by the deceased person before contacting his death. PW2 and PW4 testified that the deceased told them it was the accused person who attacked him with a machete. It was PW1 who informed PW2 about the incident. PW1 said

in his evidence that he was present at the scene of crime during the incident but he failed to identify the attackers as their faces were covering with a mask (mzura mpaka shingoni). PW2 and PW4 said the deceased continued to mention the accused person even in the car while they were on the way to the hospital. However, they failed to inform the police that the deceased had named the accused person as the suspect immediately after the incident. The arresting officer was not called to testify to give a reason why and when the accused person was arrested in connection with charges.

The defence counsel was of the opinion that it is doubtful as to whether the witnesses mentioned above were present when the deceased told them who murdered him since their statements differ. It is questionable as it took a long time to apprehend the accused while he was around, and he was sometimes visiting the village. Police officers have been arresting other persons, such as Charles Kaveva, who was charged with the murder of the deceased. Charles Kaveva was released on the 08th day of September 2021, when the Republic entered nolle prosequi. Also, Julius Kaveva, Dani Muagala and PW1 were suspected and remained in the custody of police for more than four months.

The counsel said the evidence of PW1, PW2 and PW4 that the deceased mentioned the accused person as among the culprits is dying declaration. A dying declaration is considered to be credible and trustworthy evidence, and this is based on the general human belief that a person who is terminally ill on his deathbed will never lie. However, as it will be noted at once, the law in Tanzania does not insist on the requirement for the maker of a dying declaration to be in the sense of impending death. The Supreme Court of Uganda, in the case of **Tindigwihura Mbahe vs. Uganda, Criminal Appeal No. 9 of 1987** (unreported), cited with approval the case of **Oketh Okale and Others v. R (1965) E.A. 55** where it held that evidence of a dying declaration must be received with caution because the test of cross-examination may be wholly wanting; and it might have occurred under circumstances of confusion and surprise; the deceased may have stated this inference from facts concerning which he may have omitted important particulars for not having his attention called to them.

The defence counsel said the late Stevin Kalinga made three dying declarations. The first one was made to PW2 that the accused had attacked him with a machete. The second dying declaration was made to PW4 that the accused person and his company had attacked him with a machete. The

last declaration was made to PW4 that Hashimu has disabled him (Hashimu ameniweza). In all declarations, the deceased is said to have allegedly implicated the accused persons. The said dying declarations are not enough to ground the accused conviction. There must be corroboration. In the **Republic vs. Shinoni s/o Nkwabi**, Criminal Session Case No. 114 of 2016, High Court of Tanzania at Mwanza, (unreported), it was held that:-

While it is not the rule of law that a dying declaration must be corroborated to find conviction, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a dying declaration is indeed safe."

The counsel said PW1 saw the culprits covering their faces with clothes (mzula mpaka shingoni) during the attack as a result he failed to identify them. Again, PW1 failed to join hands with the fellow witnesses if it is true that the deceased mentioned the accused person as the person who attacked him while he was in the same car taking the deceased to the hospital. The prosecution evidence failed to prove the offence, and the accused had to be acquitted.

As it was stated by both counsels in their submission, the evidence adduced by prosecution witnesses proved that Steven Kalinga is dead. Dr

Condrad Ugonile (PW3), a Medical Doctor working at Lugoda Hospital, testified that on the 10th day of May 2019, around 13:00 hours, at the Mortuary of Lugoda Hospital, he conducted a post-mortem examination of the deceased body following the requested order from the police officer. Joseph Kalinga, Alpha Kalinga, and Eliya Kalinga identified the deceased as Steven Kalinga. In his examination, he observed that the deceased was dead. The deceased had multiple cut wounds on the head, face, shoulder and hands. The deceased clothes were covered with blood. The cause of deceased death is haemorrhagic shock secondary to severe bleeding from injuries. PW3 tendered a report on the post-mortem examination of the deceased body he prepared (exhibit P1). Exhibit P1 supported PW3's testimony that the cause of the deceased death was haemorrhagic shock due to severe bleeding. The summary of the report shows that the deceased had multiple cut wounds on the face, scalp posteriorly, left hand, right shoulder, and right forearm. The evidence of PW3 and exhibit P1 proved without doubt that the deceased is dead, and his death is not natural. The deceased death was caused by injuries he sustained.

The next issue for determination is whether the accused person killed the deceased, and if the answer is in the affirmative, whether he killed the

deceased with malice aforethought. The prosecution has indicted the accused person for murder offence contrary to sections 196 and 197 of the Penal Code Cap. 16 R.E. 2002. In a murder offence, the prosecution is duty-bound to prove that the accused person unlawfully killed the deceased with malice aforethought. The standard of proof in criminal cases is beyond reasonable doubt. In the case of **Christian Kaale and Rwekiza Bernard vs. Republic [1992] TLR 302**, it was held by the Court of Appeal that the prosecution must prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case.

Nobody among the prosecution's witnesses saw the accused person killing or attacking the deceased. The prosecution's case relies on circumstantial evidence. The Court may rely on circumstantial evidence in conviction where the evidence is intact, leading to only one irresistible conclusion pointing to the accused's guilt. The burden of proving facts that justify drawing this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused. In **Julius Justine and Others vs. Republic**, Criminal

Appeal No. 155 of 2005, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:

"... the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established and that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused and that circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else."

In the case of **Mark Kasiniri vs. Republic**, Criminal Appeal No. 39 of 2017, Court of Appeal of Tanzania at Arusha (unreported), the Court of Appeal, on page 15, restated principles governing the reliability of circumstantial evidence before conviction. The Court held:-

".....we deem it pertinent to initially restate the basic principles governing the reliability of the circumstantial evidence to convict, which include:

- i. That, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that*

- within all human probability the crime was committed by the accused and non-else (See, **Justine Julius and Others vs. Republic**, Criminal Appeal No. 155 of 2005 (unreported)).*
- ii. *That, the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See, **Simon Msoke vs. Republic**, (1958) E.A. 715A and **John Magula Ndongo vs. Republic**, Criminal Appeal No. 18 of 2004 (unreported)].*
 - iii. *That, the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. [See - **Mathayo Mwalimu and Masai Rengwa vs. Republic** (supra).]*
 - iv. *That, each link in the chain must be carefully tested, and if, in the end, it does not lead to the irresistible conclusion of the accused's guilt, the whole chain must be rejected [see **Samson Daniel vs. Republic**, (1934) E.A.C.A. 154].*
 - v. *That, the facts from which an adverse inference to the accused is sought must be proved beyond reasonable doubt and must be connected with the facts from which inference is*

*to be inferred. (See. **Ally Bakari vs. Republic [1992] T.L.R. 10** and **Aneth Kapazya vs. Republic**, Criminal Appeal No. 69 of 2012, (unreported).*

- vi. *That, the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. [See **Shaban Mpunzu @ Elisha Mpunzu vs Republic**, Criminal Appeal No 12 of 2002 (unreported)].*

In the above-cited cases, circumstantial evidence may prove the case where the evidence establishing the accused person's guilt must not exist together with his innocence.

The counsels for the Republic said in the submission that the prosecution's evidence proved the offence without doubt. They said that PW2 and PW4 testified that the deceased told them that the accused person and his company attacked him with a machete. As counsels from both sides stated, the evidence is a dying declaration. In our jurisdiction, the evidence of a dying declaration is admissible. Section 34 (a) of the Evidence Act, Cap. 6 R.E. 2022, provides that a written, oral or electronic statement made by a person explaining the cause of his death or the circumstances of the transaction which caused his death is admissible as evidence. The law is silent if the dying declaration requires corroboration before the Court can

convict relying on it. For that reason, a dying declaration could serve as the sole basis for a conviction without the need for additional corroborating evidence.

However, the Court must be satisfied that the dying declaration is accurate, genuine and reliable before relying on it in conviction. Where there are doubts about the dying declaration, its reliability may be questioned. In the case of **Onael Dauson Macha vs. Republic**, Criminal Appeal No. 214 of 2007, Court of Appeal at Arusha, (unreported), it was held that:-

"It is now settled law that where a dying declaration is admitted in evidence, it should be scrupulously scrutinized, and to be acted on, corroboration is highly desirable."

As a rule of practice, the dying declaration should be corroborated before the Court could convict relying on it. See. **Republic v. Rutema Nzungu** (1969) HCD no. 445, **Republic v. Marwa** (1968) HCD no. 47, and **Africa Mwambogo vs. Republic** [1984] TLR, 240. In **Republic vs. Mohamed Shedaffa and Three Others** [1983] T.L.R. 95, it was held:-

"It is possible for a conviction to proceed upon evidence consisting of a dying declaration only, although it is a rule of practice that a dying declaration requires corroboration before it can be acted upon, the court said that it is possible for a conviction to proceed upon evidence

consisting of a dying declaration only, although it is a rule of practice that a dying declaration requires corroboration before it can be acted upon."

The exact position was stated in **Onael Dauson Macha vs. Republic** (supra), where it was held that:-

"All the same, it is trite law now that apart from what are really exceptional cases where the reliability of the deceased's statement cannot be impugned or questioned, corroboration has been held by all Courts in East Africa and India to have been necessary."

In the instant case, PW2 and PW4 said that the deceased told them he was attacked by the accused person and his company attacked with machetes. The deceased kept repeating the same to the people gathered and in the car while taking him to hospital. The defence counsel said the deceased couldn't identify the accused since PW1 (the only witness who was present at the scene of the crime) said that the attackers were covering their faces with masks or clothes (mzula). The evidence of PW2 and PW4 shows discrepancies in what each witness heard from the deceased.

I agree with the defence counsel that PW1's testimony shows that the attackers were covering their faces with a mask (mzula). As a result, he failed to identify them. But, PW1 testified further he did run away

immediately after seeing the deceased attacked by three people with machetes. PW1 did not see what happened after he ran away. Further, the deceased did not give details to PW2 and PW4 on how he was able to identify the accused person to see if the identification was accurate and reliable. The testimony of PW1 that the attackers were covering their faces with a mask (mzula) raises questions on the reliability of the deceased declaration that it was the accused person who attacked him. For that reason, the evidence of PW2 and PW4 requires corroboration on other independent evidence before the Court could rely on it.

On the claim by defence counsel that there are discrepancies in the testimony of PW2 and PW4, PW4, in her evidence, said that when she arrived where the deceased was, there was nobody else apart from the child and Cang'a who led her there. The deceased told her that the accused person and his company attacked him with machetes. While in the car taking the deceased to the hospital, he was repeatedly saying that the accused person had disabled him (Hashimu ameniweza). In her evidence, PW2 said after she arrived at the scene of the crime she found the deceased covered in blood. The deceased told her that the accused person and his company attacked him with machetes. I do not see any discrepancies in the testimony of PW2

and PW4. PW4's story went further to tell the Court what the deceased was saying while in the car taking him to the hospital, the thing which was missing in the evidence of PW2.

The state attorney said in the submission that the evidence of PW2 and PW4 corroborated the evidence of the dying declaration by the deceased. However, there is no evidence from the deceased. The evidence we have on record is from PW2 and PW4 that the deceased told them the accused person attacked him with a machete. The evidence of PW2 and PW4 was not corroborating the evidence of the deceased. There is no evidence from the deceased. The deceased dying declaration that the accused person and his company attacked him with machetes to PW2 and PW4 was independent evidence by itself which requires corroboration from other independent evidence. The evidence of PW2 and PW4 could not corroborate each other since it came from the same person, the deceased. It is evidence of the consistency of the deceased belief that it was the accused person who attacked him. Deceased repetition to PW2 and PW4 that it is the accused person who attacked him with machetes and that the accused person has disabled him (Hashimu ameniweza) could not guarantee her accuracy. Thus, the evidence of PW2 and PW4 could not corroborate each other on what

they heard from the deceased. The same was stated in **Onael Dauson Macha vs. Republic** (supra), where it was held that:

*"What the learned judge took to be corroborative evidence is only evidence of the consistency of Haikasia's belief, if she even told the witnesses so, but her repetitions were no guarantee of the accuracy or truthfulness of what she alleged: see **R v. M.U.Y.O.Y.A. bin M.S.U.M.A.** (1939) 6 EACA 128."*

The other corroborating evidence stated by the state attorney in the submission is the conflict between the accused person and the deceased over the selling of trees and between the accused family and the deceased. The counsel for the Republic said even the accused person admitted in his evidence that there was a conflict between them. However, the presence of the conflict between the accused person and the deceased, as it was stated by PW2 and PW4 and admitted by the accused person, raises strong suspicion that possibly the conflict is the reason for the accused person and his company to attack the deceased. Nevertheless, it is established law that suspicion, however strong, cannot be grounds for conviction. This was stated in several cases, including **Hakimu Mfaume vs. Republic [1984] TLR 201** and **R. vs. Israili Epuki Achietu (1934) E.A.C.A.** In the case of

Nyeura Patrick vs. Republic, Criminal Appeal No. 73 of 2013, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:-

"We similarly seek to emphasize that, as often stated, suspicions, however strong they may be, cannot be the basis of a conviction in a criminal charge."

The only remaining corroboration to the dying declaration is the accused's conduct of running away from Sawala Village immediately after the incident. PW2 and PW4 said in their evidence that the accused person used to stay at his father's house in Njiapanda Hamlet in Sawala Village, though occasionally. They said that the accused person was present in the village during the incident. However, after the incident, the accused person disappeared from the village. The accused person's conduct to disappear from the village immediately after the incident indicates that he is guilty. The act of disappearing immediately after the deceased was attacked until he was arrested is inconsistent with his innocence. PW4 said in his evidence that a police officer informed him that the accused person was arrested in 2022. The accused person admitted in his testimony that he did not return to Sawala Village after the incident. He stayed in Mafinga for two days before he went to Songea and stayed for eight months, Lupembe Njombe for one

year and Dar Es Salaam. A police officer arrested him at Dar Es Salaam on the 26th day of December 2022. The accused person said the reason for not returning to Sawala Village is his mother told him to run away as the Kaveva family is suspected to be responsible for the homicide of the deceased. The accused evidence supports the PW2 and PW4 assertion that the accused disappeared after the incident.

The defence counsel said in the submission that the accused person returned to Sawala Village in 2020 and 2021 as he testified, proving that he was not a suspect in the incident. I hesitate to agree with him because if the accused decided to run away to Songea, Lupembe Njombe, and Dar Es Salaam after the incident, it would be evident that he did not return to Sawala Village. The accused person said in 2019, the District Commissioner expelled his father from Mufindi District and went to live in Mbeya. There is no reason for the accused person to return to Sawala Village after his father was expelled from Mufindi District while the police were looking for him. Moreover, the accused said he decided to drop off at Mafinga on the 11th day of May 2019, and a few days later, travelled to Songea after his mother told him not to return to the village as he would be arrested. He said his

mother told him the whole Kaveva family would be arrested as suspects for the death of the deceased.

The act of disappearing immediately after the event until he was arrested on the 26th day of December 2022, is inconsistent with the accused innocence, as it was stated in **Omary Kijuu vs. Republic**, Criminal Appeal No. 39 of 2005, Court of Appeal of Tanzania, at Dodoma, (unreported). For that reason, I find the conduct of the accused person to disappear from Sawala Village immediately after the incident corroborates the oral dying declaration made by the deceased to PW2 and PW4.

It was the submission by the defence counsel in the final written submission that the act of arresting Charles Kaveva, PW1, Julius Kaveva, Dany Mwagala and Chungu as suspects for the deceased death raises doubts if the deceased informed PW2 and PW4 that the accused person is responsible for the attack. He said there was no reason for the police to arrest several people in connection to the deceased death. Nonetheless, the evidence from PW1, PW2 and PW4 shows that three people attacked the deceased. PW2 and PW4 testimony show that only the accused person was identified and mentioned by the deceased as among the attackers. Their statement was recorded the same day, meaning they informed the police of

what the deceased told them. After the incident, the accused person disappeared. As there were two more persons apart from the accused person who attacked the deceased, the act of police arresting other persons in connection with the deceased death does not raise any doubt about the prosecution's case.

The accused person said in his defence that he was in Bagamoyo on the 09th day of May 2019. He travelled with the lorry (lorry) he was working as a turn boy when the incident leading to the deceased death occurred. After offloading the cargo at Bagamoyo Port, they went to Dar Es Salaam to take another load to Mafinga. They started the journey from Dar Es Salaam to Mafinga on the 10th day of May 2019 and arrived at Mafinga on the 11th day of May 2019. The accused evidence raised the defence of alibi. The accused was supposed to raise the defence of alibi before the prosecution's case was closed, but the same was not done. This contradicts section 194 (4) of the Criminal Procedure Act. The state attorney said in the submission that the accused person did not bring Frank Mgaya, the lorry driver, whom he claimed they travelled together to Bagamoyo and from Dar Es Salaam to Mafinga. The Court is aware that the accused person is not under obligation to prove his defence of alibi. What he must do is to raise doubt on the

prosecution's case. However, the fact that the accused person is facing a murder offence, the Court expected him to call Frank Mgaya, whom he claimed were together from the 08th day of May 2019 to the 11th day of May 2019. But, the accused person did not call Frank Mgaya as witness. In **Sijali Juma Kocho vs. Republic [1994] TLR 206**, it was held that:

"The appellant was not under obligation to prove the alibi, but in the facts of the allegations made against him one would reasonably expect him to call person he claim was with at the time of event."

I find that the evidence of PW2 and PW4 that they were informed by the deceased that the defence of alibi raised by the accused person has no weight at all. The accused person was among the persons who attacked him with a machete is reliable and is supported by the act of the accused person disappearing from Sawala Village immediately after the incident. This evidence proved without doubt that the accused person attacked the deceased with a machete and caused his death.

The remaining question is whether the accused person caused the death of the deceased with malice aforethought. Malice aforethought is deemed to be established by evidence proving an intention to cause the death or to do grievous harm to any person, whether that person is the

person killed or not, as per section 200 (a) of the Penal Code, Cap. 16 R.E. 2022. In **Enock Kipera vs. Republic**, Criminal Appeal No. 150 of 1994, Court of Appeal of Tanzania at Mbeya, (unreported), the Court, among other things, held:-

"...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 by various factors, including the following: The type and size of the weapon used, the amount of force applied, part or parts of the body or blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances if any made before or after killing, and the conduct of the attackers before and after killing."

The exact position was stated in the case of **Elias Paul vs. Republic**, Criminal Appeal No. 7 of 2014, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:-

"Malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted. In this case, a stone was used and was hit on the head, chest and abdomen, which are vulnerable parts of a human body."

The evidence adduced by prosecution witnesses unveiled the deceased was injured and bleeding. Dr Conrad Ugonile (PW3), who examined the

deceased body, said the deceased body was covered with blood and had injuries caused by sharp objects in the head, face, right shoulder and hand. He said the deceased cause of death was haemorrhagic shock secondary to severe bleeding caused by injuries. PW3 evidence is supported by the report on the post-mortem examination report (exhibit P1). Exhibit P1 revealed that the cause of the deceased death was haemorrhagic shock secondary to severe bleeding. The weapon used, according to PW1, PW2 and PW4, was a machete, which is a dangerous weapon. The evidence of PW3 and exhibit P1 revealed that the deceased injuries were caused by sharp objects in the head, scalp posteriorly, right shoulder and hand. The head and scalp posteriorly are vulnerable parts of the human body. The weapon used, the part of the body where the blows were directed, and the number of injuries proved that the accused person intended to kill the deceased or to cause grievous bodily harm.

Therefore, I find that the prosecution evidence proved the offence of murder against the accused person without doubts. Consequently, I convict Hashimu Charles Kaveva for the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2022. It is so ordered accordingly.

Dated at Iringa this 19th day of March, 2024.



A.E. MWIPOPO
JUDGE

PREVIOUS CONVICTION AND AGGRAVATING FACTORS

State Attorney: We have no record of previous criminal convictions of the accused person. However, the murder offence attracts the punishment of death by hanging, as provided by section 197 of the Penal Code. We pray for the Court to punish the accused person accordingly.

MITIGATION

Defence Counsel: The accused person is a first offender and has a family that depends on him. The circumstances of the case are not sufficient to prove the offence despite the fact that the Court convicted him. He is still young, and he could be more productive if he is given other punishments than death or imprisonment.

SENTENCE

I have heard the mitigation by the counsel for the accused person. Unfortunately, the mitigation presented does not help him as he does not fall under the category of persons who could get lenient punishment after being convicted of murder offence. There is only one punishment for the accused person convicted of murder who is not a pregnant woman or a child under 18 years old. It is the sentence of death by hanging as per section 197 of the Penal Code, Cap 16 R.E. 2022. For that reason and by virtue of section 26(1) and section 197 of the Penal Code, Cap. 16 R.E. 2022, and section 322 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2022, I hereby sentence Hashimu Charles Kaveva to suffer death by hanging. It is so ordered accordingly. Right of appeal thoroughly explained.



A.E. MWIPOPO

JUDGE

19/03/2024

The judgment was delivered in open Court on the 19th day of March, 2024, in the presence of the State Attorneys for the Republic, the accused person, and the defence counsel for the accused person.



A handwritten signature in blue ink, consisting of stylized, flowing letters, positioned to the right of the court seal.

A.E. MWIPOPO

JUDGE

19/03/2024