

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MBEYA SUB - REGISTRY)**

**AT MBEYA**

**CRIMINAL SESSIONS CASE NO. 53 OF 2021**

**THE REPUBLIC**

**VERSUS**

- 1. PASCHAL S/O JUMA @ SWENYA**
- 2. AREHANI S/O ZUBERI @ LALIKA**

**JUDGMENT**

*10<sup>th</sup> & 27<sup>th</sup> May, 2024*

**POMO, J.**

In the instant matter, PASCHAL S/O JUMA @ SWENYA and AREHANI S/O ZUBERI @ LALIKA, are facing the information of murder contrary to section 196 of the Penal Code Cap 16, [R. E.2022]. It is said that on 17<sup>th</sup> day of August, 2020 at Nyamakungu village within Mbarali district in Mbeya region jointly and together murdered one EVARISTO S/O YOHANES MAGENDO, the information which the accused have pleaded not guilty to. Following that, the republic paraded five witnesses and tendered seven exhibits.

Witnesses called are as follows: Inspector Collins Mwasele (PW1); Ruth Eliud Kasomuzi (PW2); F959 D/SGT Eliud (PW3); Scola John Kaganga (PW4) and lastly G8238 D/CPL Maila (PW5).

In regard to exhibits, they are as follows: seizure certificate dated 19/08/2020 for seizing a machete (Exhibit PE1); seizure certificate dated 18/08/2020 for seizing an axe (Exhibit PE2); Machete (Exhibit PE3); an axe (Exhibit PE4); Sketch plan (Exhibit PE5); Order for Post-mortem Examination (Exhibit PE6) and Report on Post – mortem Examination (Exhibit PE7).

In defence, the accused testified themselves without calling any witness and tendered no exhibit. Both sides' evidence goes thus: -

**Inspector Collins Mwasele (PW1)** is police officer who in 2020 was the head of Madibila police post which is within Mbarali district in Mbeya region. He testified that on 18/08/2020 was informed by the village executive officer (VEO) of Nyamakuyu village that at Unyanyembe hamlet within that village had occurred a murder incident. With his team, he went to the crime scene together with a medical doctor from Mahango health center. At the scene, inspected it and examined the deceased's body which was lying upside down. The deceased had injuries (bruises) on the right – hand side of his head. The doctor examined the body and confirmed was dead.

In his further testimonies, PW1 stated that at the scene, he found an axe which had blood stains. He took it and issued seizure certificate (Exhibit PE2). Also, instructed crime scene sketch plan be drawn. Completed the exercise, handed the deceased's body to relatives for burial services.

On 19/08/2020, from his secret informer, PW1 was notified of the suspects, the 2<sup>nd</sup> accused inclusive. Arrested him at Nyandete village and out of the interrogation with him led into arrest of the 1<sup>st</sup> accused at Masagati village. During his arrest, the 1<sup>st</sup> accused had a machete in his hand. Interrogated, the 1<sup>st</sup> accused admitted he used it in murdering the deceased at Unyanyembe hamlet. PW1 seized that machete and issued seizure certificate thereto of which they both signed. He took the accused persons to Madibila police post and assigned CPL Eliud and CPL Meshack to interview them. PW1 tendered the following exhibits. The seizure certificates for an axe and machete which are admitted as exhibits PE1 and PE2 respectively. Also tendered the machete and an axe which are admitted in court as exhibit PE3 and PE4 respectively.

**Ruth Eliud Kasomuzi (PW2)** is the Nyamakuyu village executive officer (VEO) then. She is the one who on 18/08/2020 reported to Madibila police post the incident of killing the deceased. Together with the police did

go to the scene of crime. At the scene, met the deceased's body laid in a hut injured in the head, laid down covered with grasses. The doctor examined the body and revealed that it was dead. She led the police who drew the sketch plan and endorsed her signature to it. She witnessed the police seizing an axe which was there at the crime scene and I signed the seizure certificate to that effect which is Exhibit PE2.

**F959 D/SGT Eliud (PW3)** is police who drew the sketch plan (Exhibit PE5) of the scene and in so doing was led by PW2. The sketch plan, among others, showed the place where the deceased's body was laid as well where an axe was found

**Scola John Kaganga (PW4)** is the medical doctor who on 18/08/2020 examined the deceased's body at the crime scene. There, she met the body lying upside down and had severe head injuries. She testified that the injuries were due to being hit by a sharp object. Her examination revealed the body was dead. She so concluded having checked the deceased's body pressure which read zero, breathing read zero and eye pupils were fully dilated. Those are what made her believe he was dead. PW4 then handed to the police the body of the deceased. PW4 tendered a report on postmortem examination which is Exhibit PE7.

**G 8238 D/CPL Maila (PW5)** is the police who on 19/08/2020 recorded the 1<sup>st</sup> accused's cautioned statement. This court rejected its admission as exhibit for it was not listed during committal proceedings. This marked the end of prosecution witnesses

In defending, the accused persons were the only witnesses and tendered no exhibit.

Pascal Juma Swenya, the first accused herein, gave his evidence as DW1. He testified to the effect that he knows nothing about the incident of killing the deceased whom he stated is his cousin born to his aunt. Denied to have admitted before PW5 that he killed the deceased asserting that he had not given any statement before police. On the incident date, DW1 asserts that he was at home in Mkunyu village which is about five hours walking distance to the village where the incident occurred.

Arehani Zuberi Lalika (DW2) is the second accused in this case. He testified that the deceased is his brother-in-law. Denied having killed the deceased and asserts that if he had killed him, would have admitted straight away for so doing. He denied living near the deceased residence, saying he resides at Nyakadete village as opposed to the deceased who lived at Nyamakuyu village which is about three hours walking distance

Cross-examined, DW2 stated that the time police went to the crime scene, met him there. He was at the scene of crime because had gone there after being informed of the death of the deceased by one Mericho Bernard while he was at the farm at Masing'wanda area in Nyakadete village. This marked the end of defence

Having heard both sides' adduced evidence, the issue to determine is whether the prosecution has managed the laid down information of murder against the accused persons herein.

The offence of murder is provided under section 196 of the Penal Code, [Cap 16 Revised Edition 2022]. The section provides thus: -

*"S. 196 – Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."*

In **Abel Orua @ MATiku and 2 Others versus Republic**, Criminal Appeal No. 441 of 2020 CAT at Mwanza (unreported) the court of appeal, at page 24, had this to state: -

*"It is a settled position of the law that **in proving the offence of murder under section 196 of the Penal Code, it must be established that the death of a human being occurred,***

*that the death was unnatural and was caused by unlawful act or omission, that it was the accused person who did the unlawful act or omission leading to the death of the deceased and finally that the death was caused with malice aforethought.*"

[Also see: **John Dickson @ Ngongole versus Republic**, Criminal Appeal No. 477 of 2021 CAT at Dodoma]

And malice aforethought is provided under section 200(a) of the Penal Code as follows: -

*"S.200: - **Malice aforethought shall be deemed to be established** by evidence proving any one or more of the following circumstances*

***(a) an intention to cause the death of or to do grievous harm to any person whether that person is actually killed or not"***

Reverting back to the incident. There is no dispute that EVARISTO S/O YOHANES MAGENDO is died and died unnatural death. This is evident from the Report on Postmortem Examination (exhibit PE7) tendered by the doctor (PW4) who examined the body. She said the deceased's body was hit with

a sharp objection in his head which led into severe bleeding hence his death. Not only that, all the witnesses who testified herein in court went to the crime scene and saw the body of the deceased on 18<sup>th</sup> day of August, 2020 at Nyamakungu village within Mbarali district in Mbeya region save for the 2<sup>nd</sup> accused. Therefore, unhesitatingly I hold that the republic has proved this aspect that Evaristo S/O Yohanes Magendo is dead and died an unnatural death.

Next is who is behind the deceased's death? Is it the accused persons herein? Here the duty is cast to the prosecution to prove that it is the accused persons who murdered the deceased. Of all the witnesses who testified here in court, none stood as an eye witness that on the fateful date, saw the accused committing the incident. The evidence on which the republic wanted to rely upon is therefore that of confession by the accused person upon their arrest which was rendered inadmissible, having not been listed as exhibits during committal proceedings. Therefore, there is no any other piece of evidence remaining which links the accused to the offence.

That being the position, I find the information of murder unproved as against the accused persons and hold that they are not guilty of it.



Consequently, I hereby acquit them of the offence and order for their immediate release unless are otherwise held for other lawful cause.

It is so ordered

Right of Appeal fully explained

DATED at **MBEYA** this 27<sup>th</sup> day of May, 2024.



  
**MUSA K. POMO**  
**JUDGE**  
**27/05/2024**

Judgment delivered in open court in presence of Ms. Anastazia Elias, learned state attorney for the republic. Also, in presence of the accused persons and their defence counsel, Mr. Kamru Habibu Msonde and Ms. Calorine Mseja.

  
**MUSA K. POMO**  
**JUDGE**  
**27/05/2024**