

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF MANYARA**

**AT BABATI**

**CRIMINAL SESSIONS CASE NO 97 OF 2022**

**REPUBLIC**

*VERSUS*

**AYUBU S/O YAHAYA MWINAMI**

**JUDGMENT**

*26<sup>th</sup> March and 23<sup>d</sup> May, 2024*

**MIRINDO, J.:**

Ayubu s/o Yahaya Mwinami and Mathias s/o Mibaroi alias Masai were bicycle-mechanics with their own bicycle garages behind the old TTCL building which is famously referred to as the old Post Office building. That area which is currently called Uzunguni is near Babati central market in Babati town in Manyara Region, used to be surrounded by kiosks and hawkers.

Late in the evening of 7/1/2021 the Police were informed about a dead body of a person lying behind the old Post Office building. H5935 Detective Constable Fadhili accompanied with other police officers went to the scene which was about a three-minutes' walk from Babati Police Station. Some distances away people were surrounding the area where the dead body was lying. The

Police mounted investigation about the death of the deceased and the dead body of the deceased was taken for post-mortem examination to Babati Town Council Hospital which is commonly known as Mrara Hospital.

On 9/1/2021 around 7:50 PM, Ayubu s/o Yahaya Mwinami was surrendered by his father to their neighbour, a police officer, Assistant Inspector Pili who was living at Nangara Ziwani in Babati town. His father, who came along with a tri-cycle, loosely referred to as a "Bajaj", informed the police officer that his son was being suspected of murder and requested her to take him to a police station. The police officer called for a patrol car which came and Ayubu s/o Yahaya Mwinami was taken to Babati Police Station.

After further investigation, Ayubu s/o Yahaya Mwinami was charged with the murder of Mathias s/o Mibaroi alias Masai contrary to sections 196 and 197 of the Penal Code [Cap 16 RE 2019]. He denied the charge but at the preliminary hearing he admitted to be working with the deceased in the same location.

At the trial the prosecution was represented by Ms Rose Kayumbo, learned State Attorney and the accused had the services of the learned defence counsel, Mr Erick Machuwa.

The prosecution case rested on two sets of evidence from seven witnesses. In the first set of evidence there are five pieces of evidence. The first

piece of evidence is circumstantial evidence of preparation. The third prosecution witness, Saidi Twahiru, a welding mechanic and also a cutler, testified that earlier on the fateful day, the accused, Ayubu s/o Yahaya Mwinami, whom he knew since 2018, brought to him a machete for sharpening. After sharpening the machete, the accused paid him 1,000/= TZS but requested the machete be re-sharpened to make it very sharp like a razor blade. After sharpening the machete to the accused's satisfaction, he returned it to him in a sulphate bag with which the accused had brought the machete. The accused took it and left.

The second piece of evidence consisted of circumstantial and direct evidence from Mussa Said Ramadhani, the sixth prosecution witnesses. He testified that he was a hawker selling coffee and cassava with a kiosk along the old Post office building. On the fateful day at around seven o'clock in the evening he heard the voice of a person crying for help and something being cut. He went where the voice was coming from. When he reached there, he saw a person sleeping down and another person slashing him with a machete. He immediately recognised both persons as those working behind the old Post Office building. The one who had fallen down was Mathias s/o Mibaroi and the one who was cutting him down was Ayubu s/o Yahaya Mwinami. He narrated that both of them were his customers; his kiosk was so near to their bicycle garages so that

he could easily hear when they shouted for coffee. In addition, Mathias s/o Mibaroi once had wheelbarrows for rent and he was one of his customers.

The witness shouted for help; several people who were around his kiosk rushed to the scene. One of the persons who rushed to the scene was the fifth prosecution witness. After several people had arrived, the accused stopped cutting the deceased and rushed towards a beans garden. He stated that the surrounding area had enough electric lights including those in the old Post Office building itself, opposite buildings and road lights.

The third piece of evidence consisted of circumstantial evidence from the fifth prosecution witness, Ramadhani Abasi alias Mwalimu Kashasha who testified that at the material time he was a hawker selling nylon bags at Majengo Street in Babati Town. Around 8:28 PM on 7/1/2021 he was along the old Post office area drinking coffee from the sixth prosecution witness. While drinking coffee about six paces from the old Post Office building, he heard a voice of someone crying for help and something being cut like wood. He rushed to the building. On arrival he no longer heard the voice crying for help but saw a person who had fallen down with injuries on the head and left hand and was bleeding. He recognised the person as the deceased Mathias s/o Mibaroi. Some five paces away, he saw the accused holding the machete on his right hand. He described

the area as being full with road and building lights that enabled him to recognise both persons.

The fourth piece of evidence is circumstantial evidence. It relates to the recovery of a machete from the beans garden. The seventh prosecution witness, H5935 Detective Constable Fadhili, testified that on 8/1/2021 they were tipped-off that a machete with streaks of blood was found in the beans garden near the old Post Office building. Accompanied by other police officers, they went to the spot and with the assistance of a chairman of Majengo ya Zamani Street and a carpenter, they retrieved a machete. The machete with its black rubber handle, inscribed on both sides with letters "LM" was identified at the trial and was admitted as exhibit P 2.

The fifth piece of evidence is that contained in the post-mortem examination report of 9/1/2021 and which was admitted during the preliminary hearing as exhibit P 1. This report was identified during the trial by its author, the first prosecution witnesses Assistant Medical Officer, Emmanuel Humphrey Mkonyi. The report showed that the deceased clothes were stained with blood and soil, his body had eight wounds on scalp face and left arm estimated to be of 72 cm length and 15cm depth with brain, nasal and eye involvement. The report concluded that the deceased died as a result of severe bleeding and brain injury.

The prosecution evidence indicates that:

- (a) on the fateful day the accused and the deceased were together at the old Post Office building where they were working as bicycle mechanics,
- (b) the accused cut down the deceased with a machete that he sharpened earlier that day,
- (c) the deceased died as a result of wounds resulting from being cut with the machete, and
- (d) the deceased body was found behind the old Post office building.

In his defence, the accused stated that on account of suffering from leprosy he could not remember what took place on the fateful day. However, on cross-examination, he recalled his parents' names, his age, his children's names, his place of residence before being taken to remand custody, his place of birth, and his place of primary education and his level of education. He was able to recall the year he learnt bicycle mechanics, and the year he commenced to work as an independent bicycle mechanics. He mentioned the location of his bicycle garage to be behind the old Post Office building which is near Babati central market. He admitted that around the area there were hawkers selling coffee. He further explained that the deceased joined him in the old Post Office building to work as a bicycle mechanic and later the deceased started his own bicycle garage.

He denied owning the machete and explained that it belonged to the deceased who sent him to sharpen it. On the fateful day, the machete was in the deceased's garage.

So, is there sufficient evidence that Ayubu s/o Yahaya Mwinami killed Mathias s/o Mibaroi alias Masai?

The accused's claim that he could not remember what took place on 7/1/2021 does not amount to any defence in criminal law. The accused does not remember incriminating facts of murder but fully remembered important facts of his life before and after the incident. But the accused carries no burden to disprove the prosecution evidence. It is upon the prosecution to prove its case beyond reasonable doubt.

There is eye-witness evidence of the sixth prosecution witness, Mussa Said Ramadhani, who saw the deceased body on the ground and the accused cutting him with the machete. His evidence was corroborated by the evidence of the fifth prosecution witness, Ramadhani Abasi who saw the deceased body on the floor and saw the accused holding the machete some five paces away. Both witnesses stated that the incident happened in the evening. The sixth prosecution witness stated that the incident took place around 7 PM while the fifth prosecution witness stated that it was around 8:28 PM. There is time variation between the fifth and sixth prosecution witness about the exact hour

the incident took place. It has been held in **Manjui Msambya v Attorney General**, Civil Appeal 2 of 2002, Court of Appeal of Tanzania at Mwanza (2002) that omissions in evidence are natural. In a judgment delivered by Lugakingira JA, the Court of Appeal observed:

Omissions in evidence are normal and natural. It is not possible for witnesses to recall every detail of a speech or the exact words used but the essentials thereof. In fact omissions better indicate veracity whereas exact replication of evidence could suggest coaching. A trial judge would, of course, be entitled to reject the evidence where witnesses are materially in conflict or inconsistent...omissions, however, do not constitute grounds for discrediting a witness. They are largely due to lapse of memory and the way a witness is led in giving evidence.

In **Sohoba Benjuda v R**, Criminal Appeal No 96 of 1989, the Court of Appeal dismissed a complaint of conflicting testimony of the sixth prosecution witness because it was amply corroborated by the testimony of five prosecution witnesses. In its judgment delivered by Kisanga JA, the Court of Appeal set forth one of the governing principles in cases of conflicting testimony:

..Because contradiction in the evidence of a witness affects the credibility of that witness and unless the contradiction can be ignored as being only minor and immaterial, the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence...



In the instant case, as shown below, there is ample evidence from the accused cautioned statement and extra-judicial statement that the incident took place around 7 seven o'clock in the evening. This is a very minor variation which does not contradict the time of the commission of the offence. In any case, the variation does not negate the fact the incident took place in the late evening of 7/1/2021.

The use of a machete in killing the deceased is corroborated by the evidence of discovery of the machete with streaks of blood and the post-examination report which established that the deceased body had eight cut wounds.

The incident took place in the late evening between seven and eight o'clock. Was the accused correctly identified? The cardinal principle in dealing with evidence of visual identification has been stated and restated in a number of authorities and in **Anthony Kigodi v R**, Criminal Appeal No 94 of 2005 the Court of Appeal sitting at Mwanza restated the principle in these terms:

...The principle laid down ...is that in a case involving evidence of visual identification, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight.

Identification of a person in the dark is very likely to be under unfavourable conditions. There must be evidence favouring correct identification to eliminate mistaken identification of the accused as was held in **Said Chaly Scania v R** [2007] TLR 100 at 103:

We think that where a witness is testifying about identifying another person in unfavourable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistakable identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger. We are not attempting to exhaust the circumstances for accurate identification but this Court has on many occasions emphasized on the need to consider with great caution evidence of visual identification.

In the present case, there is evidence of several electric lights around the old Post Office building, surrounding buildings and road lights. Similarly, the accused was a long-time and well-known bicycle mechanic in behind the old Post Office building and a regular coffee customer of the sixth prosecution witness. This was clear evidence of familiarity coupled with the fact that on the fateful day the accused went to the third prosecution witness to sharpen the machete. I am satisfied that there was enough evidence of visual identification and I can safely rule out mistaken identity of the accused person.

In addition to these portions of evidence, there are accused's extra-judicial and cautioned statements which form part of the second set of the prosecution evidence.

The cautioned statement was taken on 9/1/2021 before a police officer, H5935 Detective Constable Fadhili, the seventh prosecution witness. The accused stated in the cautioned statement that he was a bicycle mechanic working at TTCL building which was near Babati central market. He worked with the deceased who was also a bicycle mechanic. He began working in the area in 2010 before the deceased joined him. They worked together for a while and then in 2018 they separated as the deceased suggested each of them to have separate bicycle garages. He had a kiosk made out of canvas and the deceased's kiosk was made out of corrugated iron roof. They also had separate stores. He was a famous bicycle mechanic who attracted many customers but the deceased disliked him and insulted him. He later suspected the deceased to be moving out with his lover, one Sophia. On these accounts he swore that one day he would do something really bad to the deceased.

One day in 2018 on his way back home to Nangara Ziwani, he picked up a machete at Mahakama ya Zamani, and kept it in his room. On 7/1/2021 he brought the machete to his office and around noon he had it sharpened by a cutler. He kept the machete along with his other items. His plan was to slash the

deceased and if possible, slash him to death. Around seven o'clock in the evening he packed his items, took the machete and went to the deceased's garage and placed the machete in the deceased's black bucket. The purpose was to cut him down. He first assisted him pack the items and waited for the opportunity to attack him. When the deceased went to the store, the accused hid behind him while holding the machete and cut him on the back of his head. The deceased fell down, screaming for help and holding up his left hand to prevent the accused from continuing attacking him. He slashed the deceased twice on the left hand and on his head several times. The accused went on slashing the deceased with the machete until people arrived at the scene. One of the persons who came to the scene was one Mussa, a coffee hawker. As the number of people who responded to the scene increased, the accused avoided running towards the market street because there were several electric lights in the surrounding buildings and along the Arusha-Babati Highway. He ran towards beans garden, threw the machete in the beans garden and then ran towards Nangara Ziwani where he was living with his parents. After communicating with some people in Babati town and discovered that Mathias s/o Mibaroi was dead, he switched off his phone, left home and went towards the junction to Galapo where he boarded a mini-bus and disembarked at Bonga old bus stand. He went to his younger paternal uncle, one Mustapha s/o Omary. He spent a night there. Early on 8/1/2024, he overheard his hosts suspecting his arrival at night the day

before. The accused decided to tell them the truth. He confessed killing the deceased and told them that he was there to hide. He stayed there and maintained some communication with certain people at Babati town until 9/1/2021 when his father, Yahaya s/o Omary came along with a tri-cycle and took him back to Nangara Ziwani. After changing his clothes, the same tri-cycle took him and his father to the house of Assistant Inspector, Pili. Thereafter police officers came and took him to Babati Police station. Towards the end of his cautioned statement, he directly confessed killing the deceased. He stated in Kiswahili:

Hivyo nakiri kutenda kosa la MAUAJI ya MATHIAS S/O MIBARO I @ MASAI nikiwa pekee yangu kwa kumkata sehemu za kichwani mara nyingi sana hadi kusababisha mauaji hayo na hivyo nakiri kutenda kosa hilo na ndio maana nimeamua kujisalimisha mimi mwenyewe kwa utashi wangu na kushauriwa na baba yangu mzazi kwani najutia kutenda kitendo hicho cha kumuua MATHIAS S/O MIBARO I @MASAI.

The cautioned statement was admitted without objection and marked as exhibit Number 5.

On 13/1/2021, the accused made a confession statement before Salumu Iddi Hewasi, Bagara Ward Executive Officer and a Justice of the Peace by virtue of the Government Notice No 369 of 2004. In this extra-judicial statement, the accused narrated that on the fateful day he took his machete for sharpening to

one Saidi, took it back and kept it in his office at the old Post Office building. After closing his bicycle garage around seven o'clock in the evening he lurked in the deceased's garage store and put his machete into the deceased's black bucket and pretended to be assisting the deceased to pack his items. His intention in assisting the deceased was to outwit him so that he could cut him with the machete. He went on assisting him and when the deceased turned his back to him while moving to his garage store, the accused attacked him on the head with the machete. The deceased fell down, the accused continued to cut him down on the head and left arm. He stopped slashing the deceased when people came around. He ran away and later surrendered himself to Assistant Inspector Pili on 9/1/2021 at Nangara Ziwani. He directly confessed at the end of the confession statement:

Hivyo ni kweli nakiri kumuua ndg MATHIAS/MASAI kutokana na kunichukulia wateja wangu

This statement was admitted as exhibit p 3 after I overruled the defence objection that the ward executive officer was not a Justice of the Peace in terms of section 51 of the Magistrates' Courts Act [Cap 11 RE 2019].

The statements in the cautioned and extra-judicial statement amount to a confession. A voluntarily and truthful confession is one of the best evidence that can ground conviction. This legal position was restated in **Mohamed Haruna**

**alias Mtupeni and Another v Republic** (Criminal Appeal 259 of 2007) [2010]

TZCA 141 in a judgment of the Court of Appeal delivered by Rutakangwa JA:

Of course in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence. But as the learned first appellate judge rightly observed in his judgment, "if the accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding on the question of his guilt." After all, the very best of witnesses in any criminal trial is an accused person who freely confesses his guilt.

Not only did the accused confess in extra-judicial and cautioned statements but also made an admission at the trial. He said in cross-examination:

Fever is what led me to cut Mathias with a machete. After cutting Mathias with the machete, I went where I did not know. I went to my paternal uncle and they asked me what transpired. I told them that I killed Mathias and that I was afraid of being arrested. I went there so that people could not beat me or police could arrest me.

I made a statement to the Justice of the Peace but I do not know. I never said the statement is not mine. When I was taken to the Police Station, I

made a statement to a police officer Fadhili. I never denied that the statement is not mine or belongs to someone else.

These statements contain accused admission and corroborates the prosecution evidence. As I have stated earlier in this judgment, the accused claim of lack of knowledge of certain facts is confined to incriminating facts but does not extend to non-incriminating facts. I hold that these denials do constitute a defence in criminal law.

From the prosecution and accused accounts of the killing, I am satisfied that the accused, Ayubu s/o Yahaya Mwinami, caused the death of the deceased, Mathias s/o Mibaroi alias Masai, by inflicting grievous bodily harm with the machete leading to his death.

From the evidence adduced there is no doubt that the accused inflicted grievous harm resulting in Mathias' death. He cut the deceased with a machete to death. Was the accused act intentional as to constitute malice aforethought under section 200 of the Penal Code [Cap 16 RE 2019]?

In the instant case, the deceased was slashed down to death and so malice aforethought is to be ascertained from the nature of the weapon used and the seriousness of the harm caused. Factors to be taken into account in determining whether particular use of a weapon that led to one's death constitutes malice aforethought were summed up in the leading case of **Enock**



**Kipela v R** (Criminal Appeal 150 of 1994) [1999] TZCA 7 where Samatta JA delivering the judgment of the Court of Appeal stated:

Usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any, used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow or blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the 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 the instant case, it has been established that the accused attacked the deceased with a machete on the head and left hand. He attacked the deceased who was standing in the garage store and continued to attack him when he had fallen down. The attack caused eight wounds on the deceased head and his left hand. It also caused injury to the deceased's brain, nose and eyes as established by the post-mortem report. The accused ran away after people rushed to the scene.

These facts clearly establish malice aforethought. Firstly, the accused used machete which is a deadly weapon. Secondly, the accused attacked the deceased head, a vulnerable part of one's body. Thirdly, the accused caused

serious injury to the deceased's body as established by the post-mortem report. Fourthly, the accused persistently assaulted the deceased even when he fell down and was defenceless.

The following facts establish that the accused knew what he was doing: The accused sharpened the machete on the day of the incident, ran away after people came to the scene, left his parent's home and went to Bonga. He equally maintained some communication with certain people in town about the deceased state.

Besides, there was proof of motive for the killing of the deceased. While motive is, on some occasions, irrelevant in proving a criminal charge, it has been held in **Obadia Kijalo v R**, Criminal Appeal 95 of 2007 to be an important piece of evidence in establishing malice aforethought.

In his cautioned statement, the accused provides motive behind the killing. He stated in Kiswahili that:

...Baada ya kuachana mimi na MATHIAS s/o MIBAROI alias MASAI ndipo tulianza kupishana kauli kutokana na mimi kuwa ni fundi maarufu hapo na pia nilikuwa nina wateja wengi hivyo MATHIAS s/o MIBAROI alias MASAI akiona wateja wapo kwangu wengi yeye ananuna na kunitukana na kunitolea maneno machafu. Mimi nilikuwa na mpenzi wangu aitwaye SOPHIA D/O? anayefanya kazi kwenye kampuni za ulinzi za watu binafsi alikuwa analinda

geti la hospitali ya mji Babati alias Mrara hospital pia aliwahi kulinda jengo la Halmashauri ya mji Babati na kwasasa bado analinda hospital ya,mji Babati ndipo mimi nilihisi anamchukua mpenzi wangu hivyo kitendo hicho kiliniudhi sana na hivyo niliamua kuwa na hasira na MATHIAS s/o MIBAROI alias MASAI kuwa ipo siku nitamtenda mabaya....

This part of the cautioned statement establishes not only motive for the killing of the deceased but also goes a long way towards proving that the accused long planned attacking the deceased. This shows that the killing was premeditated.

From these two sets of facts, I hold that there is proof beyond reasonable doubt that the accused killed with malice aforethought.

From the totality of the evidence adduced, I am satisfied that the charge of murder was proved beyond reasonable doubt. I accordingly convict the accused, Ayubu s/o Yahaya Mwinami, of the charge of murder contrary to sections 196 and 197 of the Penal Code [Cap 16 RE 2019].

DATED at BABATI this 20<sup>th</sup> day of May, 2024

**F.M. MIRINDO**

**JUDGE**

DELIVERED at BABATI this 23<sup>rd</sup> day of May, 2024 in the presence of the accused and his counsel, Mr Erick Machuwa and in the presence of Mr. Leonce Bizimana, State Attorney for the Republic.

**F.M. MIRINDO**

**JUDGE**

**23/5/2024**

**SENTENCE:**

There is only one sentence for the offence of murder though the accused allocution may be taken into account when a report is made to Her Excellency the President of the United Republic of Tanzania. But the defence counsel, Mr Erick Machuwa, had nothing to say.

With those remarks, I proceed to pronounce the sentence to the accused:

The accused, Ayubu s/o Yahaya Mwinami, shall suffer death by hanging as provided for under section 26 (1) of the Penal Code [Cap 16 RE 2019].

**F.M. MIRINDO**

**JUDGE**

**23/5/2024**

At BABATI, in open court, before the accused person, Ayubu s/o Yahaya Mwinami, his defence counsel, Mr Erick Machuwa and Mr Leonce Bizimana, State Attorney for the Republic.



**F.M. MIRINDO**

**JUDGE**

**23/5/2024**

**Court:** Right of appeal explained



**F.M. MIRINDO**

**JUDGE**

**23/5/2024**