

**THE UNITED REPUBLIC OF TANZANIA**

**(JUDICIARY)**

**THE HIGH COURT**

**(MUSOMA SUB REGISTRY AT MUSOMA)**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSIONS CASE No. 70 OF 2023**

**REPUBLIC v. MKOME EDWARD @ MWITA**

**JUDGMENT**

23.02.2024 & 05.03.2024

Mtulya, J.:

**Mr. Mkome Edward @ Mwita** (the accused) was arraigned in this court for allegation of murder of his own child son aged fourteen (14) years, **Mwita Mkome** (the deceased), contrary to section 196 and 197 of the **Penal Code [Cap 16. R.E 2022]** (the Code). The incident is alleged to have occurred on 29<sup>th</sup> May 2023 at Bumangi Village within Butiama District in Mara Region. According to the Republic, all circumstances in the present case point a finger irresistibly to the accused. In order to substantiate its case, the Republic had summoned a total of eleven (11) witnesses and produced five (5) exhibits, whereas the defence had invited one (1) witness and registered one (1) exhibit.

In order to show the deceased had actually expired, the Republic had marshalled the deceased's mother **Rosemary Hamad Gewa** (PW2) and medical doctor, **Mr. Bernard Alfaxad** (PW7). PW2 had testified that on 29<sup>th</sup> May 2023, she sent his son, the deceased to fetch milk in neighboring residence of **Mama Wase Ruhuro** (PW4) at around 17:00 hours by use of a bicycle, but could not return up to

20:00 hours. According to PW2, practice shows that when the deceased leaves with the bicycle for PW4's residence, he uses an average of two (2) hours and around 19:00 hours, he was supposed to be at home residence. However, to the surprises of PW2, on 29<sup>th</sup> May 2023, the accused never returned home up to 20:00 hours hence she called and went to PW4's residence to learn what had transpired, but PW4 replied to have served the deceased milk and had left his residence since 18:00 hours. Following the disappearance of the deceased, according to PW2, the villagers whistled *yowe* species of noises at night hours and searched for the deceased along the way without any success.

PW2 testified further that on the early hours of the next day, 30<sup>th</sup> May 2023, the villagers whistled another *yowe*, searched and successfully found the deceased already expired in a watery mud area without his garments, save for underpants. According to PW2, they had informed the accused on the disappearance of the deceased by use of cell-phone call on 29<sup>th</sup> May 2023 and the accused promised to appear in early hours of 30<sup>th</sup> May 2023 to cooperate in searching the deceased, but he had never appeared for the searching on 30<sup>th</sup> May 2023 and during burial ceremonies of the deceased on 31<sup>st</sup> May 2023. Finally, PW2 testified to have been involved by the police authorities in identification of the deceased's garment T-shirt on 8<sup>th</sup> June 2023 and correctly identified it.

The death of the deceased was confirmed by PW7, who briefly testified to have examined the deceased's body on 30<sup>th</sup> May 2023 in the presence of the deceased's relatives **Mr. Samora Lucas** and **Mr. Hamad Mitaya Gewa** (PW3) and had found the deceased to have died from strangulation with wound on head and bruises on neck and back. PW7 testified further to have prepared a **Post-Mortem Report of the deceased** and prayed to tender the same in the case to substantiate his evidence. The Report was tendered as exhibit P.4 and briefly shows that the accused had expired due to: *brain injury caused by suffocation*.

PW4 was summoned to testify on visitation and fetching of milk by the deceased on evening hours of 29<sup>th</sup> May 2023. According to her, the deceased had visited her residence on 29<sup>th</sup> May 2023 at 18:00 hours and gave him milk and had safely left his residence for his home. However, PW4 was surprised to receive a cell-phone call from PW2 at around 20:00 hours on disappearance of the deceased. According to her, the deceased had left her residence with a bicycle and had carried with him milk bottles, and was witnessed by **Matindi Joseph** (PW6), but she is unaware what had transpired to him after his departure.

PW6 was marshalled to testify what she had witnessed on the evening hours of 29<sup>th</sup> May 2023. In her testimony she stated that on 29<sup>th</sup> May 2023, she witnessed the accused taking milk from PW4's residence and along the way, when she was moving towards grains

mills, she also witnessed the accused in bushes near cemetery. According to her, she witnessed the accused in bushes holding a panga in a direction where the accused used to pass-by towards his residence. In her evidence, PW6 testified that she had never witnessed any other person along the way to and from the grain mills.

Similar evidence of seeing the accused next to the cemetery area was produced by **Jane Mau Mbango** (PW9). According to PW9, on 29<sup>th</sup> May 2023, at around 18:00 hours, she was moving from Bumangi area to Mulyaza area and along the way, at the cemetery next to a four-ways junction she witnessed the accused. PW9 testified further that she did not notice anything suspicious on the accused until the next day when she heard the deceased had already expired in an area next to the cemetery, when she started connecting dots on the incident.

The Republic also called **Christina Boniphace** (PW8), the wife of the accused to display that the accused had left his home residence on 29<sup>th</sup> May 2023 in morning hours and had never returned home on the day whereas **Braina John Robert Kalemeza** (PW10) was brought to show that the accused was arrested at Shinyanga on 2<sup>nd</sup> June 2023. According to PW8, the accused had left his residence on 29<sup>th</sup> May 2023 in morning hours of 08:00 hours to unknown places as that was his usual practice of leaving without saying where he goes. In her testimony, PW8 stated that since that

morning, she had never returned home until when he found him at the police custody. PW10 on the other hand had testified to have arrested the accused within Shinyanga District in Shinyanga Region at Afande Stanley's house in morning at 11:00 hours and kept him under Shinyanga police custody before Musoma police authorities ferried him to Musoma on 7<sup>th</sup> June 2023.

In order to confirm the Musoma police authorities were involved in carrying the accused from Shinyanga to Musoma on 7<sup>th</sup> June 2023, investigated the matter and recorded confession statement of the accused, two police officers from Musoma police station were brought into the fore, namely: **PF.17829 ASP Marco Neligwa** (PW1) and **H. 292 Cpl. Ezbon** (PW11). According to PW11, on 30<sup>th</sup> May 2023, he was mandated to investigate a murder case file numbered **BUT/IR/445** from Butiama police station related to the death of the deceased. In his testimony, PW11 had testified that on 7<sup>th</sup> June 2023, he was informed by the police authorities of Musoma on arrest of the accused and immediately went to record cautioned statement of the accused.

After following all necessary steps in recording accused persons' statement, according to PW11, he recorded the accused cautioned statement on the same day 7<sup>th</sup> June 2023 within two hours of arrival from Shinyanga. PW11 testified further that in the cautioned statement, the accused had confessed to have committed the offence of murder against his son for sacrifice rituals (kafara) to gain

economic muscles. According to PW11, the accused went further to explain on when and how he had killed the deceased and took the police to the scene of the crime and exhibits bicycle and garment of the deceased. PW11 testified that during a trip to the scene of the crime and exhibits, the police had involved and participated village authorities of acting Bumangi Village Chairman, **Mr. Yona Jumanne Mgendi** (PW5) and a relative of the deceased, named as grandfather of the deceased, **Mr. Hamad Mitaya Gewa** (PW3).

In order to validate his evidence, PW11 had prayed to tender intended exhibit cautioned statement of the accused. However, the exhibit was protested by the defence side on account that the accused had never recorded any statement at Musoma Police Station. The protest was invited and resolved in a trial within trial in favor of the Republic and the intended exhibit was admitted as exhibit P.5.

Those who were cited by PW11 were summoned by the Republic to cement the allegation of the Republic and display the police authorities in Musoma had involved other authorities at the village level and relatives. In that case, PW1, PW3 and PW5 were called to testify in different occasions of their involvement in the allegation against the accused.

According to PW1, the accused had explained how the murder had occurred and location in Bumangi village where he had concealed exhibits bicycle and garments of the decease. PW1 testified further that the narrations of the accused on the indicated

exhibits had prompted the police to move to the scene of exhibits with the assist of PW3 and PW4 on the next day of the interrogation and confession of the accused, 8<sup>th</sup> June 2023. In rendering his evidence, PW1 stated that it was necessary for PW3 to be present as a village authority and PW3 as a relative for identification of the alleged exhibits bicycle and garment of the deceased. PW1 testified that the police, including himself, PW3 and PW5 went at the crime scene under the directives of the accused and found exhibits bicycle and garment T-shirt. Finally, PW1 prayed to tender three (3) exhibits, namely: a bicycle, deceased's garments in T-shirt and certificate of seizure to substantiate involvement in the case. The exhibits were admitted as exhibits P.2, P.3 and P.1 respectively.

PW3 and PW5 were all summoned to testify on what transpired on 8<sup>th</sup> June 2023 and their involvement in searching exhibits P.2 and P.3. According to PW3, on 8<sup>th</sup> June 2023, he received a cell-phone call from PW1 directing him to find PW5 and both to prepare for a trip to the scene of the exhibits. In his testimony, PW3 stated that he called PW5 and both went to the main road to wait for police officer to the exhibit's scene. PW3 stated further that the police then showed up with the accused in a police vehicle and the accused had led them up to the forest where the exhibit bicycle and T-shirt were found. Finally, PW3 testified to have identified the bicycle and T-shirt and signed a certificate of seizure admitted as exhibit P.1 in the case.



PW5 on his part stated to have been cell-phoned by PW3 on 8<sup>th</sup> June 2023 to go to the main road to meet police officers who wanted to have the village authorities and had complied with the call. According to him, he was picked-up by the police officer in a police vehicle at the main road and went to Mibango forest where they were led by the accused to find exhibits bicycle and T-shirt. In his testimony PW5 stated that the accused had shown them location of the exhibits bicycle and T-shirt and the accused had signed the certificate of seizure in exhibit P.1 in his presence and presence of PW1 and PW3.

During a ruling on a prima facie case, this court had believed that the materials brought by the Republic call for the accused to reply the complaint of the Republic. In his reply, the accused had testified to have been brought from Shinyanga on 7<sup>th</sup> June 2023 and PW11 had interrogated him on allegation of murder of the deceased and denied the allegation. However, PW11 had forced him to register his signature in an already hand-written paper which did not know its contents.

According to the accused, he was tortured in an interrogation room at police mess and forced to sign before PW11 at Musoma police station in a room containing weapons guns, sticks, clubs and iron bars intended to attack and torture accused persons. On his testimony regarding the incident day, 29<sup>th</sup> May 2023, he left his home residence Bumangi Village in morning hours around 08:00



hours for rice searching in Shinyanga Region. In his way towards Shinyanga, he walked by foot from his home residence to the center, and from the centre to Butiama District, he took Okwi's Bodaboda to Butiama, and from Butiama District to Kiabakari area he took Noah type of vehicle before taking Zakaria Bus to Shinyanga. However, when he was in Shinyanga Region for rice collection, he was arrested on 2<sup>nd</sup> June 2020 and taken to Musoma Police Mess for torture to confess the killing of his son. According to the accused he was beaten to different parts of the body, including the right arm, but he refused to confess the offence. Regarding his signature, the accused stated that he was taken by PW11 for conversation of thirty (30) in the interrogation room at Musoma police station and was forced enter his signature in unknown papers.

Regarding the disappearance and expiry of his son, the accused stated that he was not cell-phoned on 29<sup>th</sup> or 30<sup>th</sup> of May 2023, but heard the news on the death of the deceased from his brother on 2<sup>nd</sup> June 2023 and could not immediately rush to Bumangi Village to mourn his son's death as he was busy wrapping up rice bags in Shinyanga. The accused testified that he does not know to date as to when his deceased son was buried. The accused stated further that on 8<sup>th</sup> June 2023, he did not take any one to the scene of exhibits P.2 and P.3. Finally, the accused prayed to tender a **Police Form Number Three** (PF.3) to show that he was beaten by the

police officers to the extent of damaging his right hand, and the same was admitted as exhibit D.1.

In the present case, this court is called to resolve whether the accused has killed the deceased on the evening hours of 29<sup>th</sup> May 2023 at Bumangi Village within Butiama Village in Mara Region. As from the facts and evidence of the case, it is plain and vivid that there is no any witness in all eleven (11) witnesses brought by the Republic to testify in the instant case, who has seen the accused killing the deceased. The Republic has essentially based its case on circumstantial evidence and confession statement of the accused.

The law in section 62 (1) (a) of the **Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act) provides that: *oral evidence must, in all cases whatever, be direct, that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it.* In the instant case, as indicated, there is no eye-witness who saw the accused killing the deceased.

However, the available practice in this court and the Court of Appeal (the Court) shows that if the indicated text of the law in section 62 (1) (a) is followed blindly many killings would have remained unsolved (see: **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 and **Republic v. Elija Thomas Patrick @ Patrice Anthony Patrick**, Criminal Sessions Case No. 163 of 2022). The reasoning extracted from the precedents displays that there are circumstances where direct evidence of killing cannot be obtained.

The thinking of the Court in the precedent of **Mathias Bundala v. Republic** (supra) displays that:

*...if every killing had to be witnessed, then many homicides would remain unsolved. We believe so because killing may be by poisoning, starving, drowning and a thousand other forms of death by human nature may be overcome. Such killings can hardly be eye-witnessed by independent witnesses.*

In the instant case, there is no eye-witness and the Republic has brought witnesses to show that there are circumstances which point a finger to the accused and that the accused had confessed killing of the deceased and admitted P.5 to substantiate its allegation. The law regulating circumstantial evidence shows that: *the circumstantial evidences must produce more certainty with exclusion of every reasonable doubt and that to convict an accused person, the evidence must point irresistibly to the accused's guilty* (see: **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159 'B' of 2017; **Peter Mabara v. Republic**, Criminal Appeal No. 242 of 2016; **Republic v. Maximilian Leonidas**, Criminal Session Case No. 1 of 2018; and **Republic v. Manila Hamduni & Another**, Criminal Session Case No. 76 of 2017).

In that case, in order to remove doubts, the Court has been asking for corroborating factors (see: **Lucas Njoweka @ Jariba v. Republic**, Criminal Appeal No. 220 of 2005; **Shabani Mpunzu @ Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002, **B.**

**Mapunda v. Republic**, Criminal Appeal No. 2 of 1989; **Haruna Mohamed & Mathew Lwali v. Republic**, Criminal Appeal No. 30 of 2001; and **Benedict Ajetu v. Republic** [1983] TLR 190). In order to align with the courts' directives, the Republic has brought PW2, PW4, PW6 and PW9 to produce materials to show certainty with exclusion of every reasonable doubt that the accused is responsible for the killing of the deceased. In their materials, PW2 had testified to have sent the deceased on 29<sup>th</sup> May 2023 at around 17:00 hours to PW4 to fetch milk by use of a bicycle and the deceased was wearing a Jeans trouser and T-shirt. On the same day, according to PW4, she served the deceased milk and had left his residence around 18:00 hours. Around the same hours of 18:00 hours on the same date, PW6 and PW9 testified to have spotted the deceased rambling around cemetery area along the road towards the deceased's residence in Bumangi Village.

On the other side of the village, PW2 had waited the deceased to arrive at his home residence on his traditional time of 19:00 hours unsuccessfully. Following the disappearance of the deceased, PW2 had moved to inform the accused on the subject, on the same day, but the accused declined any assistance or appearance during the search. Similarly, the accused was informed on the death of the deceased by his brother on 2<sup>nd</sup> June 2023, but was busy scheduling rice bags in Shinyanga. Finally, the accused had confessed and

moved further to show the police authorities the exhibits T-shirt and bicycle.

In replying the materials brought by the Republic, the accused testified that: first, he did not produce any materials in exhibit P.5 tendered by PW11, but was forced by police authorities to enter his signature in confession statement; second, he did not show any police officer the exhibits' scene; witnesses PW2, PW4, PW6 and PW9 should not be believed; his Zakaria bus Ticket was taken by police authorities on 7<sup>th</sup> June 2023; finally, he brought exhibit D.1 to substantiate torture exerted to him by the police authorities to damage his right hand.

The law regulating reliability and credibility of witnesses is well enumerated in the precedent of **Goodluck Kyando v. Republic** [2006] TLR 363, that: *a witness who testify consistencies statements and his demeanor is inviting may be believed and his testimony accepted, unless there are good and cogent reasons for not believing him*. The statement is supported in the precedent of **Sabato Thabiti & Benjamini Thabiti v. Republic**, Criminal Appeal No. 441 of 2018). This court has been cherishing the move without reservations (see: **Republic v. John Mbatira @ Mtuke & Three Others**, Criminal Sessions Case No. 181 of 2022 and **Republic v. Mroni Samo @ Ryoba**, Criminal Sessions Case No. 12 of 2023).

In the present case, the defence has brought exhibit D.1 to show that the accused was tortured his right arm by the police authorities at the police mess in Musoma on 7<sup>th</sup> June 2023 and was forced to sign a unknown paper, which later was tendered in this case as confession statement and named exhibit P.5. I have perused the indicted exhibits P.1 and D.1 in details to uncover the truth of the two exhibits. Exhibit P.5, in brief, contains the following narrations of the accused:

*Mimi...mzaliwa na mkulima wa Kitongoji cha Mibango Kijiji cha Bumangi Kata ya Murwanza, Tarafa ya Makongoro Wilaya Butiama na Mkoa wa Mara. Elimu yangu ni Darasa la Saba niliyohitimu Mwaka 2011 katika Shule ya Msingi Bumangi, hivyo najua kusoma na kuandika. Baada ya kumaliza elimu yangu ya msingi...nikaamua kujishughulisha na biashara ya bucha ya kuuza nyama ya ng'ombe katika Senta ya Bumangi kwenye bucha ya Mabizi s/o Makuri ....nilipozidiwa majukumu, niliamua kuoa mke aitwaye Waryoba d/o Amon ambaye nilizaa naye watoto 2 ambao ni MWITA S/O MKOME na MGESI S/O MKOME na mara baada ya huyo mwanamke kunishinda tabia niliamua kuachana naye na kumwachia watoto lakini matumizi nilikuwa natoa kama kawaida. Baada ya kuachana na huyo mwanamke nilioa mke mwingine aitwaye Wambura d/o Boniphace ambapo ilikuwa ni Mwaka 2018 lakini hapo awali huyo mwanamke alikuwa hawala yangu kabla ya kumwoa. Ambapo baada ya kumwoa, tuliamua kufungua duka la rejareja na kuachana na biashara ya kuuza nyama ambapo baada ya kufungua duka niliwapata marafiki zangu wakubwa ambao ni Ruhuro s/o Makuri, Wanyangi s/o James, William*



s/o Muhunga na Jaoko S/O? Nakumbuka kuanzia mwezi Aprili Mwaka 2023 majira ya jioni huwa Mzee William s/o Muhuga ana tabia ya kuja dukani kwangu na kunieleza jinsi ya kupata mali kwa kuwa kuna mganga yupo anatoa dawa ya kumtoa mtoto au ndugu wa karibu sana kama vile Mama au Baba kafara. Kwa ajili ya kupata utajiri wa mali na fedha lakini ni lazima muwe na nguo za mtoto wangu zikiwa na damu. Ambapo nakumbuka mnamo mwezi February 2023 kabla ya Mzee kumpatia ushauri huo mimi mwenyewe nilishawahi kuwaleta waganga wawili nyumbani kwangu kutokea huko kijiji cha SAPIWI-BARIADI na waganga hao nilikuwa nawafahamu kwa jina la MADUHU s/o? na MWANASHIMBA s/o? ambapo walinipatia dawa pamoja na kuwachanja familia yangu isipokuwa mke wangu yeye alikataa. Lakini baada ya kutumia dawa niliyopewa na hao waganga sikuona mabadiliko yoyote katika maisha yangu ndipo niliamua kumwuliza Mzee William s/o Muhuga kuhusiana na ushauri ambao alishawahi kunipatia lakini huyo mzee hakuweza kunijibu chochote na ndipo nikaamua kumpigia simu rafiki yangu aitwaye RUHURO S/O MAKURI ili aweze kunikopesha fedha kiasi cha shilingi 200,000/= kwa ajili ya usafiri wa kuelekea huko kwa mganga ambapo hakuwaza kupokea simu yangu kwa muda muafaka, ndipo siku moja nilienda kwa mama mmoja anayeza maziwa aitwaye WASE d/o RUHURO ambapo mtoto wangu anachukuaga maziwa ili kuangalia mazingira mazuri jinsi ya kumuua, nilipofika hapo nilimpigia simu tena rafiki yangu RUHURO s/o MAKURI nikamwomba aje nilipokuwa na yeye alikuja nikawa nimemshirikisha suala langu la kutaka kutoa kafara mwanangu na nikamuomba tena pesa ile laki 200,000/= lakini hakutaka kunijibu na hata pesa hakunipa. Niliondoka naye hadi nyumbani kwake ambapo nilikaa kidogo na kuondoka. Wakati narudi nyumbani



*nilikutana na EZEKIEL S/O WILLIAM nilienda naye hadi dukani kwangu nikiwa namwelezea jinsi benki wanavyonidai na nia yangu ya jinsi ya kupata pesa. Nilimwambia anisaidie kumuua mtoto wangu ili akienda kwenye kufuata maziwa anambie, siku hiyo ya tarehe 26/05/2023 sikufanikiwa na yeye hakuwa na simu hivyo iliniwia vigumu kuwasilisana naye lakini ilipofika tarehe 29/5/2023 majira ya saa 12:00hrs muda huo nilikuwa dukani kwangu nafanya mahesabu ndipo nikagundua kuwa duka langu linazidi kufirisika ambapo niliamua kufanya ni jinsi gani nimuue mtoto wangu aitwaye MWITA s/o MKOME ili nipate nguo yake yenye damu niipeleke kwa mganga kwa ajili ya kupata mali...siku hiyo hiyo ya tarehe 29/05/2023 majira ya saa 17:00hrs ndipo niliamua kuchukua panga langu iliyojikunja kwa mbele na kuelekea kitongoji cha MBANGO kupitia njia ambayo huyo mtoto huwa anapita kila siku jioni akienda kufuata maziwa kwa WASE d/o RUHURO na nilipokaribia kwake nilikutana na binti yake aitwaye MATINDI D/O JOSEPH na kumweleza kuwa asije akamwambia mtu yeyote kuwa nimekutana naye ambapo nilibana kichakana kumsubiria huyo mtoto. Ilipofika majira ya saa 19:15 hrs giza likiwa linataka kuingia nilimuangalia huyo mtoto na kumwona akiwa anakuja anaendesha baiskeli na alipokaribia kwa karibu sana nilimteka na kumuingiza kichakani na kumbamiza kichwa kwenye jiwe na kupoteza fahamu akawa anatokwa na damu kwenye jiwe na kupoteza fahamu kwa kutokwa na damu kwenye jeraha ambayo alipasuka baada ya kumbamiza ndipo niliendelea na kumkaba koromeo ili afe na baada ya dakika chache nilikuwa tayari ameshafariki. Ndipo nilimchukua maziwa aliyokuwa nayo na kumwaga kichakani na maziwa hayo yalikuwa ni chupa mbili (2) kubwa ya maji ya kampuni ya jambo yenye ukubwa wa lita moja na nusu kila moja.*

*Baada ya kumuua nilichukua mwili huo na kuufunga kwenye baiskeli kwa kutumia kamba niliyokuwa niliyokuwa nayo ndipo nikahamisha mwili huo na kuupeleka mbali kidogo karibu na dimbwi la maji kwa ajili ya kupoteza ushahidi wa kilichopelekea kifo cha mtoto huyo MWITA S/O MKOME. Lakini baiskeli ya marehemu niliichukua na kuificha vichakani. Baada ya kufanikiwa kuchukua nguo za marehemu suruali ya marehemu na kuificha kwenye mfuko wa koti, lakini T-shirt niliitupa kichakani karibu na mahali ambapo nilificha baiskeli. Tarehe 31/05/2023 majira ya saa 05:30 hrs nilipanda gari aina ya HIACE rangi nyeupe na kuelekea Musoma na baada ya kufika Musoma nilipanda gari la kuelekea SHINYAGA kwa kaka yangu aitwaye MRUGA S/O MIGERA anayeishi Mtaa wa Misufini. Tarehe 02/6/2023 majira ya saa 11:00 hrs nikiwa nyumbani kwa kaka yangu walikuja askari polisi wakiwa na mwanamke mmoja aliyejitambulisha kuwa ni OC-CID SHINYANGA ndipo walinikamata na kunipeleka kituo cha polisi SHINYANGA na kuanza kuniulizia kuhusu tukio ambalo nililofanya la kumuua mtoto wangu, ndipo nilimjibu kuwa ni kweli tukio hilo nalifahamu. Tarehe 07/06/2023 majira ya saa 16:00 hrs kuna askari alinichukua lock-up na kunieleza kuwa tunaenda kupanda gari kuelekea Musoma- Butiama ambako kuna kesi yangu. Ndipo tulienda stendi na kupanda gari kuelekea Musoma na baada ya kufika stendi kuna gari la polisi ilinichukua hadi central Musoma na kuwekwa lock-up kwa kosa la mauaji. Nikiwa lock-up majira ya saa 20:00 hrs kuna askari mmoja alikuja na kuniuliza kuwa baada ya kumuua marehemu baiskeli yake nilipeleka wapi? Ndipo nilimjibu kuwa baada ya kumuua baiskeli yake niliificha viachakani, ambapo aliniuliza kuwa niko tayari kumpeleka mahali ambapo ambapo niliificha baiskeli hiyo ndipo nikamjibu sawa niko tayari.*

Reading the details in exhibit P.5, it is obvious that the statement would only be produced by a person who has direct knowledge of what has transpired to the deceased. I am also aware that the accused, apart from his narrations at the police station, he also took police officers to the scene of the exhibit bicycle and T-shirt in presence of independent witnesses PW3 and PW5. This discovery of the scene of the exhibits is a most important factor in deciding whether the accused committed the offence. Correspondingly, the accused during his testimony had stated similar facts contained in exhibit P.5 in terms of his historical background, marriage to two (2) wives and seven (7) children which are significant supporting evidence on the alleged offence.

Exhibit D.1 on the other hand shows that the accused had attended and treated at **Butiama Government Hospital** (the hospital) on 1<sup>st</sup> July 2023 and approximate age of the injury complained shows that the injury had occurred three (3) days before attending the hospital, whereas the torture occurred on 7<sup>th</sup> June 2023 and 8<sup>th</sup> June 2023. Similarly, while the accused stated to have been injured at the right hand, exhibit D. shows he suffered injuries on the left hand. The exhibit, at item (v) of the first page, also described the accused's condition and appearance as: *well*. This exhibit, in my considered opinion, have less value and disregarded in justifying the accused was beaten or tortured on his right hand on 7<sup>th</sup> June 2023. It is also unfortunate on the part of the accused to be

able to preserve and maintain exhibit D.1, but could not produce Zakaria Bus ticket. The accused may be understood in his allegation that on 7<sup>th</sup> June 2023, the police had grabbed his bus ticket and never returned to him for exhibit in this case.

However, the accused had declined to summon all those who were in his chain of trip from Bumangi Village to Shinyanga on 29<sup>th</sup> May 2023. The accused was ferried by Okwi from Bumangi Center to Butiama District, and by Noah species of vehicle from Butiama District to Kiabakari area to Shinyanga Region, where he found his brother Afande Stanley. The accused has declined to call them to corroborate his statement.

The available practice in this court and the Court shows that failure to call material witness to corroborate party's evidence may move courts to draw adverse inferences against the party (see: **Wambura Marwa Wambura v. The Republic**, Criminal Appeal No. 115 of 2019; **Stanley James @ Mabesi v. Republic**, Criminal Appeal No. 115 of 2022; **Republic v. Mroni Samo @ Ryoba** (supra).

In the instant case, there is another surprising factor to the accused and his conduct. The accused was immediately informed on the disappearance of the deceased on night hours of 29<sup>th</sup> May 2023 and promised to show up in morning hours of 30<sup>th</sup> May 2023 to cooperate in searching the deceased, but failed to appear. The accused went further up to Shinyanga in search of rice bags and

collected them by 2<sup>nd</sup> June 2023. On the same date, 2<sup>nd</sup> June 2023, he was informed by his brother on the death of the deceased, but was busy scheduling his rice bags for economic purposes. This is the surprising picture printed by the accused under normal circumstances of African tradition and values.

In the instant case, there is no doubt that the deceased had expired on 29<sup>th</sup> June 2023 and his death was caused by brain injury due to suffocation. The question on who had killed the deceased depends on the totality of evidence brought in this court (see: **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 and **Republic v. Chacha Mwita Mhere**, Criminal Session Case No. 141 of 2022).

After considering the totality of evidence brought by the Republic in the present case, I am persuaded to believe that the accused had killed the deceased on evening hours of 29<sup>th</sup> May 2023 at Bumangi Village within Butiama District in Mara Region. In that case, the defence of *alibi* produced by the accused to deny the allegation of killing the deceased dies a natural death (see: **Abdallah Hamisi Salim @ Simba v Republic**, Criminal Appeal No. 68 of 2008; **Edgar Kayumba v. D.P.P.**, Criminal Appeal No. 498 of 2017; and **Republic v. Elija Thomas Patrick @ Patrice Anthony Patrick** (supra).

The defence *alibi* that was raised by the accused in the instant case does not introduce a reasonable doubt in view of the strong

evidence produced by the prosecution. The defence of *alibi* brought by the accused was intended to deceive this court (see: **Edgar Kayumba v. D.P.P.**, Criminal Appeal No. 498 of 2017; **Republic v. Keraryo Rhobi Busere & Another**, Criminal Sessions Case No. 31 of 2022; **Republic v. Peter Ntingwa Peter**, Criminal Session Case No. 184 of 2022; and **Republic v. Elija Thomas Patrick @ Patrice Anthony Patrick** (supra).

The remaining question in the instant case is: *whether the accused had killed the deceased with malice aforethought*. The circumstances to assist this court in determining malice aforethought in criminal cases of murder species are enacted in section 200 of the Penal Code. The enactment has received interpretation of the Court in 1994 in the precedent of **Enock Kipela v. Republic** (supra) where it was stated, in brief, that:

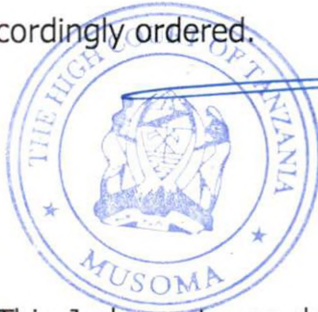
*usually an attacker will not declare his intention to cause death or grievous bodily harm. The intention of accused must be ascertained from various factors, including the following: the type of the weapon used in the attack; the amount of force applied in assaulting; the part of the body where the blow was directed; the number of blows; and the kind of injuries inflicted.*

From the facts displayed in exhibits P.4 and P.5, the accused was attacked on sensitive part of the body head, neck and back to cause brain injury to death. This depicts existence of malice aforethought on part of the accused.



In the circumstances of instant case, I am satisfied that the prosecution has proved its case beyond reasonable doubt as per requirement of the law in section 3 (2) (a) of the Evidence Act and precedent in **Said Hemed v. Republic** [1987] TLR 117, that the accused murdered the deceased. Having said so, I find the accused, **Mr. Mkome Edward @ Mwita**, guilty to the charged offence of murder against the deceased contrary to sections 196 and 197 of the Penal Code.

Accordingly ordered.

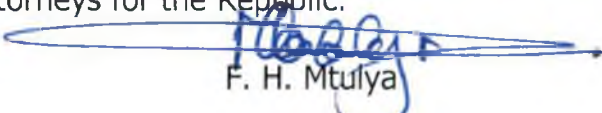


  
F. H. Mtulya

**Judge**

05.03.2024

This Judgment was delivered in open court in the presence of accused, **Mr. Mkome Edward @ Mwita** and his learned Defence Attorney, **Ms. Mary Joakimu** and in the presence of **Mr. Felix Mshama**, **Ms. Happiness Machage** and **Ms. Grace Matimbwi**, learned State Attorneys for the Republic.

  
F. H. Mtulya  
**Judge**

05.03.2024

### **ANTECEDENTS**

**Mshama:** My Lord, we thank you. The accused has been found guilty. My Lord, we pray for a sentence in accordance to the provision of section 197 of the Penal Code. My Lord, we also pray for



an order to release P.2 and P.3 to be given back to the owners. That is our prayers My Lord.

F. H. Mtulya

**Judge**

05.03.2024

**MITIGATION**

**Joakimu:** My Lord, the accused has been found guilty of murder. We are aware that the only sentence is hanging to death. My Lord, this court may avoid death sentence and follow Constitution. My Lord, the Constitution is a mother law and sets guidelines on how to run this State. My Lord, right to life is a constitutional right and we pray life of the accused be preserved. My Lord, the accused is also sick suffering from chest pains and has wounds which were caused by the police brutality. My Lord, the accused has a total of six (6) children and depend on him, we pray for a lenient sentence My Lord.

F. H. Mtulya

**Judge**

05.03.2024

**Accused:** My Lord, I was found guilty and going to be penalized for an offence which I did not commit. My Lord, I have six (6) children who depend on me. I have no parents. My Lord, that is all for me.

F. H. Mtulya

**Judge**

05.03.2024

## SENTENCE

**Mr. Mkome Edward @ Mwita**, was arraigned in this court for murder of his son, Mwita Mkome and was found guilty to the offence. Mr. Mshama for the Republic thinks that the law in section 197 of the Penal Code provides for appropriate sentence, whereas Ms. Joakimu thinks it is against the constitution. The accused on his part stated that he did not commit the offence and has six (6) children who depend on him.

The law in section 197 of the Penal Code provides for a death sentence. The Tanzania sentencing Guidelines 2023, which assist judges in arriving at appropriate sentence, is silent. Practice shows that all accused persons who found guilty of murder are sentenced to death by hanging.

I am aware of the complaints of Ms. Joakimu and human rights activities, but this court as created to uphold law and justice I am bound to follow the previous decisions of this court in cases like this one. Having said so, I am moved to sentence the accused, **Mr. Mkome Edward @ Mwita** to death, which shall be suffered by hanging.

It is so ordered.




  
F. H. Mtulya

**Judge**

05.03.2024

This Sentencing Order was delivered in open court in the presence of the accused, **Mr. Mkome Edward @ Mwita** and his learned Defence Attorney, **Ms. Mary Joakimu** and in the presence of **Mr. Felix Mshama, Ms. Happiness Machage** and **Ms. Grac Matimbwi**, learned State Attorneys for the Republic



F. H. Mtulya

**Judge**

05.03.2024

**Court:** The prayer of Mr. Mshama regarding exhibit P.2 and P.3 is hereby granted.

**Order:** Exhibit P.2 and P.3 is hereby ordered to be released and returned to the owners.

F. H. Mtulya

**Judge**

05.03.2024

**Court:** 1. Right of appeal explained

2. Both parties thanked.



F. H. Mtulya

**Judge**

05.03.2024