

**IN THE HIGH COURT OF TANZANIA**  
**KIGOMA DISTRICT REGISTRY**  
**AT KASULU**  
**ORIGINAL JURISDICTION**  
**CRIMINAL SESSSIONS CASE NO 25 OF 2022**  
**REPUBLIC**  
**VERSUS**  
**JACKSON S/O KALOSA**

Date of Last Order: 8/11/2022

Date of Judgment: 11/11/2022

**JUDGEMENT**

**MAGOIGA, J.**

The accused person, **JACKSON KALOSA** stand charged with murder of MUSSA MBEGWA contrary to sections 196 and 197 of the Penal Code [Cap 16 R.E.2022. The Court has been informed that on or about the 22<sup>nd</sup> day of January, 2022 at Katandara area within the District of Kasulu, in Kigoma Region, the accused murdered Mussa Mbegwa. The accused pleaded not guilty to the charge of murder but admitted to have killed him without malice during preliminary hearing.

A preliminary hearing was held in accordance with the Accelerated Trial and Disposal of Cases Rules 1988; whereby the prosecution stated in details all facts of the case. Briefly the facts were that the accused suspected the

deceased to have sexual relationship with his wife. Due to this suspicion, on the fateful night the accused went into the house of the deceased and knocked at the door. The deceased opened the door and came out with the matchete whereby the accused hit him with the iron bar causing him to fall down and took the matchete and cut him on the head leaving him groaning and ran away.

On the same day in the afternoon, the accused went to the office of the Ward Executive Officer and surrendered the matchete and went away. The Ward Executive and others hunted the accused and managed to arrest him and reported to police who mounted investigations which established that the cause of death was excessive bleeding or haermorrage after major cut wound on the head of the deceased. The accused confessed during police interrogation and before justice of peace to have caused the death of the deceased.

The defence admitted, among others, the names of the accused, that the accused went to the house of Mussa Mbegwa on the fateful night of 22/01/2022 who, upon knocking the door, the deceased came out with a matchete (panga) and in the course the accused cut the deceased with a matchete on the head, which matchete was later surrendered to the Ward



Executive Officer of Msamabara and that was later arrested and charged in this court for an offence of murder.

Full trial was then held whereby the Republic called a total of seven witnesses and tendered 2 physical exhibits and 6 documentary exhibits. The accused person defended himself and had no exhibit to tender.

**PW1- BALIYIMA GWIGILIYE** who is physical neighbour of the deceased told the court that on the night of 22/01/2022 at around 1 hours while sleeping heard the deceased calling for help and went out with others to find the deceased lying down groaning with big wound on his head and the matter was reported to police who took up the matter. **PW2-F7059 D/CPL ELIAS** told the court that he was ordered by OC-CID, one, ASP Msangi to go to Msambara ward where there is an accused person and exhibit who is alleged to murder Musa Mbegwa. PW2 upon filing certificate of seizure took out the matchete as an exhibit earlier surrendered to the WEO and went with the accused to police for investigations. PW2 tendered in court certificate of seizure as **exhibit P1** and matchete as **exhibit P2**.

**PW3 -ASSISTANT INSPECTOR OF POLICE-AIDAN** who told the court under the instructions of the OC-CID, one, AASP Msangi, on 25/01/2022 he went to the home of the accused to retrieve the iron bar suspected to have

been used in the commission of the murder of the deceased. PW3 went on telling the court that after long search at last was able to get the iron bar from the latrine which is about 1.4 metres long. PW3 upon filing the certificate of seizure took the iron bar as an exhibit and went back to police for further investigations. PW3 tendered in court certificate of seizure as **exhibit P3** and iron bar as **exhibit P4**. PW3 explained further that the dates appearing in exhibit P3 were just typing errors not intended to mislead but the actual date was 25/01/2022.

**PW4—PREXEDy FIDEL—WARD EXECUTIVE OFFICER (WEO)** of Msambara. PW4 told the court that on 22/01/2022 around 2pm the accused went to his office where he was in accompany of other people and to their surprise took out a matchete from his coat and told the them that ***"I am surrendering this matchete because it has finished the work I did tonight of killing Musa Mbegwa."*** PW4 went on telling the court that all were shocked beyond repair and not knowing what to do, the accused left the office and went away. Further testimony of PW4 was that, after composure they called police who asked them to follow him and have him arrested. PW4 told the court that at around 20:30 hours they managed to arrest the accused and informed the police who came for him immediately



and handed over the accused and the matchete to police for further investigations. PW4 identified certificate of seizure which is exhibit P1 and the matchete which was surrendered by the accused which is exhibit P2 in these proceedings. PW4 as well identified exhibits P3 and P4, certificate of seizure and iron bar as was involved in its search at the home of the accused person.

**PW5- ISACK ZUBERI JUMANNE-** a medical doctor told this court that on the morning of 22/01/2022 accompanied with policemen, local leaders and some neighbours of the deceased, examined the deceased body and found that the deceased had two injuries; one, in the right shoulder inflicted by blunt object causing the clavice bone broken, and second, on the head inflicted by sharp object causing the skull broken. According to PW5, the deceased died due to severe bleeding or excessive haermorrhage. PW5 tendered Post Mortem Report as **exhibit P5**.

**PW6 – RAJAB FAKIH MTULI-** The Primary Court Magistrate and Justice of Peace of Kasulu Primary Court. PW6 told the court that on 25/01/2022, morning hours police officer by the name of Abdul came with the accused person who wanted to make a confession before Justice of Peace. PW6 went on telling the court that, after complying with all the legal requirements recorded the confession of the accused person who willingly told him that on

the fateful night of 22/01/2022, he went into the house of the deceased and managed to hit him on the right shoulder with iron bar and took a matchete from the deceased and cut him on the head and ran away. According to PW6, the reason for doing so was suspicions that the deceased had sexual relationship with the wife of the accused person. PW6 tendered in court extra judicial statement as **exhibit P6**.

The last witness for prosecution was **PW7- E7844 D/SGT ABDUL**. Most of the testimony of PW7 is like other police men which I need not repeat. PW7 told the court in the morning of 22/01/2022 accompanied with other policemen went into the scene of crime where he drew a sketch map of the incidence and in the evening he recorded cautioned statement of the accused person who had been arrested with the commission of murder of Mussa Mbegwa, in which the accused admitted to have caused the death of the deceased on that previous night at his home. PW7 did not end there but also told the court that he took the accused person to the Justice of Peace on 25/01/2022 where again the accused person confessed to have killed the deceased. PW7 tendered in court as evidence sketch map of the scene of crime as **exhibit P7** and cautioned statement of the accused as **exhibit P8**.





On the evidence collected PW7 told the court that it is the accused person who murdered the deceased as charged.

That was all about the case for prosecution and this court guided by the provisions of section 293 (2) of the Criminal Procedure Code, [Cap 20 R.E.2022] found the evidence on record sufficient to call the accused to enter defence. The court addressed the accused person of his rights, who, together with his advocate, opted to defend himself under oath and that he will have no witness save for himself and had no exhibit to tender.

The accused gave evidence on oath. **DW1- JACKSON KALOSA.** DW1 admitted knowing that he is charged with the offence of murder of, one, Mussa Mbegwa, now deceased but totally distanced himself from the killing of Mussa Mbegwa who was his neighbour and that had no any quarrel with him. DW1 went on telling the court that, all what the prosecution witnesses testified against him are lies he heard them today in court. DW1 denied the testimony of PW4 that he went to his office with a matchete and told them he killed the deceased. However, DW1 admitted was arrested on that day by PW4 and militia people and was handed to police. DW1 denied any relationship with the matchete. DW1 went on defending that while at police was interrogated by 8-10 policemen on their own way and he decided to lie

to them that he is the one who killed the deceased in fear of being beaten or tortured by policemen. DW1 admitted signing the cautioned statement by Abdul but with a rider that, none his rights were explained to him. DW1 further testimony was that, the extra judicial statement he confessed to Justice of Peace was lies because he copied what he lied to police in the cautioned statement which he had during the recording.

As to iron bar, DW1 admitted to know and own it and was kept by him as one of the building materials. DW1 also admitted that it was retrieved from the latrine after being thrown in there by his wife in fear of using it to beat her and not because of the affairs with the deceased.

In totality, DW1 denied all the evidence against him and called the charges against him false and the exhibits tendered not having any bearing with him and urged this court to dismiss the charge against him and set him free.

In addressing the court in the final closing submissions, the Republic speaking through Mr. Shaban Juma Masanja, learned Senior State Attorney contended that it is a cardinal principle that the legal duty as provided for under section 3(2) of the Evidence Act, [Cap 6 R.E.2022] is the Republic have an unwavering duty to prove their case beyond reasonable doubt. It was the strong submissions of the learned Senior State Attorney in this case that,



they have so far discharged that legal duty because the evidence of PW5 a medical doctor established and was supported by exhibit P8 and P6 that the deceased did not die natural death but due to severe bleeding or excessive haermorrhage through cut wound on his head and broken right shoulder which were inflicted by sharp and blunt objects respectively. Learned Senior State Attorney pointed out that, in exhibit P8 and P6 the accused admitted to have beaten the deceased in the shoulder and cut him on the head and that when asked to clarify to court admitted he was not beaten by any police.

On the matchete and iron bar, the learned Senior State Attorney submitted that, PW4 explained how the matchete exhibit P2 was used to cut the deceased was surrendered and was admitted without any objection. The learned Attorney pointed out that, both the matchete and the iron bar were mentioned both in exhibits P8 and P6 and have bearing with the accused person.

The learned Attorney was of the strong submissions that the accused killed the deceased with malice afore thought as defined under section 200 of the Penal Code [Cap 16 R.E. 2022] because he went during midnight of the fateful night, armed with iron bar and upon arriving he broke the door and pursued the deceased who in the circumstances acted reasonably but beaten

him on the right shoulder and worse enough took the matchete and cut him on the head which is fatal parts of the body. In support of his position cited the case of **BUJIGWA JOHN vs. REPUBLIC, CRIMINAL APPEAL NO. 427 OF 2018 BUKOBA CAT (UNREPORTED)** in which the Court of Appeal referred the case of ENOCK KAPELE vs. REPUBLIC at page 19 in which the court held that malice aforethought can be inferred from various factors such as: *'type and size of weapon, if any, used in attack, the amount of force applied in the assault, the part or parts of the body the blow or blows were directed or inflicted, the number of blows although one blow may, depending upon the facts of the particular case, be sufficient for this purpose, the kind of injury inflicted, the attackers utterances, if any, made before or during or after the killing and the conduct of the attacker before and after the killing.'*

In this case, the learned Senior State Attorney submitted that the accused person used matchete to inflict fatal wound in the head with force that the skull was broken. It is the very matchete that the accused person went before PW4 to surrender.

Further the learned Senior State Attorney pointed out that, in the extra judicial statement, the accused did not say exactly that he killed but



explained what he did to the deceased, which exact acts caused the death of the deceased.

As to exhibit P3 which had dates different from the date the incident occurred submitted that PW3 explained the variance as typing errors which were not intended to mislead and can be ignored or corrected under section 64 of the Interpretation of Laws Act, [Cap 1 R.E. 2022].

More to the case, the learned Senior State Attorney pointed out that in exhibit P8 and P6, the accused person explained the cause of all this was suspicious that the deceased have sexual affairs with the accused person's wife, which he can allege was provoked but which do not arise in this case because he never caught them ready handed. The accused person instead prepared himself and had a motive to execute which he did by killing the deceased at midnight, insisted the learned Senior State Attorney.

Finally the learned Senior State Attorney submitted that, the accused person in his defence admitted that he gave exhibits P6 and P8 and signed them and both contained details which could not be known if they were not given by the accused person in dock. Mr. Masanja argued that no reasonable discrepancies were noted in the prosecution evidence to prejudice the prosecution case. In support of this he cited the case of **DICKSON ELIYA**

**MSHAMBA SHAPWATA AND ANOTHER vs. REPUBLIC, CRIMINAL APPEAL NO. 92 OF 2007, CAT MBEYA (UNREPORTED)** in which the Court of Appeal held that, normal discrepancies in evidence do not fetter the evidence and corrode the credibility of evidence but material discrepancies do.

On that note, the learned Senior State Attorney concluded that in this case, based on evidence on record, they have proved their case beyond reasonable doubt. And as such prayed that this court finds the accused person guilty and proceed to convict and sentence the accused as charged in accordance with the law.

In reply, learned defence counsel, Ms. Mpeta submitted that the circumstances of this case, the case was not proved beyond reasonable doubt. It was the learned advocate for defence submissions that, the cautioned statement was taken during night and was taken in front of several policemen without observing and explaining to the accused person's rights. Not only that but also that, the time of recording was not clear at all as PW7 was guessing that is an hour. DW1 was not given a chance to call relatives and the statement was not read over to him. In the totality of the above





noted deficiencies prayed this court not to give the cautioned statement any evidential value.

On the extra judicial statement, the learned advocate for the accused person argued that there was not direct admission that the accused killed the deceased and that the accused person did not request to go and do the recording of confession, but PW7's own initiatives.

On matchete, the learned defence advocate argued that exhibit P2 had no blood stains as such not proved that it was the one used to kill as alleged and that PW4 had no document to prove handing over to him. Also, was her arguments that, PW7 who alleged the banana tree was used to clear the blood stains admitted to have not seen blood in the banana tree. The learned advocate was of the strong submissions that the matchete story was created by the prosecution to suit their goal to fix the accused person.

As to the iron bar, it was the submission of the learned advocate that, the same was hidden by the wife in fear of being used to beat her and not because of this case. Failure to call exhibit manager, according to the learned advocate for the defence, was fatal on the prosecution case because the exhibits tendered none could tell whether were the ones retrieved from where they were and were the ones used to kill.

And lastly that, of all the 7 witnesses for the prosecution, none testified to have seen the accused person committing the crime.

On the totality of the above noted discrepancies, the learned advocate for defence invited this court to find the accused person not guilty and discharge him.

In the alternative and without prejudice to the above submissions, the learned advocate for defence urged this court that, in case the court finds the accused person was responsible for the murder of the deceased, it be pleased to reduce the offence to manslaughter because no full intention to kill has been established and convict him for the lesser offence of manslaughter.

This marked the end of hearing of this criminal case on homicide. The noble task of this court now is to determine whether the prosecution has discharged their legal burden of prove which is always beyond reasonable doubt that, it was the accused person before this court and not somebody else who killed the deceased and was with malice aforethought. However, before going into that task, having heard stories of both sides' in this case, I have noted some facts not in dispute between rivaling parties' in this case which will assist me in determining this case. These are: **one**, it is not



disputed between parties' that the deceased Mussa Mbegwa died on the night of 22/01/2022 and did not die natural death but due to excessive haemorrhage or severe bleeding resulting from fatal wound inflicted on his head by his assailant. **Two**, it is not disputed between parties' that the accused person before this court was arrested on the same day and interrogated and investigations mounted on which culminated into charging the accused person before this court for the offence of murder charged with.

However, what are in serious dispute between rivaling parties' in this case, in my own opinion are two issues; **one**, whether the accused person was the one who inflicted the injuries with malice aforethought which led to the death of the deceased as charged. **two**, is whether suspicion of adultery can afford a defence of provocation in murder case and reduce the offence to manslaughter.

I will start with the most pressing issue whether the accused person is the one who inflicted the injuries with malice aforethought which led to the death of the deceased as charged. First, I must admit that the evidence for prosecution is circumstantial one because of all 7 witnesses as correctly argued by Ms. Mpeta, defence counsel, and rightly so in my own observation




and opinion, none saw the accused person beat and cut the deceased on the parts of the body as observed by PW5.

Nevertheless, having carefully gone through the entire proceedings and evidence on record by both sides in this case, I am inclined to believe the evidence for the prosecution because irresistibly points finger to the accused person as responsible person as charged. I will explain why I am taking this stance. **One**, the first time accused person's plea was taken during preliminary hearing the accused person had this to say, I beg to quote him:

***"Plea: Siyo kweli kuwa nilimuua kwa kukusudia, nilimuua bila kukusudia (it not true that I intended to kill him, I killed him without intention)."***

The plea of the accused person was taken after the information of the charge were read and explained to him in a language he understands and he responded to as noted above. I can boldly say, the issue as to who killed the deceased was once confirmed to the court, by the accused person himself before the court and not anybody else because he was free agent before the court by then.






**Two,** the subsequent admissions before the police and before the Justice of Peace (in exhibits P6 and P8) of which he admitted before this court was not tortured as correctly argued by the learned Senior State Attorney and given that were admitted without any useful objection from defence, and rightly so in my own opinion, speak the truth of what was done by the accused and any denial that are not true are lies by the accused person which do not create any doubt to the prosecution evidence tendered.

**Three,** the unfolding of events started with the story by PW4 but who the accused categorically admitted had no grudges with him to lie to police of the matchete surrendered by the accused and the words spoken by him that take the matchete I used to kill the deceased. More so, on this point no question was put forward to PW4 during cross examination to suggest that he had any reason to lie that the accused did surrendered the matchete and uttered the words that he was responsible for the killing.

**Four,** I have carefully considered the evidence of PW5 and his findings in exhibit P5 truly confirm and collaborates the two blows that were inflicted to the deceased body on the right shoulder and head and which blows were admitted in exhibits P6 and 8 respectively by the accused person himself explaining how and where he inflicted the blows.



**Five,** the accused person's defence that he lied to police and Justice of Peace are but lies to this court because even during tendering of the same, no objection taken on being procured by force or threat or torture but that the recording officer did not sign on each page which is not requirement of the law but requirement of the accused person who complied with the law.

**Six,** the arguments that the accused was not given his rights like calling relatives are but of no help in this case because exhibit P8 is clear that rights were given and all others and even during committal proceedings and preliminary hearing, the accused person has been consistent to be alone and no witness or relative was ever wanted to be called and denied of such right.

**Seven,** I have been asked that in case I find the accused person guilty of the offence charged, I reduce this homicide to manslaughter because his intention was not to kill. I have given this prayer a serious thought but given the manner the offence was committed that; at midnight the accused went to the hopeless deceased person's home who even after knocking and denied entrance decided to break the door, the deceased fled through another door but pursued and struck him on the right shoulder breaking the clavicle bone and worse still the deceased being under no defence and harmless, the accused person inflicted a fatal blow to head which left the skull broken. All



these taken on board and considered, no way, it can be said that the accused person did not intend to kill and was with no malice aforethought. I have taken the guidance in the cited case of **BUJIGWA JOHN@ JUMA KIJIKO vs. REPUBLIC** (supra) in my own opinion, the two blows inflicted to the accused person and the extent damages caused as exhibited in exhibit P5 amounts and are sufficient to infer malice aforethought in this case. No doubt in this case, the accused person killed the deceased with malice aforethought.

With the above reasons and conclusion, I now turn into the second issue whether suspicion of adultery can afford a defence of provocation in murder case and reduce it to manslaughter. In my research on this issue have come across a case that can help me decide this issue. This is the old case of **MANYERI S/O MUNKONKO (1954) EACA 274** while the deceased and her husband, the appellant had retired to bed a man came to the door of the hut they had been living in and spoke to the deceased, who told the man that she did not know him. The man asked what she meant and then the man stated that he had been living with the deceased. The appellant got out and chased the man who ran away. The appellant got angry and speared the wife. It was held that the sudden discovery of a wife's adultery even if not



finding her *infragante delicto* may in law be sufficient provocation to reduce an intentional killing to manslaughter.

But in my own firm opinion, this case can be distinguished on the facts from the Mukonko's case. In Mukonko's case, the paramour went to the door of the appellant and spoke to the deceased. The appellant heard the man. Secondly, the appellant heard the deceased talk to the man who being told by the deceased that she did not know him, the man stated that he had been living together with her. In the present case the accused did not find nor see the suspected paramour nor was there any conversation between the deceased and the alleged paramour on any event nor did the accused confirmed any suspicious, however, grave it was.

I have gathered further guidance in cases of **YOKOYADI LAKORA S/O OMARI V.R [1960] EA 323 AND R. V ERNEST MKUMBA IJIMILI [1979] LRT NO. 27**. These cases dealt with previous knowledge of adultery of a wife with a paramour. In both cases it was held that prior knowledge by a husband of the adultery of his wife with a paramour does not bar him from raising the plea of provocation if the killing was done upon finding the wife and her paramour in the act of adultery. Again in the present case, the accused person never stated such circumstances as gathered from the facts



of this case in particular in exhibit P6 and P8. Accordingly, I find no any justification of using adultery and provocation for causing the death to the deceased person in the circumstances of this case.

In any case, the defence evidence did not raise any doubt in the prosecution evidence.

For the reasons I have endeavoured to explain, I am satisfied that the prosecution has established that the accused killed the deceased intentionally and with malice aforethought. I am satisfied that the murder against the accused had been proved. Consequently I convict the accused person of murder contrary to sections 196 and 197 of the Penal Code as charged in this court.

Order accordingly.



**S. M. MAGOIGA**

**JUDGE**

**11/11/2022**