

TANZANIA / JUDGMENT

Criminal Session Case No

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MTWARA AT MTWARA CRIMINAL SESSION CASE NO. 28 OF 2023 THE REPUBLIC VERSUS
HAMIS PETER SUED@MKWIDU

JUDGMENT

3d & 13h March, 2025 MPAZE, J.: The facts of this case are straightforward, particularly considering that Hamisi Peter Sued @ Mkwidu the accused herein, in his defence, does not dispute the evidence given by the prosecution witnesses. However, despite this apparent consistency between the defence and the prosecution's evidence, the court has carefully scrutinized the case, mindful that the burden of proving the charge beyond a reasonable doubt rests upon the prosecution. This principle is enshrined in criminal jurisprudence, which holds that the prosecution must establish guilt beyond any reasonable doubt, failing which the accused is entitled to an acquittal. See the case of *Woodmington v. DPP* (1935) AC 462 and *William Ntumbi v. DDP/Criminal Appeal No. 320 of 2019* TZCA 72 (25 February 2022) 1 Nevertheless, there is no specific statutory definition of what constitutes proof beyond a reasonable doubt. However, through various judicial decisions, courts have provided guidance on its application. For instance, in the case of *Magendo Paul & Another v. R* (1993) TLR 219, the Court explained the threshold required to establish a case beyond a reasonable doubt, holding that; 'For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed.' Additionally, it is a well-established legal principle that a confession made in court in cause of accused defence is of great effect than any other proof. See the case of *Nyerere Nyaque v. R*, (Criminal Appeal No.67 2010) [2012] TZCA 103 (21 May 2012), *Edward Waison Mzolopa v. R* (Criminal Appeal No. 631 of 2020) [2024] TZCA 26 (12 February 2024) and *Isaya Athanas v. R* (Criminal Appeal No. 435 of 2021) [2024] TZCA 472 (14 June 2024). These two principles will be meticulously examined, particularly given the severity of the offence, which carries the ultimate penalty of death by hanging, while keeping in mind that the accused cannot be 2 convicted based on a weak defence, but solely on the strength of the prosecution's evidence. In this case the accused, Hamis Peter Sued @Mkwidu, was charged with the offence of murder contrary to section 196 and 197 of the Penal Code, [Cap 16 R.E. 2019] now 2022 (the Penal Code). The particulars of the offence alleged that on the 25th October, 2022 at Mavuji village, within Kilwa District in Lindi Region, the accused did murder one Jamali Mtepa. The charge was read over and

explained to the accused in a language he understood, whereupon he responded; 'Mimi sijamuua kwa kukusudia' The court accordingly entered a plea of not guilty. Traditionally, when an accused pleads not guilty, the burden shifts to the prosecution to prove the charge against the accused. To discharge this burden, the prosecution called five witnesses, namely; Hawa Amon Msigwa (PW1), Mshamu Mohamed Kiugu (PW2), PF No. 219218 INSP Juma Ismail Said (PW3), Beatrice Cosmas Bityagate (PW4), and G. 3066 D/CPL Edward (PW5). The testimony of PW1, a clinical officer, established the fact of death. According to her evidence, the deceased sustained multiple injuries 3 on various parts of his body, particularly the head and neck, leading to significant blood loss, which was the cause of death. The post-mortem report, which was admitted as Exhibit P1, corroborated this finding. PW2, the Acting Village Executive Officer (VEO) of Mavuji village, testified that the accused was apprehended by villagers in connection with the killing of Jamali Mtepa on 25th October, 2022. He further stated that the accused confessed before him that he had killed the deceased because the deceased had been stealing from him. According to PW2, the accused admitted that he struck the deceased with stones on the head and subsequently cut him on the neck using a knife. The stones and the knife suspected to have been used in the murder were admitted as Exhibit P3 collectively. At this juncture, it is important to note that no eyewitness directly observed the accused committing the alleged killing. However, the accused is implicated based on his own oral confession and his admission during his defence. In his defence, the accused (DW1) stated; V remember on 25th October, 2022¹ went to a disco. The disco ended at 00:00 hrs, and I left heading toward my residence. Upon reaching the bridge, I saw a torch near my place I live. I wondered what was going on since I hadn't started a fire. I moved quietly 4 and, upon getting closer, I picked up a stone and hit my suspect because I often have my belongings stolen. After hitting him, I left and went to search for something in the village. It was there that I was told, 'You have killed him,' and I was then apprehended and taken to Masoko. Since then, I have been locked up until now. When cross examined by the State Attorney he responded; 7 hit him with two stones, one large and one small, which I have shown as an example here. After I struck him with the stones, Jamai lost his strength. He had a knife with him. I only wounded him slightly on the thigh so he wouldn't speak to me... While I was hitting him, he was saying, 'Mama, mama.' I told him, Mama is not here. When the court sought for clarification DW1 responded; 'I decided to cut him slightly on the neck out of anger after realizing that he was the one who had been stealing my belonging'. In a murder case, the prosecution is not only required to prove that death occurred and that it was unnatural, but they also bear the burden of establishing that no one else was responsible for the death other than the accused. 5 Having carefully analyzed the prosecution's evidence and the defence raised by the DW1, it is undisputed that the deceased, Jamali Mtepa, died on the night of 25th October, 2022 and that his death was unnatural. The question is whether it was DW1 who caused that death and whether he did so with malice aforethought. Based on the evidence provided by both parties, there is no doubt that it was DW1 who caused the death of Jamali Mtepa. However, the question remains whether he did so with malice aforethought. For an offence to qualify as murder, the prosecution must prove malice aforethought as provided under section 200 of the Penal Code, which provides; '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 the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; 6
- (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.' In *Said Ally Matola* ©Chumila v. R Criminal Appeal No. 129 of 2005) TZCA 220 (5 July 2007), where the Apex Court cited its own decision in *Enock Kipela v. R* (Criminal Appeal No. 50 of 1994) [1999] TZCA 7 (10 June 1999) outlined factors for ascertaining malice aforethought, it held; ' Usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type 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 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.' See also the case of *Chrissant John v R* (Criminal Appeal 313 of 2015) [2016] (24 February 2016). 7 According to what has been stated in the cited cases above, to constitute malice aforethought, the court must consider factors such as the nature of the weapon used, the severity of the injuries, the part of the body targeted, and whether the act was premeditated or carried out with reckless disregard for human life. In the instant case DW1 claimed that on a fateful day he was returning from a disco when he saw a torchlight near his residence. Believing that someone was attempting to steal from him, he approached cautiously and, without any prior verification, attacked the person with a stone. He later admitted to striking the deceased twice, using both a large and a small stone. The force of these blows caused the deceased to lose strength. DW1 further admitted to cutting the deceased on the neck out of anger after realising that he was the person who had allegedly been stealing from him. Additionally, he inflicted another wound on the thigh to prevent the deceased from speaking. Looking at this evidence DW1 did not merely strike the deceased once in an act of spontaneous reaction. Instead, he hit him with two stones, one of which was large enough to cause significant harm. After incapacitating the deceased, he proceeded to inflict further injuries, including a deliberate cut on the neck. The act of targeting the neck, a vital part of the body, demonstrates an intention to cause

grievous harm or death. The claim that he acted out of anger does not negate the presence of malice aforethought. The law does not require an extended period of premeditation; even a momentary decision to cause fatal harm can satisfy the legal threshold. DW1's actions after the attack further indicate a consciousness of guilt. He did not seek help for the injured person but instead left the scene and was later apprehended after villagers informed him that he had killed the deceased. His statement to the PW2 and his defence confirm that he took the law into his own hands, acting in retaliation for previous thefts he had never reported. This suggests that his actions were not merely defensive but punitive in nature. I am aware that the accused should not be convicted based on the weakness of his defence but rather on the strength of the prosecution's case. This led me to question whether DW1's defence could be considered weak. 9 A defence is regarded as weak if it fails to cast reasonable doubt on the prosecution's case, is contradictory or unreliable, does not rebut malice aforethought, and fails to explain key factors. In this case, DW1 admitted to attacking the deceased, targeting vital body parts such as the head and neck, and acting out of anger. His own account did not negate intent but instead reinforced the prosecution's argument that he acted with malice aforethought. Nevertheless, upon carefully analyzing DW1's defence, it appears that he sought to rely on two possible defences. First, he attempted to justify his actions as a defence of property, asserting that he believed the deceased was the person who had been stealing from him. Second, he implied that his actions were driven by anger, which suggests an attempt to rely on the defence of provocation. However, both defences fail to rebut the prosecution's case. Regarding the defence of property, DW1 did not establish that the deceased had actually taken his property and was in the process of escaping with it at the time of the attack. A valid defence of property under the law requires that force used to reclaim stolen property must be reasonable and proportionate to the 10 threat posed. More critically, the law does not permit the use of excessive force, especially lethal force, in defending property alone. Furthermore, DW1's own testimony undermines any justification for his actions. He admitted that after striking the deceased with stones, rendering him weak and defenceless, he proceeded to slit his throat with a knife. By his own admission, he stated that he did so with the intent to silence the deceased. This goes beyond mere defence of property and demonstrates an intention to cause death or grievous harm, which supports the prosecution's case of malice aforethought. As for the defence of provocation, section 203 of the Penal Code provides that provocation must be sudden and must cause a loss of self-control in the accused. However, DW1 did not establish that he was subjected to any immediate provocation by the deceased at the time of the attack. Instead, his actions appear premeditated, as he attacked the deceased out of accumulated frustration from previous thefts, rather than in response to an immediate provocation. Considering these factors, I find that the two defences raised by DW1 failed to cast any reasonable doubt on the essential elements of murder, particularly the DW1's intent and the unlawfulness of the killing. 11 Consequently, this analysis leads me to conclude that his defence is not weak at all but rather does not exonerate him from criminal liability. In light of the evidence, the court finds that DW1 acted with malice aforethought. His deliberate and repeated attacks on the deceased,

particularly the fatal cut to the neck, establish the necessary intent. The prosecution has sufficiently proved the elements of murder beyond a reasonable doubt, and the defence advanced by the accused does not exonerate him from liability. Accordingly, Hamisi Peter Sued@Mkwidu is found guilty of murder contrary to section 196 and 197 of the Penal Code [Cap 16 R.E 2022] and hereby convicted as charged. It is so ordered. Dated at Mtwara this 13th day of March, 2025. 12 SENTENCE Upon convicting Hamisi Peter Sued @ Mkwidu, the next step is sentencing. Unlike other offences where the court has discretion to impose a lesser penalty, in this instance, the law mandates a specific punishment. My hands are therefore tied, as I lack the power to impose any alternative sentence other than the one prescribed under section 197 of the Penal Code. Accordingly, I hereby sentence Hamisi Peter Sued @ Mkwidu to suffer death by hanging until he die. < Judge 13/3/2025 Order The three stones and one Knife, which were used as weapons in Judge 13/3/2025 Court: Right of appeal fuhyexplained as per section 323 of the Criminal it - Procedure Act, Cap 20 R.E 2022 13 Court: Judgment delivered today in the presence of Mr. Mr. Jordan Odhiambo, Mr. Hillary Hamza and Mr. Majaliwa Sebastian State Attorneys for the Republic, Mr. Emanuel Ngogi Advocate for the accused and the accused M.B Mpaze Judge 13/3/2025 14

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