

**IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU
CRIMINAL CASE NO 43 OF 2022**

PUBLIC PROSECUTION

VS

AHMED SALUM ALI

JUDGEMENT OF THE COURT

10/09/2024 & 10/10/2024

KAZI, J.:

On 11th April 2022, around 5 pm, Mambo Juma Sariboko (the deceased) and his friend, one Mkocho Daniel Mkocho, were apprehended by the accused and other unknown people at the farm of the accused, located at Mkanyageni Kitundu, in the West 'A' District of the West Urban Region, Unguja, for, allegedly, stealing shokishoki (rambutan) therein. It was alleged that the accused and other unknown people (attackers) assaulted the deceased and his friends with sticks after apprehending them.

After being assaulted, the deceased and Mkocho was sent by the attackers to Mwera Police Station. As the deceased was injured due to the beatings inflicted on several parts of his body, he was later sent to Mnazimmoja Hospital by the attackers, where he succumbed to death soon after being admitted. Following the death of Mambo Juma Sariboko, the accused was brought to this Court, facing the charge of

murdering the deceased contrary to sections 179 and 180 of the **Penal Act**, No. 06 of 2018 (the Penal Act).

In this case, the prosecution was represented by Mr. Anuar Saadun and Mr. Suleiman Yusuf Ali, learned State Attorneys, whereas the accused was represented by Mr. Jambia S. Jambia, Ms. Asha Said and Alexander Joel, learned Advocates.

As this case involved an offence that attracts capital punishment, it was conducted with the aid of three Assessors: Mr. Claud John Majaliwa, Mr. Iddi Ali Makame, and Ms. Sania Ali Said. At the closure of the case from both sides, all assessors had an opportunity to air their opinions as per the requirement of Section 268 (1) of the **Criminal Procedure Act**, No. 7 of 2018 (the CPA).

I sincerely thank the Legal Practitioners from both sides and the Lady and Gentlemen Assessors for their tireless contributions during the trial, which smoothed the determination of this case.

In a mission to prove the case against the accused person, the prosecution called to testify nine (9) witnesses, namely, Riziki Omar Othman (PW1), Mkocho Daniel Mkocho (PW2), Said Mambo Mabiti (PW3), Nahoda Sariboko Mabiti (PW4), F 9241 Sargent Haji (PW5), E 2265 Sargent Amani (PW6), F 9283 Detective Sargent Ame (PW7), F 1980 Detective Sargent Bakari (PW8), and Wardat Atai Masoud (PW9). In addition, they tendered two (2) exhibits, a pathologist's report, which was admitted as Exhibit P2, and six photographs of the deceased body taken soon before and after the postmortem was tentatively admitted as Exhibit P1 with a judicial notice that their admissibility will be considered

in this judgement due to the objection raised by the defence advocates on their admissibility.

On the defence side, the accused, who testified under oath as DW1, was a lone witness. No exhibit was tendered on his part.

Let me start by determining the objection Mr Jambia raised on the admissibility of six photographs of the deceased body (exhibit P1). Mr. Jambia argued that the photos in question are electronic documents and are the product of computer output. He stressed that Section 73 (2) (4) of the **Evidence Act**, 2016 (the EA) provides for the procedure for admitting electronic evidence. He contended that one of the conditions is that before tendering such an exhibit, the certificate showing how the document was produced, and its authenticity must be submitted in Court. He argued further that the device used to take photos was not described if it was a camera or a mobile phone. He concluded that exhibit P1 cannot be admitted in Court without a certificate of authenticity.

On the other hand, Mr. Saadun, a learned State Attorney, conceded the objection and left everything to the Court to decide.

From the unopposed submission of Mr. Jambia, the only issue to be determined is whether exhibit P1 can be admitted in evidence. Exhibit P1 are digital photos. Hence, its admission must be made in accordance with section 73 (4) of the EA. Section 73 (4) provides as follows:

"(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following:

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; or

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) of this section relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities, whichever is appropriate, shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

It is essential to state that the law sets the above conditions to ensure the source of the electronic evidence and its authenticity. In this regard the Supreme Court of India in **Anvar P.V vs P. K Basheer and others**, AIR 2015 SC 180: (2014) 10 SCC 473 had this to say:

"All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records be more susceptible to tampering, alteration, transposition, excision, etc. Without such safeguards, the whole

trial based on proof of electronic records can lead to travesty of justice."

In this matter, as Mr Jambia argued, no certificate was tendered in terms of the quoted supra provision prior to PW7's prayers to tender exhibit P1. Therefore, Mr. Jambia's objection has merit, and exhibit P1 is inadmissible, and they will not be considered in this judgment.

Back to the merit of the case. The prosecution evidence revealed that one eyewitness witnessed the incident. Mkocho Daniel Mkocho who testified as PW2, in his testimony, stated that on 11/04/2022, when he was at his home in Mkanyageni, the deceased, who was his friend, visited him. He said the deceased asked him to accompany him to his (deceased) farm to harvest madafu (young coconut). PW2 testified further that they went to the deceased farm, and while they were on their way, they took a short way, which passed through the shokishoki's farm (rambutan's farm), which was owned by a person known as Damiano. When passing at Damiano's farm, the deceased harvested three shokishoki and ate them. At the time the deceased harvested the shokishoki, the farm's security guard saw them and raised the alarm by shouting 'thief thief', whereby three people appeared and started beating them. PW2 contended that the owner of the shokishoki, who rented the farm, assaulted them. He testified that the attacker used sticks to assault them and that he was tied up with the ropes when beaten. It was PW2 evidence that after the deceased was heavily beaten and became in bad shape, the attacker picked Shokishoki and placed them into the deceased bag so it could be seen that he stole them. PW2 averred further that later, the attacker called the car, its model was 'Carry', and took them to Mwera Police Station. PW2 went on testifying

that the Police at Mwera refused to receive the deceased due to his condition and asked the attacker to send him to the hospital. PW2 stated that on the following day, he heard that Mambo passed away. During his testimony, PW2 identified the accused as among the people who attacked him and the deceased.

When cross-examined by Ms. Said, learned advocate, PW2 stated that they were beaten by the clubs to their body and head. When cross-examined by Mr Jambia, the learned advocate, he stated that the offenders took sticks from the farm, and he saw the accused beating the deceased with the club.

A police officer, E 2265 Surgent Amani (PW6), who was stationed at Mwera Police Station as CRO in charge, told the Court that on 11/04/2022 at about 6:45 pm he received two theft suspects who were sent to the station by five people with a car known as Carry. PW6 testified that one of the suspects was unable to stand and was in pain. He contended further that he took a statement from the complainant, Ahmed (accused), and issued a PF3 for sending a sick suspect to Mnazimmoja Hospital.

Riziki Omar Othman (PW1) is the deceased's sister-in-law. In her testimony, she averred that on the material date, at about 6 pm, when she got home from the farm, she heard people talking that the unknown people beat the deceased after stealing shokishoki. After having heard the news, she informed the deceased wife about the devastating story, whereby at about 8:30 pm, she went with the deceased wife to Mnazimmoja Hospital, where they were informed that Mambo passed away. Having heard that, they decided to return home.

PW1 testified further that when reaching home, she received a video clip on his phone through WhatsApp, which shows the deceased was beaten by clubs by people she doesn't recognize. She stated further that later, at about 12:00 am, she showed and sent the said video to the relative of her husband, who went to her home to find out about the deceased.

The deceased uncle, Said Sariboko Mabiti (PW3), also heard about the incident on the material date at about 5:30 pm. He was at Mkanyageni Street heading home from his job when he heard that their son Mambo was attacked. After receiving the news, he called his relative Nahoda Sariboko Mabiti (PW4) and informed him about the attack. As the period of the incident was a month of Ramadhan, PW3 was advised by PW4 to make a follow-up of the incident after they finish to break their fast. After breaking the fast, he went with PW4 to Mnazimmoja Hospital, where they were informed that Mambo had passed away. While at Mnazimmoja, PW3 and PW4 identified the body of the deceased.

PW4's testimony was like the testimony of PW3, with the exception that PW4, in addition, told the Court he was alone with a doctor at the mortuary when identifying the deceased body. He stated that he saw a big wound on the back of the deceased head. He also saw several wounds from the deceased body. PW4 also testified that when they returned home, he met PW1, who informed him that she had a video clip showing the deceased was attacked. Therefore, he asked PW1 to send the said video clip to his phone, and she did. On the following day, at about 8:00 am, PW4 went to Mwera police station and showed them the video clip of the incident. He stated further that at the police station, he met the guy who was sitting on the bench and recognized him as

he was confronted by the said person, named Ahmed (accused person) and his partner with two other people who were introduced to him as the security guards of shokishoki's farm, two days before the day of the incident. He claimed that the trio reported to him that his son Mambo was picking their shokishoki. PW4 then stated that he advised them to arrest Mambo and send him to the police station if he did it again. But, he said, the trio left while uttering "tutakachomfanya sisi tunajua" meaning "we know what we will do to him"

The cause of the deceased death was revealed by Wardat Attai Masoud (PW9). She testified that the cause of the death of the deceased was a subdural hematoma, which was caused by a head being beaten by heavy objects. In her testimony, PW9 tendered a postmortem report (**Exhibit P2**), which shows, among other things, that the deceased head had internal hematomas on the right temporal bone with linear, on the left parietal part with linear, and a big hematoma on the left occipital area.

PW7, F 9283, Detective Surgent Ame is a police officer and photographer within the Urban West Region. In his testimony, he told the Court that on 12/04/2022 at about 11:00 pm, he was ordered by his boss to go to the mortuary in Mnazimmoja Hospital to take photos of the deceased for investigation. He went to Mnazimmoja and took six pictures of the deceased. He took three photos before the postmortem and another three photos he took after the postmortem. Later, he returned to his office to process the images; he marked each of them with a letter starting with A, and he appended his signature to them and the date they were taken.

PW5, F. 9241 Surgent Haji, a police officer and a storekeeper at Bububu Police Station, at his testimony, he told the Court that on 12/04/2022 he received a mobile phone, model Samsung, red and silver in colour from F. 1980 Detective Surgent Bakari (PW8) for safe custody. He stated that on 15/04/2022, PW8 took the phone, sent it to the forensic investigation bureau, and returned it to him on 10/05/2022.

This case was investigated by PW8, a police officer working at Bububu Police Station. In his testimony, he narrated the steps he took to investigate this matter after being assigned to do it on 12/04/2022. He stated that after receiving the file, he visited a scene of the crime, collected statements from the witnesses, witnessed a postmortem examination of the deceased body and took the phone, which had the video clip of the incident, to the cybercrimes department of the Police Headquarters. He also collected a postmortem report and a PF3 Form issued by Mwera Police Station. PW8 then told the Court that he was convinced the accused committed the crime after reading Daniel Mkocho's and Doctor's statements.

In the defence, the accused person, who testified on oath as DW1, denied committing a crime. He testified that on 11/04/2022 at about 5 pm, when he was aboard the Dala Dala (passenger van) in Bububu Msikiti Mdogo's area, he received a call from one of his farm's security persons who informed him that they caught a thief at his farm located in Mbuzini. He was, therefore, asked to send a car to his farm. DW1 testified further that he asked his security to find a vehicle, but they also asked him to be there. Therefore, he decided to disembark from the daladala; he took a bodaboda (passenger motorcycle) and went to his farm. He contended that, when arriving at his farm, he saw a crowd of

people, including his security guards, surrounding a car (model Carry). He testified that he asked what happened and was shown thieves; one thief was carrying a viroba (sack) of shokishoki, and another was lying on the ground. He stated that the thief who had viroba was Mkocho Daniel Mkocho (PW2), and the one lying on the ground was Mambo Juma Sariboko (the deceased). He contended that having seen them, he directed his security guards to take the said thieves to the police station. He added that, on their arrival at the police station, he introduced himself and handed the thieves to the police. At the said time, he claimed, the deceased stayed outside the station, claiming he could not get inside. Therefore, the police went outside and forced the deceased to enter the police station, but the deceased refused. Then the police took a metal stick and started beating him. Later, as the deceased still resisted, the Police issued a PF3, and they were asked to send him to the hospital. It was DW1 testimony that the deceased was treated, but around 10 pm, they were told by the Doctor that they had to be prepared as the deceased would be admitted. DW1 told the Court that they then decided to go back to Mwera police station, where they were asked to report on the following day to file the case. He testified that when he went to the police station on the following day, 12/04/2022, at about 7:30 am, he was apprehended and sent to Bububu Police Station.

After the closure of the defence case, I delivered the summary of the evidence adduced by both sides to the Lady and Gentlemen Assessors whereby I guided them on the law that establishing the offence of murder, the nature of evidence adduced from both sides and the law governing it. Moreover, I guided them on how malice aforethought is

deemed to be established and the settled principle regarding killing by mob justice.

In their opinion, the Lady and Gentlemen assessors unanimously opined that the accused did not commit the offence of murder. They opined that the accused did not intend to kill as he would not send the deceased to the police and hospital if he intended to kill him. In addition, it was their opinion that the accused did not kill the deceased because the deceased was a victim of a mob justice.

The pertinent issue that needs my determination is whether the prosecution side has proved this case beyond a reasonable doubt. It is instructive that for the offence of murder, which the accused is charged, the prosecution is required to prove three ingredients that can be extracted from section 179 of the Penal Act that, first; there is a person who died an unnatural death, second; the unlawful act of the accused caused the death, and third; the accused causes the death with malice aforethought.

I will start with the first ingredient, whether the deceased, Mambo Juma Sarboko, died an unnatural death. From the evidence, the fact that the deceased died on 11/04/2022 was not contested. Moreover, the uncontested evidence of PW9 and Exhibit P2 establishes that the deceased died an unnatural death due to the head injury caused by the beating inflicted on his head that led to subdural hematoma. Therefore, undoubted, the answer to whether the deceased died unnatural death is in affirmative.

The second ingredient to be considered is whether the unlawful act of the accused caused the death of the deceased. As I have noted earlier,

the evidence tendered by the prosecution side premises on direct evidence of PW2. PW2 narrated the tribulation they had gone through with the deceased at the farm of the accused when caught stealing shokishoki.

PW2 in his unchallenged evidence elaborated clearly that accused was among the person who attacked him and the deceased. The evidence also shows that accused was at the scene of crime on the material date and time. It is common ground that it was the accused person, with other unknown people, who took the deceased to the police station soon after he had been heavily beaten. The accused, in his evidence, claimed that he was not at the crime scene when the deceased was attacked, and that the deceased was assaulted by the police at Mwera Police Station, after refusing to enter the station. However, his evidence contradicts his statement recorded at the Bububu Police Station on 14/04/2022 and filed in Court in terms of section 227 (1) of the CPA. In his statement taken from the police station, the accused stated that he was at his farm when PW2 and the deceased was caught stealing. He did not state in his statement that the deceased was assaulted by the police at the police station. It is clear that the accused story on his whereabouts when the deceased was attacked and the claim that the police assaulted the deceased was a made-up story. He was just trying to save his own skin. Therefore, I'm not convinced by the accused story, which did not raise any doubt that could impeach the weight of the prosecution evidence.

Based on the testimony of PW2, whom I find to be a truthful and credible witness, there is no doubt that the accused participated, along with other unknown persons, in beating up the deceased with sticks and

clubs. It is, therefore, the unlawful act of the accused person that caused the death of the deceased.

The above being determined positively, the last question that I will now address is whether the accused caused the death of the deceased with malice aforethought. The term malice aforethought refers to the premeditated or deliberate nature of the act, showing that the accused planned or intended to kill someone, See; Section 181 of the Penal Act. Therefore, to establish malice forethought, the Court must determine all circumstances leading to the deceased's demise. This can be considered by looking at several factors based on the accused person's act, omission or conduct before, during and after the incident.

In the present case, the deceased was assaulted with sticks and clubs after being caught stealing shokishoki. He died due to head injuries that led to subdural hematoma. The unchallenged evidence adduced by the prosecution side revealed that the deceased was attacked by several people, including the accused person, who responded to the alarm raised by the accused's farm watchman. Thus, I have no doubt that the deceased was a victim of mob justice. It is settled principle of the law that killing by mob justice if established beyond reasonable doubt, it may amount to murder. The Court of Appeal in **Enock Kipela vs The Republic** (Criminal Appeal 150 of 1994) [1999] TZCA 9 (10 June 1999) when addressing the issue of killing by mob justice stated as follows: -

"Depending upon the particular facts of the case, an attack in the course of administering "mob justice" which results in the death of the victim may, under the law of this country,

constitute murder. Provided common intention existed, it would not matter who inflicted the fatal wound or wounds"

Therefore, the circumstances of mob justice that may lead to murder may, *inter alia*, include the common intention of the attacker, infliction of fatal wounds, prolonged beating and any utterances accompanying the attack that indicate an intention to kill. In this case, I haven't found any piece of evidence which shows that accused and his fellow attacker had common intention of killing the deceased. In his testimony, PW2 told the Court that the accused and his companion picked from the farm sticks they used in attacking them soon after the two were caught stealing. Moreover, the evidence did not establish if there were any prolonged beating or any circumstances that indicated an intention to kill, to the contrary, the accused and other attacker, immediately after the incident they called the car and sent the deceased and PW2 to Mwera Police Station and lodged a complaint against them for stealing shokishoki. It was also the accused and his companion who later sent the deceased to Mnazimmoja Hospital so that he could be treated. That is not all, the evidence also revealed that even on the following day, the accused went to Mwera Police Station to follow up on his reported theft case and to provide his statement regarding the same against the deceased. At the time, he was not aware that the deceased, whom, on the previous day, left him admitted to hospital, had passed away. In general, the conduct of the accused person shows that he did not premeditate the demise of the deceased. For a person who intends to kill someone, he will not behave as the accused does. I am of the settled mind, therefore, the evidence adduced by the prosecution side failed to prove the aspect of malice aforethought. As such, I agree with

the lady and gentlemen assessors that the accused did not commit the offence of murder.

In the event and for the abovementioned reasons, I am satisfied that the prosecution side has failed to prove the offence of murder to the required standard against the accused person. The accused is, therefore, acquitted accordingly from the offence of murder indicted against him under sections 179 and 180 of the Penal Act. On the flip side, in terms of section 275 (2) of the CPA, the accused is found guilty of, and convicted for, the offence of manslaughter contrary to Section 177 (1) of the Penal Act.

It is so ordered.

Dated at Tuguu, Zanzibar this 10th day of October 2024.



G. J. KAZI
JUDGE
10/10/2024