**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: LUBUVA, J.A., NSEKELA, J.A., And MSOFFE, J.A.)**

**CRIMINAL APPEAL NO. 62 OF 1999**

**MODESTUS RAPHAEL MBAVUMBILI..... APPELLANT**
**VERSUS**
**THE REPUBLIC..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Morogoro)**

**(Manento, J.)**

**dated the 29th day of April, 1999**
**in**
**Criminal Sessions Case No. 6 of 1996**
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**JUDGMENT OF THE COURT**

## LUBUVA, J.A.:

This is an appeal against the decision of the High Court (Manento, J.) sitting at Morogoro in Criminal Sessions Case No. 6 of 1996. The appellant, Modestus Raphael Mbavumbili, was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code. He was sentenced to death. Dissatisfied, this appeal has been instituted.

Briefly stated, the facts giving rise to the case are that the deceased, Carolina Mbavumbili, was the daughter of the appellant and that Oliva Funguni (PW1), the wife of the appellant, was the mother of the deceased. The appellant and his family including the deceased, lived at Newange Village in Ulanga District, Morogoro Region. The case for the prosecution was that on the day of incident, at about 1 p.m.,

the deceased went to fetch water from the well within the village. For some reason, she delayed to return home and the appellant became impatient, he followed and met her on the way. The appellant beat and admonished the deceased not to delay when sent by the parents on such errand. The appellant went his way until late in the evening when at about 8.30 p.m. he returned home calling out for Carolina the deceased, to open the door for him. The deceased opened the door and the appellant entered. He asked the deceased who her father was, and the deceased replied that the appellant was. The appellant denied that he was the father of the deceased, he went out of the house, picked a stick with which he severely beat the deceased burning her private parts with a fire brand. The deceased died from the injuries. The appellant was arrested and charged with the murder of the deceased.

At the trial, the appellant's defence was that he did not remember anything connected with the death of the deceased. This, he said was due to the fact that he had been drinking the local brew commonly known as "komoni" for a long time from about 2 p.m. until 8.30 p.m. He only remembered the time the deceased came late earlier in the day when she was sent to fetch water. The following morning, he was informed by his wife (PW1) that the deceased had died. Upon consideration of the whole case the learned trial judge was satisfied that the appellant killed the deceased with malice aforethought. The judge held that the defence of drunkenness could not be sustained because the appellant knew what he was doing. Consequently, the

defence of drunkenness was rejected.

Before us in this appeal, the appellant was represented by Mr. Mhango, learned counsel, and Mrs. Kabisa, learned State Attorney, appeared for the respondent Republic. Mr. Mhango filed the following grounds of appeal:

1. That the learned judge erred in law and in fact in convicting the appellant by relying on evidence which is not on record;

2. That the learned judge misdirected himself in law and in fact in holding that the appellant had beaten the deceased because he was opposed to the deceased going to Europe for education.

3. That the learned judge misdirected himself in law and in fact in that he failed to consider that evidence on record did not show the appellant had formed any intention to kill the deceased.

4. That the conviction for murder is against the weight of evidence on record.

Mr. Mhango opted to argue these grounds together. The essence

of his submission was that the trial judge erred in law in holding that the appellant had intended to kill the deceased. In convicting the appellant, the trial judge relied on the evidence which was not on record. For instance, the finding that the appellant had gone to drink alcohol in order to get the courage to commit the offence of murder and that the appellant burnt the deceased is not borne out from the evidence of Oliva Fungusi (PW1). Had the trial judge properly evaluated the evidence on record, he would have come to the finding that the appellant was drunk and that by reason of intoxication did not know what he was doing at the time of the incident. Before making any evaluation of the evidence, in an apparent biased manner the trial judge had already found that the appellant mercilessly beat up the deceased. Had the trial judge properly directed himself and the assessors on the evidence, he would have found that the defence of intoxication was available to the appellant in terms of the provision s of section 14 (4) of the Penal Code. On the evidence, the appellant should have been found guilty of the lesser offence of manslaughter.

Mrs. Kabisa, learned State Attorney, vehemently countered these submissions. She maintained that the appellant’s intention to commit the offence can be inferred from his conduct prior and after commission of the offence. In this case, she said the conduct of the appellant when the offence was committed shows that he knew what he was doing. The learned State Attorney further submitted that after the deceased had opened the door and the appellant’s entry to the house, he asked the deceased who her father was. Upon her reply

that he, the appellant was, the appellant retorted denying that he was her father because he had learnt that she (deceased) would be going to Europe for studies. Thereafter the appellant went out to collect a stick with which he beat up the deceased. This, Mrs. Kabisa stressed, was not the conduct of an intoxicated person within the meaning of the provisions of section 14 of the Penal Code. She urged that the defence of intoxication was properly rejected.

The determination of this appeal turns on the issue whether the defence of intoxication was available to the appellant. The defence of intoxication in a criminal charge is provided for under section 14 (4) of the Penal Code. It provides that:

> 14. (4) Intoxication shall be taken into account for purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

To start with, in this case it is apparent that the defence of intoxication did not feature at all at the commencement of the trial. From the record, when the preliminary hearing was conducted on 24.4.1997, one of the matters not in dispute was that the accused person beat the deceased after returning home late from the well as a corrective measure. Otherwise, intoxication was not raised as a defence when the proceedings were commenced. If the defence based

on intoxication was anticipated, ordinarily, it would have been indicated at the stage of preliminary hearing. There is therefore merit in the submission by Mrs. Kabisa, learned State Attorney, that the defence of intoxication was raised as an afterthought.

On the other hand, even as an afterthought if the defence was accepted, what was the evidence upon which the defence of intoxication could be sustained. As said before, Oliva Fungusi (PW1), the wife of the appellant, was the only eye witness to the incident leading to the death of the deceased, her child. According to her, when the appellant returned home calling out for the deceased to open the door, and started beating her (deceased), he did not appear to be drunk. Furthermore, the evidence of PW1 also shows that the appellant was aware of what he was doing. For instance, he asked the deceased who her father was and upon her reply that he was, the appellant not only denied to be the father, but also gave reasons. This, we are with respect, in agreement with the State Attorney that it does not accord with the behaviour and conduct of a person who is so drunk as not to know the nature and quality of his action.

It hardly needs to be over emphasized that it is trite principle of law under section 14 (1) of the Penal Code that intoxication shall not constitute a defence to a criminal charge unless it is shown that by reason of intoxication, the appellant did not at the time of the offence know what he was doing and that he was incapable of forming the intent to kill. On a number of occasions this Court has stated this

position of the law. See for instance, **Athuman Rashid v. Republic,** Criminal Appeal No. 138 of 1994 (unreported). In the instant case, the evidence of PW1 which the trial court found truthful, shows that the appellant at the time of the incident was consciously aware of what he was doing.

Furthermore, if as seen from the agreed matters during the preliminary hearing that the appellant beat the deceased as a corrective measure, this course of action is incompatible with the conduct of a person who is drunk. It is inconceivable that a person who is so drunk as to be incapable of forming the intention to kill, would be in a position to think rationally about corrective measures to be taken against the deceased child. On the contrary, we think this fact as accepted at the preliminary proceedings, was suggestive of a person with a sound state of mind bent on punishing his child with a view to correct her behaviour. On the agreed undisputed matters, we are increasingly satisfied that the defence of intoxication was belatedly raised as an afterthought. It was not available to the appellant.

In the circumstances, we are of the settled view that the appellant was capable of forming the intention to kill or cause grievous bodily harm to the deceased. He killed with malice aforethought. In the event, and with respect to Mr. Mhango, learned counsel for the appellant, we do not accept his submission that the trial judge erred in rejecting the defence of intoxication. It was properly rejected.

All in all therefore, we find no merit in the appeal which is

dismissed in its entirety.

DATED at DAR ES SALAAM this 22nd day of August, 2005.

D.Z. LUBUVA

**JUSTICE OF APPEAL**

H.R. NSEKELA
**JUSTICE OF APPEAL**

J.H. MSOFFE
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

( S.M. RUMANYIKA )
**DEPUTY REGISTRAR**

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**CRIMINAL APPEAL NO. 62 OF 1999**

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**dated the 29th day of April, 1999**
**in**
**Criminal Sessions Case No. 6 of 1996**

**Between**

**The Republic..... Prosecutor**
**Versus**
**Modestus Raphael Mbavumbili..... Accused**

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**In Court this 1st day of September, 2005**

**Before: The Honourable Mr. Justice D.Z. Lubuva, Justice of Appeal**
**The Honourable Mr. Justice H.R. Nsekela, Justice of Appeal**
**And The Honourable Mr. Justice J.H. Msoffe, Justice of Appeal**

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THIS APPEAL coming for hearing on the 9th day of August, 2005 in the presence of the Appellant AND UPON HEARING Mr. Mhango, Counsel for the Appellant and Mrs. Kabisa, State Attorney for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for judgment this day;

IT IS ORDERED that the appeal be and is hereby dismissed in its entirety.

DATED this 1st day of September, 2005.

Extracted on the 1st day of September, 2005.

( S.M. RUMANYIKA )

**DEPUTY REGISTRAR**