IN THE HIGH COURT OF TANZANIA

AT MAFINGA

· ORIGINAL JURISDICTION

(Iringa Registry)

CRIMINAL SESSION CASE NO. 3 OF 2006

THE REPUBLIC

VERSUS

BISEGE MWASOMOLA

JUDGMENT

WEREMA, J.

This is rather a technical matter involving the offence of manslaughter. As a criminal offence, it is governed by principles of criminal law. The offence of manslaughter is not a strict liability offence and as such recklessness or knowledge on the part of the accused must be proved as the mens rea of the offence. If the mens rea is not proved or inferred conviction cannot be found. I must also state at this early moment that the standard of proof of culpability in manslaughter is proof beyond reasonable doubt and not the civil standards which are based on the balance of probability. The onus of proof is always on the prosecution and the duty of the accused person is to raise

reasonable doubts on prosecution's evidence. This case is sensitive in that it involved death of younger primary school pupils in what appear to be lack of supervision by teachers. It is likely that sentimental feelings, which are obvious in a human nature, can have an upper hand to infer culpability. That should not happen to courts of law. The facts are as hereunder.

The accused, Bisege Mwasomola, was a Head teacher at Kimala Primary School in Kilolo District Iringa region. It is a school with more than 700 scholars of grades one to seven. These grades are known as standards and are also classified as Classes one to seven. The school goers are pupils but I will refer to them as scholars. On 11 March 2004, the accused announced in a parade of scholars and in the presence of members of teaching staff that on the following day, those in grades 3 to 7 come with utensils such as buckets, baskets, sufurias and bags and that they were required to go and carry sand at a place known as Holowa, a distance of about 6 kilometres from the school. That announcement came after the Head teacher and members of the teaching staff emerged from a meeting where it was agreed that the scholars be used to fetch

sand. There is no denial that the announcement was made and that it was made by the accused person.

From those who testified it would appear that the age group of scholars involved was between 9 years and 15 years. I think, such age group, requires attention and supervision by teachers even if there are prefects among their peers. There is no doubt, and I so hold, that the scholars required not only supervision but care.

The sand was to be used as a building material by masons who were at that time constructing class rooms and a staff room the properties of that lower school. Indeed, in the morning of 12 March 2004 the scholars came at the schools with such utensils. They were numbered and at about 07.15 am left for Holowa It is estimated that more than 500 scholars left for Holowa. This number is not merely numerical but it shows that supervision and care was required to manage them regard being to their age. According to the defence, the instructions to the scholars were to carry sand which was dug by the parents on the previous day. It was not to enter into the gully/gorge to dig for the sand. But in my

opinion, whether the sand was to be fetched or to be dug it does not matter. Either way, supervision was a requirement. The prosecution's version is that when the scholars arrived at the scene they did not find any heap of collected sand as they were told. Be as it may, the scholars are said to have entered into the gully which was about 9ft deep and started to dig sand using sticks. Momentously, the gully collapsed and some scholars were trapped. 8 of the scholars died on the spot and another died as he was being rushed to the dispensary. This happened at about 07.45 a.m.

The accused and Mr Alphonce Nyakunga who was a master on duty on 12 March 2004 were all arrested and charged for the offence of manslaughter. Mr Nyakunga was later discharged after the prosecution filed a **nolle prosequi** in his favour. The accused was charged with the offence of manslaughter of the nine pupils who died on that fateful day. He has pleaded not guilty to the nine counts. The Prosecution called five witnesses while the defence called four including the accused. The substance of the Prosecution evidence is that the accused let the scholars to go to Holowa without an appropriate or

adequate supervision and that those deaths could have been prevented if the accused had provided or ensured adequate supervision and care of the scholars.

It is not disputed that nine scholars of Kimala Primary School died. The post mortem reports on the examination of bodies of the deceased show that the cause of death was **asphyxia** which is lack of oxygen to the lungs leading to suffocation and ultimately to death. The fact of the matter is that the scholars were buried in rubble when they were inside the gorge. It is not disputed that the overhanging earth of the gorge was water logged and could not withstand its own unsupported weight. It not disputed either that the scholars entered into the gorge or were digging sand using sticks. Those facts are not disputed.

I have already said that it is not a dispute that the accused directed scholars to come with utensils and disclosed the purpose for which the utensils were to be used. Initially, except during final address, the prosecution implied that the scholars were not allowed to engage in such tasks. If indeed it was so, then the accused directions and his conduct was misconduct in a

public office. It is so because as a public officer he wilfully neglected to perform his duty and wilfully misconduct himself to such a degree as to amount to an abuse of the public trust without reasonable excuse or justification. Here the point is that if the law, including any of the delegated legislation under the Education Act prohibited the use of scholars in such labour works, then the accused's conduct was a breach of such law. But that would not be the end by itself, the law must be clear as to make the accused aware of the existence of a duty to act or otherwise the prosecution must prove that the accused was subjectively reckless as to the existence of such duty. The test for recklessness applied will be whether in particular circumstances a duty arose at all as well as the conduct of the accused if it did. The test will be subjective test which must be applied both to reckless indifference to the legality of the act or omission and in relation to the consequences of that act or omission. This is a legal issue and a technical one at that. I am not bound by Common Law cases decided by courts in England. However, those decisions have a highly persuasive value in the development of law. In the case of ATTORNEY GENERAL'S

REFERENCE(NO.3/2003) which is reported in [2005]4 ALL.E.R 303 the issue arose in a case where a police officer was acquitted upon charges of manslaughter and misconduct in public office. The facts in that case were that a man was assaulted. He fell on the ground hitting his head. He was taken to hospital where the police officers attended with a view to investigating the assault. He was arrested on the ground of an apprehended breach of the peace. When asked whether the person was fit to be detained, the Doctor treating him agreed. The police took him to the police station in a van. On arrival, though still seated in a position in which he had been placed, he did not respond to the officers. He was placed on the floor in a semi face down position, not the recovery position. His breathing was audibly obstructed and several minutes later he stopped breathing. Attempts on resuscitation failed. He died. The police officers were charged with manslaughter by a conduct amounting to gross negligence and misconduct in a public office. The specific allegations were that the officers had failed to put the man in a better position, had failed to ensure that his airway was clear and had failed to obtain medical

assistance. At the close of the prosecution case the trial judge ruled that there was no evidence which to found a conviction for misconduct in public office on the basis of recklessness. He directed acquittal. The Attorney General referred to the Court of Appeal the question of what were the ingredients of the Common law offence of misconduct in public office and in particular, whether it was necessary for the prosecution to prove bad faith.

On the issue referred to it the Court held that **the test of recklessness applied to the question of whether in a particular circumstances a duty arose at all as well as to the conduct of the accused if it did and the subjective test applied both to reckless indifference to the legality of the act or omission and in relation to the consequences of the act or omission.**

I have carefully considered this decision. I am impressed by it. I think it provides for me an entry point to resolve the riddle in this case.

There is evidence of dissenting opinion from members of the teaching staff objecting to the use of

scholars for that task. Some thought the use of scholars in such tasks was prohibited. The use of the word "prohibited" is in the ordinary sense and not legal sense. I think the issue whether the use of scholars in labour works such as sand fetching can be discerned from a circular letter which was tendered and admitted as **EXH "C"** for the Court. This Circular letter **RAS/IR/E.10/65/101** dated 21 September 1999 addressed to all Head teachers, among others, does not prohibit the use of scholars. This Circular was issued after 10 scholars of Igomtwa Primary School in Mufindi District, Iringa region were buried by landslide when they were digging sand in a gorge for purposes of building a school toilet. In that circular letter, the Heads of School were directed as follows:

1. Wanafunzi wa Shule za Msingi na Sekondari wanawajibika kushiriki kwenye Kazi za Mikono kwa ajili ya Maendeleo ys Shule zao;
2. ...walimu waandae utaratibu mzuri wa kusimamia utekelezaji wa kazi za mikono wanazopangiwa wanafunzi;
3. kamwe wanafunzi wasiachwe peke yao kufanya kazi za nje ya darasa bila usimamizi mzuri wa walimu;

4 wakuu wa shule/walimu wakuu na walimu lazima waainishe kazi ambazo zinaweza kufanywa na wanafunzi bila kuleta au kusababisha athari kwa maisha yao;

5. wakuu wa shule/walimu wakuu na walimu wahakikishe kuwa wamekagua vizuri maeneo ambayo wanafunzi watafanya kazi za nje kabla ya siku ya kazi yenyewe. Hii itasaidia kuweka utaratibu mzuri wa utekelezaji.

6. Kila mara Mkuu wa Shule /Mwalimu Mkuu ashauriane na Bodi/ Kamati ya shule kuhusu utaratibu mzuri wa kuwashirikisha wanafunzi kwenye kazi zinazohusiana na ujenzi wa majengo ya shule. Kwa shule za msingi Serikali ya Kijiji pia wahusishwe. Hii ni kuwafanya wazazi washiriki kwenye kazi ngumu k.m kuchimba mchanga, mawe na wanafunzi wasaidie kubeba;

7. Licha ya kazi za mikono, wakuu wa shule /walimu wakuu wanaagizwa kukagua maeneo yote ya shule na kutambua majengo na maeneo mengine ya hatari ili kuwazuia wanafunzi wasiende huko. Ni vema majengo hayo ya hatari kwa maisha ya watu yakachambuliwa na kutumwa kwenye mamlaka zinazohusika.

There is no doubt from the contents of the circular that the greatest concern of the Regional Education Officer

of Iringa was the safety of a child for which all scholars in the case of Kimala Primary School were. The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection. This requirement is a universal obligation arising from the **International Convention on the Rights of the Child,** a Convention adopted by the United Nations General Assembly resolution 44/25 of 20 November 1989 and which entered into force on the 2 September 1990. Tanzania is a signatory and did according to Article 63 of the Constitution duly ratify it. For ratification alone does not make the Convention part of municipal laws, what the state has done so far after ratification show that the Convention is a higher order, which under international customary law read together with the spirit of our Constitution binds the state and its institutions. For example, Tanzania has continuously submitted to the Committee established under Article 43 of the Convention reports on the measures she has adopted which give effect to the rights recognized by the Convention and progress made to their realization. Further, there is now in the set up of the Executive

ministerial allocation of responsibilities a specific ministry responsible for children. State behaviour in implementing its obligations under a treaty, I think should be taken into account in determining the status of such a treaty in the domestic law, the duality practice of some states like Tanzania, notwithstanding. This is the essence of universality of international human rights standards which such conventions offer and this is the implication to ratification of such conventions.

Whatever decision or interpretation we may take or give on the circular and use of scholars use in manual labour, our primary consideration should be the best interests of the child. That is the minimum standard under which we shall not allow ourselves to descend. I will not traverse the legality or the legal basis of the Circular but I assume it is consistent with the law governing education. I did not benefit from the Bar in this regard but having read the relevant law and regulation thereof I am satisfied that the circular is not **utra vires** the Education Act. My interpretation of the Circular is that it is not prohibitive. The Convention, in Article 29, direct

State Parties to ensure that education of a Child shall be directed to, among other things:

(a) The development of the Child's personality, talents and mental and physical abilities to their fullest potential;

(b) The preparation of the child for responsible life in a free society...

The environment surrounding our scholars requires education for self reliance. This, I think is still the lynch pin of our primary school education as it should be for secondary and tertiary levels. So I do not agree that it was illegal or that the Head teacher was prohibited to use the scholars for the purpose for which they were sent to Holowa. It was regular. That will settle the issue of misconduct to a degree amounting to abuse of the public trust. The accused breached no law.

There are a few contentious and serious issues. The first and most contentious of all is whether the scholars were under supervision while at the gorge on that fateful morning. The second one will be whether the accused was the person to provide that supervision; and the third

would be whether the accused was reckless in the supervision or not supervising the scholars. There are many other side issues connected to the main issues which I will raise in the course of this judgment.

I will be fast in concluding that as the testimonies indicate there were no teachers at the gorge on the morning of 12 March 2004. The accused's explanation is that he detailed teachers to supervise scholars at the gorge on 11 March 2004. One of such teachers was Mr Alphonce Nyakunga. According to **PW1 Telia Maliga** and **PW2 Christina Kisoma** and **PW5 A/Insp Nicolaus** none of the teachers were at the gorge on that morning. This is equally confirmed by the defence in the testimony of **DW3 Corwin Mbelwa** who was in grade seven and a head prefect then. He was not on site but was detailed to supervise safe passage of scholars at the bridge. As there was no accident at the bridge I assume his was a successful implementation of the accused directions. I did not see any serious contention to the accused's explanation in respect to detailing teachers to accompany scholars. I therefore take his version as correct and true.

The defence position is that scholars were not expected to enter into the gorge because the sand was not in the gorge but out of it. They were also expected not to dig or scratch for the sand but to collect sand which was dug by villagers on the previous day. This position is supported by accused and **DW 2 Mrs Mary Ndegela**, a member of the teaching staff at the school; **DW 4 Festo Mtenga, VEO; PW2 Christina Kisoma and PW1 Telia Maliga**. The principle of criminal law is that where there is a situation like the one here the balance of scales must tilt to the benefit of the accused. I therefore hold that the scholars were to collect sand which was dug from the gorge on the previous day. I have already said that this alone did not make supervision redundant. Is it reasonably expected of a child not to wonder in areas of interest to him? We must bear in mind, as I do here, that a child is mentally immature and his mental faculties will not stop to take him to spots that a mature person cannot dare go. Of course chasing hare, birds or venturing into gullies, gorges, hill top, running or chasing each other are common games for a child. A child can only be restrained by a supervisor and in case of scholars, their teachers.

Prefects may do so but for a number of scholars that went to Holowa, it is a mammoth task for prefects. It is not difficult for a reasonable man to see how important it was for special safeguards and care of scholars at the gorge. This special safeguards and care was not provided. **PW2 Christina Kisoma**'s testimony is evidence of lack of this safeguard and care. She testified that **"we arrived at Holowa at about 08.00 we were not accompanied by any teacher including the Head teacher. We found no heap of sand as we were told. Others scholars picked up sticks and started digging. I did not enter into the gorge but I was collecting sand left on the pathway. I was joined by other scholars. The gorge was 9ft deep. We noticed that the gorge was about to collapse. We alerted our peers who were inside the gorge to get out but they ignored us. Immediately the gorge collapsed".**

The warnings by other scholars were ignored. It is possible that there were many and uncoordinated shouts which confused those who were inside. These warnings did not come from prefects and were easily ignored. That is the effect of absence of a leader in a situation like the

one we had at Holowa. According to the witness even those prefects who were around were also mining sand. The unfortunate conclusion is that there was no supervision. The children were left on their own in such a risky area. Though teachers expected that sand was available in a non risk area they were reckless in not accompanying the children to Holowa. I must infer that whoever was responsible for accompanying children to Holowa did not do it. This omission and conduct was nothing but reckless or grossly negligent.

I am thankful to the Bar. Both counsel with the usual zeal and eloquence argued their positions well. The prosecution argued and asked the assessors to find that the accused was reckless, meaning he ought to have foreseen the risks or risk that was facing the pupils at Holowa and that he did not exercise reasonable care in the supervision of the pupils there. The Case of R V Selemani Rashid [1985] T.L.R 95 was cited as an authority to support this position. I must say here that this authority does not make manslaughter a strict liability offence. To the contrary, it seems to me, it requires proof of a state of mind in the commission of manslaughter.

Negligence, like recklessness is a state of mind. As I have shown below, the standard of proof of negligence in a criminal culpability is not at the same rank as proof of negligence is a civil tort. In criminal culpability, the standards are higher as those required to prove any other offence. In the proper context, the case does not advance the argument made by Mr Mmbando, the Learned State Attorney. This case as both sides have shown, and as I have pointed earlier, is centred on the mental element or mens rea known as recklessness. Mr Onesmo Francis, the Learned Advocate for the defence was so kind to provide his written submissions, which course should be encouraged. In his submissions, which he eloquently expanded also touched on recklessness as a fundamental issue here. He cited a paragraph in Watkin L.J speech in West London Coroner, ex-parte Gray [1988] Q.B 467 for which I am grateful. That speech defines recklessness and set a test that should apply to it. It is one of the cases that provide a historical perspective of recklessness in England. But there the matter is statutory unlike the way it is in our own jurisdiction.

I invited the honourable Assessors to determine whether even if the accused did not intend injury or death of the pupils, he had foreseen that sending them to Holowa unattended might have caused injury or death. They dutifully returned a verdict of not guilty in favour of the accused. I commend them for their time and concentration. I am not bound by their decision but they have spoken on an issue of fact. The culpability of the accused on the charge facing him is thus negated by the Assessors.

On the basis of an old English case, ANDREWS V DPP (1937) 2 ALL.ER 552 a high degree of negligence such the one I see here or indifference to the risk that faced scholars, would justify conviction for manslaughter. That was Lord Atkin's judgment. At the time, the doctrine of constructive manslaughter whereby death resulting from unlawful act, whether intrinsically likely to injure or not, was manslaughter. But development of the law appears to have overturned this thinking. R V LOWE (1973) 57 Cr. App. 365 appears to have given the doctrine a *coup de grace*. This omission can support a charge for the offence of manslaughter if it can be proved

that the accused's recklessness involved foresight of possible consequences of the omission. I think inspite of the coup de grace, Lord Atkin's judgment is good law where it guides that negligence in civil law of tort should not be confused with the concept of recklessness which is a common law concept in mens rea in criminal law. This is the central theme of this case. Lord Diplock's speech in R V SHEPPARD [1980] 3 ALL.E.R 899 has impression on Lord Atkin preposition and I think it is relevant here. He stated eloquently that:

"The concept of a reasonable man as providing the standard by which liability of real persons for their actual conduct is to be determined is a concept of civil law, particularly in relation to the tort of negligence, the obstruction in criminal law of conformity with the notional conduct of the reasonable man as relevant to criminal liability, though not known, is exceptional and should not be extended. If failure to use the hypothetical power of observation, ratiocination and foresight of consequences possessed by this admirable but purely exemplar is to constitute an ingredient of a

criminal offence it must surely form part not of the actus reus but of mens rea".

Let me say the obvious that recklessness is a state of mind of the accused. Intention, recklessness and knowledge are the basis of liability in criminal law. They all fall under the mens rea window. All of them will require proof. Recklessness postulates foresight of consequences and requires either an actual intention to do the particular kind of harm that was actually or in fact done or reckless indifference whether the harm could occur or not. It is obvious that it is neither limited to, nor does it require, any ill-will or bad faith towards the person injured. Common law cases are many on this point, but the old case of R V CUNNINGHAM [1957]2 ALL.E.R 412 is also worthy reading for an historical perspective. It may help to decide as a matter of fact whether, even if the accused did not intend injury or death of the scholars, he foresaw that sending more than 500 scholars unattended might have caused injury to the pupils.

The accused explanation was that he detailed a teacher on duty and other teachers to accompany pupils to Holowa. That piece of evidence has not been

contradicted. What the accused is saying is that he exercised reasonable care befitting a Head teacher to put down structures of administration and supervision of pupils while they were proceeding to and while at Holowa. His instructions according to the evidence were not followed by his fellow teachers. The prosecution did not give evidence to show that the accused did not give such instructions. Each of those teachers had a duty of care to the scholars and the deceased scholars in particular. A charge may stand if it is proved that they did not exercise that duty as it seems here. This amounted to a wilful neglect of children, not by the accused but by those teachers who were instructed by the accused to accompany the scholars to Holowa and who are not in the dock. I did not see evidence which indicated that the accused knew that his instructions would not be honoured by teachers he had detailed. None of them had demonstrated such a degree of administrative insubordination in public when the announcement was made. Neither did or do I see a postulation of foresight consequences that a land slide or the gorge would likely collapse on the part of the young teacher, the accused.

Culpable negligence on his part, as I discern, will be farfetched.

Like Lord Bingham in R V G [2004]1 A.C 1034, I find and hold that an accused person could not be culpable under criminal law of doing something involving a risk of injury to another or damage to property if he did not genuinely perceive the risk. Applying this rule here, I find to be a salutary principle that conviction of serious crime, which manslaughter is, should depend on proof not simply that the accused caused by act or omission, an injurious result to another but that his state of mind when so acting was culpable. This is not a new rule. It is a restatement of ***actus reus facit reum nisi mens sit rea.*** It means that in the absence of exculpatory factors, the accused state of mind is all important where recklessness is an element of the offence charged. I think from all of these authorities some principles emerge. They are as follows:

(a) that a person is reckless in respect of circumstances when he was aware of a risk that it existed or would exist;

(b) that a person is reckless in respect of a result when he is aware of a risk that

would occur, and it was, in the circumstances known to him, unreasonable to take the risk;

(c) that it is a salutary principle that conviction of a serious crime should depend upon proof not simply that the accused had caused by act or omission, an injurious result to another, but that his state of mind when so acting was culpable;

(d) that the most obviously culpable state of mind was an intention to cause injurious result;

(e) That indifference of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily acceptable as culpable too;

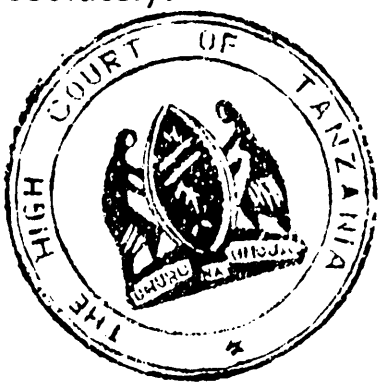
(f) That it is clearly blameworthy to take an obvious and significant risk of causing injury to another but it is not clearly blameworthy to do something involving the risk of injury to another if, for reasons

other than self induced intoxication, one does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

In applying these principles to the case before me, I do not see any scintilla of recklessness on the part of the accused. The accused cannot shoulder responsibilities of those teachers that he had detailed to go to Holowa because the principle of vicarious liability does not apply in criminal law to the extent that omission of other teachers subordinate to the accused would be inferred on him. On the facts of the case and testimonies of witnesses, the accused instructions were ignored by the Teacher on duty. The Prosecution did not call him to explain what happened or show the culpability of the accused at least. To me, it seems, he is the person who could be in the dock. But hypothetically, even if he could be the one to stand trial, evidence on his mens rea would still be a tall hurdle to jump. There is, in my considered judgment, no evidence which could safely found

conviction on the basis of recklessness or failure to exercise due care.

I find the accused not guilty of the offence of manslaughter as charged. I subsequently acquit him absolutely.



F.M. Werema, 11.9.2007
JUDGE

Judgement is read in the presence of the accused person, counsel, Assessor, Court Clerk and in the open court.

Court: The Honourable Assessors are thanked and discharged honourably.