IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT MPANDA

CRIMINAL JURISDICITON

CRIMINAL SESSIONS CASE NO. 44 OF 2012

THE REPUBLIC
VERSUS
PETRO KAKOLE @ KATABI

2nd & 6th June, 2014

JUDGMENT

MWAMBEGELE, J.:

The accused person Petro Kakole @ Katabi; a self confessed bhang smoker, stands charged with murder contrary to section 196 of the Penal Code, Cap. 16 of the Revised Edition, 2002 (henceforth "the Penal Code"). He is alleged to have killed with malice aforethought one Cathelina Mpasi on or about 21.03.2011. He pleaded not guilty to the information and a full trial ensued. The Prosecution fielded only two witnesses in support of the information for murder prior to which a Preliminary Hearing was conducted on 25.02.2014 during which two matters were agreed to be not in dispute. These are the contents of the postmortem examination report and the names of the accused person and the deceased.

The material facts of the case are not complicated. They go thus: the accused person and deceased were residents of Mamba Village in Mpanda District of Katavi Region. The deceased was the wife of Clement Mwanaminzi PW1. According to Paschalia Nsumba PW2 and the accused person himself, the accused person used to smoke bhang (otherwise known as marijuana or cannabis) and that he was, somehow, of unsound mind.

On the morning of 21.03.2011 at about 0630hrs, PW2; neighbour of the deceased and PW1, went out of her house to attend a call of nature. PW2 saw the accused in a suspicious movement hiding under a *mbono* tree. He had a sizeable piece of wood measuring about one foot long. As the accused person did not notice her, PW2 hid herself to see what he wanted to do.

After a short while, PW2 saw the deceased coming out of her house. She was holding a gourd which PW2 learnt later contained urine. The deceased went a bit of a distance from her house and poured the contents of the gourd on the ground. After that she attended a short call of nature there. After she had done that, she started to go back inside the house. At that point in time, PW2 saw the accused person going where Catheline was heading inside her house. Alas! the accused hit the deceased on her head with the piece of wood he was holding. He hit her while she was going back inside the house. The old lady fell down. The accused wanted to unleash another blow but the second blow was obstructed by the roof and the piece of wood slipped out of his hand. After the piece of wood

slipped off his hand, he took to his heels, leaving the piece of wood at the scene of crime. Frightened, PW2 rushed to another neighbour, one Mzee Modest Kisike and told him to go and see what had happened. Neighbours went to the scene of crime and found the old lady unconscious. They took her inside her house. Following PW2's word, the accused person was arrested and charged with the present offence. According to PW2, the deceased had poor sight. Thus, during the night, she used to attend to her short calls of nature in the gourd and would empty the gourd in the morning.

In defence, the accused person testified that his name is Petro Kakole Katabi and that before his incarceration he was living at Mamba Village in Mpanda District. That he was in court because he was accused of killing Cathelina Mpasi. He testified that he does not remember anything about the incident and that he did not know the deceased and that he has never seen her. That he knew the deceased was an old woman because her age was read to him in court. That he could not remember when he was arrested. That he gained consciousness after coming from Mirembe Hospital. That he could not remember anything before going to Mirembe Hospital. That he does not remember his doctors at Mirembe but that he could identify if he sees them. That he was interrogated by the consultant psychiatrist after some forty days at the Hospital. In the meantime he had been taking some medications together with other inmates. That he was told to prepare himself for his journey back here to Mpanda after 45 days. He was taken to Isanga Prison after 50 days where he stayed for ten more days and transported back here at Mpanda.

The accused person insisted that he was not conscious of himself before being taken to Isanga Institution. That he was being told that he was mentally unfit. He told the court that his family has a history of mental unfitness - his maternal uncle was mentally unfit until his death. So is his paternal uncle who is mentally unfit to date. The accused person therefore concluded that, due to that background of his family, he could not be surprised if he was mentally unfit at the commission of the offence but that he did not recall anything about the commission of the offence.

The three gentlemen assessors who assisted me in this trial were, unanimously, of the view that the deceased was killed by none other than the accused person. They said the accused person was seen by PW2 committing the offence. On whether the killing was done with malice aforethought, the gentlemen assessors were divided. The first two assessors (Alexander Kapama and Fortunatus Ndasi) were of the view that the accused person lacked the requisite malice aforethought in killing the deceased. They said as the accused person was known of smoking bhang, he might have smoked drug which might have led him to the killing. The third assessor; Mathias Kalyagi was of a different view. He was of the opinion that the accused person had a premeditated intention to kill the deceased. Mzee Kalyagi said the accused knew and testified that smoking bhang was not good, why did he smoke it in the first place?

The learned State Attorney and counsel for the accused person submitted their final submissions in writing. Mr. Mwakyusa for the accused person, in

answering the issue whether it was the accused person who killed the deceased, first, chips in the question of visual identification. He relies on ***Waziri Amani Vs R*** [1980] TLR 250 to submit that the identification of the accused person was not watertight. He is of the view that the possibilities of mistaken identity of the assailant by the identifying witness, who was at a distance of about forty five metres, could not be eliminated. It is the law, he submits, that in order to convict on the basis of visual identification, such evidence must be absolutely watertight and should not leave out any possibility of mistaken identity.

Secondly, in answering the question whether the accused person killed with malice aforethought, counsel for the accused person relies on the evidence of PW2 who testified that the accused person was known to be of unsound mind and that he used to smoke bhang. The learned counsel relies on section 13 of the Penal Code, ***R Vs Tomson Msumali*** [1969] n. 26 and ***R Vs Magata Kachehakana*** [1957] 1 EA 330 to buttress the point that the accused person had disease of the mind and lacked the requisite malice aforethought in killing the deceased. He also cites ***Muswi Musule Vs R*** (1956) EACA 622 and ***Kachehakana*** (supra) on the definition of the disease of the mind as a result of belief in witchcraft.

On expert evidence, Mr. Mwakyusa learned counsel for the accused person submits that courts are not bound by such kind of evidence if there is good reason for not accepting it. He cites ***DPP Vs Omar Jabili*** [1998] TLR 151 and ***Agnes Doris Liundi Vs R*** [1980] TLR 38 to buttress this proposition.

He therefore urges this court to find the accused person not guilty of the offence he is charged with and acquit him.

On the other hand, Mr. Mwashubila, learned State Attorney submits that the prosecution has proved the case against the accused person and urges the court to find him guilty as charged. He submits that PW2 witnessed the accused person killing the deceased and the evidence of that single witness is enough to prove the case beyond reasonable doubt. He cites section 143 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 and ***Yohanis Msigwa Vs R*** [1990] TLR 150 on the irrelevancy of a number of witnesses in proving a fact.

On the state of the mind of the accused person, the learned State Attorney submits that the court should rely on the expert evidence which has it that the accused person was of sound mind at the commission of the offence. As regards malice aforethought, the learned State Attorney submits that the court should have due regard to the weapon used, the manner in which it was used and the part of the body on which the injury was inflicted. On this point, he cites ***Ally Z. Shenyau Vs R*** Criminal Appeal No. 27 of 1993 (CAT Arusha unreported).

In my considered view, there are two questions that this judgment must answer. First, did the accused person kill the deceased? And, secondly, if the answer is in the affirmative, did the accused person have the requisite malice aforethought in so doing? In answering the second question, the

court will, as well, have to direct itself to the state of mind of the accused person.

As a preliminary remark, let me address my mind to two points Mr. Mwakyusa, learned Counsel raised in his submission. These are matters of visual identification and belief in witchcraft. On visual identification, I must state at the outset that this is not a case on identification. Admittedly, learned counsel for the respondent tried to raise it during cross examination of PW2 but surely, identification of the accused was not in point in this case. After all, just for the sake of argument, even if visual identification was at issue, PW2 testified that there was no darkness as it was around 0630 hrs and secondary school students had started going to school. And to crown it all, PW2 mentioned the accused person at the very earliest possible opportunity which fact lends credence to her testimony. She mentioned the accused person to the neighbour who went to the scene of crime and helped PW1 take the deceased inside the house few moments after the incident. The ability of PW1 to name the accused person at the earliest possible opportunity is a significant assurance of her reliability. I find comfort on this stance in the Court of Appeal decision of ***John Gilikola Vs R*** Criminal Appeal No. 31 of 1999 (unreported). In ***Gilikola***, the Court of Appeal, relying on its earlier decisions of ***Swalehe Kalonga @ Sale Vs R***, Criminal Appeal No. 16 of 2001 (unreported) and ***Marwa Wangiti Mwita & Another Vs R***, Criminal Appeal No. 6 of 1995 (unreported), stated:

"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability; in the same way as un-explained delay or complete failure to do so should put a prudent court to inquiry."

[See also: ***Minani Evarist Vs R*** Criminal Appeal No. 124 of 2007 and ***Yohana Dionizi Shija Simon Vs R*** Criminal Appeal No. 114 and 115 of 2009 (both unreported decisions of the Court of Appeal at Mwanza).

The foregoing notwithstanding, the accused person cannot rely on the defence of visual identification and at the same time rely on the defence of insanity as a result of disease of the mind of the accused person. Or, put differently, the accused person cannot say he was not identified at the scene of crime and at the same time rely on the defence of insanity or intoxication as a result of smoking bhang. I say so because depending on the former defence of visual identification means killing the latter defences of insanity or intoxication as a result of smoking bhang. As already observed above, this case is not one on visual identification as first, visual identification was not at issue as it seemed to be conceded by the defence and secondly, as the accused opted to rely on insanity and or intoxication caused by smoking bhang, the defence of visual identification was killed at that point.

Secondly, is the issue of belief in witchcraft appearing in the learned Counsel for the accused person. With due respect to the learned counsel

for the accused person, I have not seen anywhere in evidence suggesting involvement of the belief in witchcraft as being the subject in the present case. At first, I thought Mr. Mwakyusa had in mind the contents of the expert evidence forwarded to this court by the Isanga Institution but then he states in his submissions that the report was not copied to them and that the expert was not called to testify. But it could be, as well, the defence counsel might have had a glance at the report elsewhere and felt he should canvass on it lest the court relies on it to convict his client. If that is what was at the back of his mind, let me give him comfort that that part of expert evidence cannot be used in evidence for the simple reason that the expert said in the report that he was told the witchcraft episode by the accused person himself. And, in view of the fact that the accused person did not say anything in court about it and in further view of the fact that the said expert witness was not called to testify, that piece of evidence is rendered hearsay and can therefore not be used in evidence. What can be sieved from the report, in my well considered view, is the report relating to the mental state of the accused person after his examination, not the story or stories told by the accused person to the expert.

Having said something on the preliminary matters, before embarking on determining the pertinent issues in the present case as posed above, let me, first, say something about the insanity episode of the accused person as far as can be gleaned from the court record. After the accused person was committed to this court for trial, when this case was called for hearing for the first time on 22.03.2013, Counsel for the accused person prayed

that his client be sent to Isanga Institution so that he could be medically examined on his mental condition. The learned advocate made that prayer after he examined the accused person and felt that he was not consistent in his explanations on the charges facing him. The court granted the prayer and consequently, the accused person was sent to Isanga Institution for examination of his mental condition.

At Isanga Institution the accused person was examined by Dr. Erasmus Mndeme; a consultant psychiatrist in the presence of Gema Simbee (psychiatrist) and Paul Kawamala, Daniel Magina and Rhoda Waryoba (senior nurses). The examination was conducted three times – on 11.08.2013, 24.09.2013 and 27.09.2013. After such examinations, Dr. Mndeme and his team concluded that the accused person was normal and that he was sane at the time he committed the offence. These are, *inter alia*, the contents of his report he forwarded to this court vide his letter bearing Ref. 9198/2013 dated 26.09.2013.

Mr. Mwakyusa, learned counsel for the accused person has challenged the expert evidence and submits that courts are not bound by such kind of evidence if there is good reason for not accepting it. To his mind, in view of PW2's testimony, his client was or might have been of unsound mind at the commission of the offence. I understand what Mr. Mwakyusa, learned defence counsel was trying to drive at. If I captured his intentions well, Mr. Mwakyusa is desperately urging the court to ignore the expert report which holds his client as sane at the time he committed the offence and in

its stead rely on the evidence of PW2 and the accused person himself which suggests he was not sane.

Expert opinion is essentially advisory in nature. As rightly pointed out by Mr. Mwakyusa, a court will not be bound by it if there are good reasons so to do. The catch point is good reasons to depart from such an expert evidence. Sudipto Sakar and V. R. Manohar; the learned of **Sarkar's Law of Evidence**, 17th Edition Reprint 2011, states at p. 1255 as follows:

> "A Court is not bound by the evidence of the experts which is to a large extent advisory in nature. The Court must derive its own conclusion upon considering the opinion of the experts which may be adduced by both sides, cautiously, and upon taking into considerations the authorities on the point on which he deposes."

It is settled criminal law that the burden of proving insanity is on the accused on a balance of probabilities and not merely to raise a reasonable doubt as to the sanity of the accused. The principle has been laid in a number of cases: see ***Godiyano Barongo s/o Rugwire Vs R*** (1952) 19 E.A.C.A. 229. ***Magata Kachehakana*** (supra) ***Nyinge s/o Suwatu Vs R*** [1959] EA 974, ***Mbelukie Vs R*** [1971] EA 479, ***Agnes Doris Liundi*** (supra), and ***Majuto Samson Appellant Vs R*** Criminal Appeal No. 61 of 2002 (unreported); all these are decisions of the Court of Appeal for

Eastern Africa or Court of Appeal of Tanzania. In ***Kachehakana*** (supra), the Court of Appeal for Eastern Africa, quoting from the headnote in its earlier decision of ***Rugwire*** (supra) which headnote is identical with the note of the learned editors of Archbold (33rd Edn.), p. 20 as follows:

> "The burden of proof which rests upon the prisoner to establish the defence of insanity is not as heavy as that which rests upon the prosecution. ... It may be stated as not being higher than the burden which rests on the plaintiff or defendant in civil proceedings and may be discharged by evidence satisfying the jury of the probability of that which the prisoner is called on to establish."

On a balance of probabilities, the accused person in the present case has failed to convince this court that he was not sane at the commission of the crime he is charged with. I observed the accused person's conduct during the whole trial, particularly when he was testifying in the witness box. Throughout the trial and more especially in the witness box, the accused person looked sane, calm, composed and fully aware of what he was doing in the witness box. He desperately attempted to convince the court that he could not remember anything before he was committed to Isanga Institution. Yet, he could recount a bit of his family history as regards insanity in a rational manner. This court believes that the accused person's word regarding his insanity had no truth. If anything, it was

meant to save his otherwise sinking boat. In the premises, I find no good reason not to accept the expert evidence as regards the accused person's mental condition at the time of commission of the offence.

I must confess, however, that this case has caused me some anxiety. Here is a situation where expert evidence has it that an accused person is of sound mind and that he was so at the commission of the offence. Here is a situation where the accused person is an advocate of himself testifying that he might have been of unsound mind at the time he is alleged to have committed the offence and is, somehow, supported by a witness for the prosecution who used to see him in the village in that condition.

I had an in-depth consideration of the testimony of PW2 who testified to have witnessed the incident and I feel it necessary to make a repetition of her testimony at this stage. She testified that her residence neighbours that of Clement Mwanaminzi PW1; husband of the deceased. On 21.03.2011 at about 0600hrs she went outside her house with a view to attending a call of nature. While outside, she saw the accused person hiding by a *mbono* tree. He was holding a sizeable piece of wood measuring about one foot. She hid herself to see what the accused person wanted to do. After a while, she saw the deceased Catheline coming out of her house. Catheline was holding a gourd. She learnt later that the gourd contained urine as when Catheline was out, she poured the contents of the gourd onto the ground. After that she attended a call of nature there. After she had done that, the deceased started to go back inside the house. That was at the point in time when PW2 saw the accused person

going to where Catheline was. He hit her on the head with the piece of wood he was holding. He hit her while she was going back inside the house. The old lady fell down. Having seen that, PW2 rushed to one Mzee Modest Kisike in the neighbourhood and told him to go to the scene and see what the accused person had done. Other neighbours went to the scene of crime and found the old lady unconscious. They took her inside.

On cross examination, PW2 testified that the accused person hit the deceased only once. His second attempt to hit the deceased was obstructed by the roof and the wood slipped out of his hand. That was when the accused person took to his heels leaving the piece of wood at the scene of crime. PW2 added that, at night, the old lady used to attend to her short calls of nature in the gourd as she had poor sight. She added that the accused person used to smoke bhang and was known to be of unsound mind sometimes.

I am satisfied that Cathelina Mpasi is indeed dead and that she did not die a natural death. I so find bearing in mind the testimony of Clement Mwanaminzi PW1; the deceased's husband and the Post Mortem Examination Report dated 21.03.2011 which has it that the body of the deceased was examined by a medical practitioner in the presence of PW1 and Faustine Chuma in the presence of No. E 1351 D/C Jeremiah and D/C Privatus and that her cause of death was severe head injury. Fortunately, this is not disputed; the name and deceased's death as well as the cause of her death were among matters listed as not disputed at the PH stage.

PW2 is the only witness who witnessed the killing of the deceased. I am alive to the fact that an accused person can be convicted on the strength of a single witness if such witness is not only credible but also reliable. As rightly pointed out by the learned state attorney, no particular number is required to prove any fact as statutorily provided for by section 143 of the Evidence Act. It is the quality and not the quantity of the evidence that matters [see: Sarkar's Law of Evidence (supra), at p. 72]. On the testimony of a single witness, I feel irresistible to quote the words of this court (Mwaikasu, J.) which were quoted on appeal of the same case of ***Anangisye Masendo Ng'wang'wa Vs R*** [1993] TLR 202:

> "While fully aware of the danger of relying on a single witness in a serious charge like this, this Court is clearly of the view that bearing in mind the fact that this incident took place in broad daylight the PW1 was very close to the assailants, and had ample time to have a close, careful and clear look at them all, and that in all respects the PW1 appeared to have been telling the truth, it can confidently and safely walk on the rope of the evidence of the PW1 to the sacred end of justice in this case. There is therefore, no hesitation in placing reliance in the evidence of the PW1, though the only eye witness in this case".

The same position was taken by the Court of Appeal in ***John Gilikola*** (supra).

I saw Paschalia Nsumba PW2 testify in the witness box. She was stable and composed. PW2 left me with the impression that she was speaking but the truth; a credible and reliable witness. PW2 gave her testimony which was simple, credible and unshaken in cross-examination. In the premises, I have no iota of any reasonable doubt that the deceased Cathelina Mpasi met her death in the manner recounted by PW2. Having believed PW2 as a credible and reliable witness, this court can convict the accused person on the strength her testimony only. Like the learned State Attorney and the three gentlemen assessors, I am satisfied that the deceased Cathelina Mpasi was killed by none other than the accused person in the manner recounted by PW2.

Now comes the second issue of whether the killing was coupled with the requisite malice aforethought to constitute the offence of murder. Murder is the intentional killing of a human being by a human being. The offence of murder is therefore committed when the killing is accompanied with the intention to kill. Such intention is, at law, referred to as malice aforethought. Under the provisions of section 200 of the Penal Code, malice aforethought is 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;
>
> (c) ...
>
> (d) ... ".

Existence of malice aforethought can also be inferred from the nature of the weapon used and the body location of the injury sustained as well as the force used to inflict the injury. In ***Juma Ndege Vs R*** Criminal Appeal No. 41 of 2001 (unreported); the decision of the Court of Appeal which followed its earlier decision of ***Elias Sefu Vs R*** [1984] TLR 244, it was held that the use of a stick on a vulnerable part of the body coupled with excessive force was indicative of malice aforethought. The Court of Appeal held:

> "As was observed by this Court in the case of ***Elias Sefu v. R*** [1984] TLR 244, existence of malice aforethought could also be found from

> the nature of the weapon used and the location of the injury sustained. In the instant case, the use of the stick on a vulnerable part of the body was indicative of malice aforethought. We may add that even the force used was excessive as to infer malice".

[See also the ***Shenyau*** case (supra); a case cited to me by the learned State Attorney].

In the instant case, the use of a sizeable piece of wood measuring about one foot to hit the vulnerable part of the deceased's body – the head – was amply indicative of malice aforethought. It can therefore be said that, all things being equal, the killing in the present case was coupled with malice aforethought.

But in the case at hand the accused person was known to be smoking bhang, so PW2 told the court and the accused person himself admitted. The first two assessors opined to me that the accused person might have smoked the drug which led him to the killing. With utmost respect, basing on the principle of resolving any doubt in favour of the accused person, I find myself in agreement with the two assessors. Admittedly, the fact that the accused person was hiding before the commission of the offence and the fact that he took to his heels immediately after he hit the deceased, one may make an inference that he was to his senses; that he knew what he was doing and that he knew what he was doing was wrong. Otherwise,

he would have gone to attack the deceased in the open and would have remained there after the attack. This is perhaps the reason why the third assessor (Mr. Mathias Kalyagi), whose opinion, with equal utmost respect, I have opted to differ, felt the accused person had the requisite malice aforethought in killing the deceased. However, the principle of criminal law that doubts must be resolved in favour of the accused ties my hands to follow the path taken by the third gentleman assessor.

I feel irresistible to refer to an identical situation which appeared in one Commonwealth case of ***Von Starck Vs the Queen (Jamaica)*** [2000] UKPC 5 (available at *http://www.bailii.org/uk/cases/UKPC/2000/5.html*). This is a case decided by the Privy Council. It emanated from Jamaica. In that case, briefly stated, the facts of the case were as follows: On Wednesday 02.08.1995 the dead body of a woman named Michelle Kernoll was found in room 28 in the Sea Shell Hotel, Montego Bay, Jamaica. Her death had been caused by a single stab wound to the left chest. Very strong force had been used, causing fractures of six ribs. Von Starck was arrested in connection with the murder of the deceased. He was convicted of murder by the High Court of Jamaica and appealed to the Court of Appeal of Jamaica which confirmed the conviction and sentence. On investigation, the appellant was found in possession of a jar which contained a white powdery substance which resembled cocaine and was not disputed by the parties that it was indeed cocaine. It was learnt that both the deceased and appellant had taken the drug on the material night. On appeal to the Privy Council, the issue was whether the trial judge ought

to have left the possibility of a verdict of manslaughter to the jury. The Privy Council held:

> "[There was] a possible conclusion that the appellant had killed Michelle but had done so under the influence of cocaine. As a matter of law it is not disputed that **the voluntary consumption of drugs, as well as the voluntary consumption of alcohol, may operate so as to reduce the crime of murder to one of manslaughter** on the ground that the intoxication was such that **the accused would not have been able to form the specific intent to kill or commit grievous bodily harm**."
> [Emphasis supplied].

The Privy Council went on:

> "In the present case the statements made by the appellant on arrest and in his caution statement point strongly to a conclusion that while he had killed Michelle he was so far under the influence of the cocaine that he lacked the mens rea required for murder and accordingly should be convicted only of manslaughter."

In conclusion, the Privy Council had this to say:

> "Their Lordships will humbly advise Her Majesty that the appeal should be allowed, that **a conviction for manslaughter should be substituted for that of murder**, and that the case be remitted to the Court of Appeal for sentence".
> [Emphasis supplied].

The ***Von Starck*** case, having been decided after the reception clause, is of persuasive authority in this jurisdiction. The Privy Council believed what the accused stated that he had taken cocaine at the time of the killing. Applying the principle in that case to the one a hand, the accused person Petro Kakole @ Katabi might have smoked bhang and got intoxicated to the extent that he would not have been able to form the specific intent to kill or commit grievous bodily harm. If this was the case, the smocking of bhang and the consequent intoxication may operate to reduce the crime of murder facing the accused person to one of manslaughter. This is the tenor and purport of subsection (4) of section 14 of the Penal Code which provides that

> "Intoxication shall be taken into account for the 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."

In this jurisdiction an unreported decision of the Court of Appeal of ***Stanley Anthony Mrema Vs R*** Criminal Appeal No. 180 of 2005 might help the court to elaborate further the case at hand and the proper course to take. In that case, the accused person was a drunkard who used to go home late at night and made noises. On the material night; a little after midnight, the accused person was heard by the deceased; his landlord and his wife shouting. The landlord went thither (to the accused person's room) where he urged the accused person to stop shouting. It was not clear what happened but later, when other people showed up at the scene of crime, they found the deceased lying down on the ground with some bruises on his body and a swelling on his head. The accused person was found there holding a spring. The deceased was rushed to the hospital to which he later died. It was not established by evidence that the accused person was drunk that night. He was convicted by the High Court of the offence of murder. On appeal, in reducing the conviction of murder to one of manslaughter on the ground that the accused person might have been drunk, the Court of Appeal held:

> "We are increasingly of the view that the established facts are not consistent with the existence of malice aforethought. **The appellant might have been drunk as usual. It does not add up that a person in full**

control of his mental faculties would wake up in the dead of night and alone in his room begin to make noises disturbing other peoples' tranquility."
[Emphasis added].

As already observed above, in ***Stanley Anthony Mrema*** the accused person was known to be drinking alcohol daily but there was no evidence that he had consumed the stuff on the material night. However the Court of Appeal assumed that the accused might have been drunk as usual. In my view, the assumption was made in favour of the accused person because of the existence of doubt as to whether the accused person was drunk or not; the doubt ought to be resolved in favour of the accused person. Likewise, in the ***Von Starck*** case the Privy Council assumed that the accused person might have been under the influence of cocaine when he killed the deceased.

Applying the principle in the binding authority of ***Stanley Anthony Mrema*** and the persuasive authority of ***Von Starck*** to the present case, it will be in the interest of justice to assume that the accused person Petro Kakole @ Katabi might have smoked bhang on the material day and therefore he might have been under the influence of the drug during the killing and that he might have lacked the requisite murderous intent in killing the deceased Cathelina Mpasi.

I wish to restate here by way of emphasis that this conclusion has been reached as a result of the doubt felt by the two assessors, which doubt the court shares, that the accused person might have smocked bhang which might have led him to the commission of the offence he is presently charged with. I am convinced therefore, as did the two assessors, that the deceased Cathelina Mpasi was killed by the accused person Petro Kakole @ Katabi but that in killing her, the accused person lacked the requisite malice aforethought. In the premises, this court acquits the accused person Petro Kakole @ Katabi of the offence of murder contrary to section 196 of the Penal Code but finds him guilty of a lesser offence of manslaughter contrary to the provisions of section 195 of the Penal Code and convicts him accordingly.

DATED at MPANDA this 6th day of June, 2014.

J. C. M. MWAMBEGELE

JUDGE

Judgment delivered today 06.06.2014 in the presence of the three Gentlemen Assessors, the accused person and Mr. Mwashubila, Learned State Attorney for the Republic.

Sgd. J.C.M. Mwambegele,

Judge

06/06/2014

Mr. Mwashubila:

We have no previous criminal record of the accused person. However we pray for a stringent sentence to deter other members of the society from doing what the accused person did.

Mitigation:

Mr. Mwakyusa:

The accused person is an orphan; his father is no more and his mother is very old who depends on him for survival. He has three kids of the marriage to take care of after his marriage broke. The accused is a first offender and has been in remand for three year now.

Allocutus:

I have nothing to add to what my advocate has said.

SENTENCE

The accused person Petro Kakole @Katabi has just been convicted of the offence of manslaughter c/s 195 of the Penal Code, Cap.16 (RE:2002). While taking into consideration the mitigation factor advanced by Mr. Mwakyusa, learned Counsel for the accused person particularly that the accused person is an orphan who has an old mother and three kids to take care of, and that he is a first offender who has been in remand for three years now, I also take into consideration the factors raised by Mr. Mwashubila, learned State Attorney for the prosecuting Republic that a stringent sentence will be apposite to deter others from committing the

offence. The accused person exhibited cruelty against the deceased; an old lady who had poor sight.

All considered, the court sentences the accused person Petro Kakole @Katabi to life imprisonment.

Sgd. J.C.M. Mwambegele,
Judge
06/06/2014

Court: Right of appeal to CAT explained.

Sgd. J.C.M. Mwambegele,
Judge
06/06/2014

Court: Assessors thanked and discharged.

J.C.M. Mwambegele,
Judge
06/06/2014