

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

[ORIGINAL JURISDICTION]

CRIMINAL SESSIONS CASE NO. 25 OF 2021

REPUBLIC

VERSUS

B. 9815 WDR ASTERIUS CHARLES

JUDGMENT

6th and 15th July, 2021

KISANYA, J.:

B. 9815 WDR Asterius Charles is a prison officer stationed at Musoma Prison. On the night of 30th October to 1st November 2019, he was assigned to guard the Prison's Regional Office located at Lake Side area within Musoma Municipality. In the course of executing his duties, he shot his gun into the air to stop a person who climbed the fence to the Prison's Regional Office. One bullet hit that person who happened to be **Simon Gidion @ Mtwale**, thereby causing to his death.

Therefore, **B. 9815 WDR Asterius Charles** was indicated with the offence of manslaughter, contrary to sections 195 and 198 of the **Penal Code**, Cap. 16, R.E 2019. It was alleged that, on 1st November, 2019 at Lake Side area within the District and Municipality of Musoma in Mara Region, the accused person

unlawfully killed one, **Simon Gidion @ Mtwale** (hereinafter referred to as the deceased).

When this matter was called on for preliminary hearing on 28th June, 2021, the accused person pleaded guilty. The prosecution was then called upon to adduce the essential facts of this case. It was the finding of this Court that the facts read by the prosecution did not constitute the one essential element of offence, whether the deceased was unlawfully killed. Thus, the accused was not convicted due to that reason. The Court found it appropriate to proceed with the full trial.

It is pertinent to note here that, the facts to the following effect not disputed during the preliminary hearing: First, that the accused person is B. 9815 WDR Asterius Charles, a prison officer. Second, the offence was committed on 1/11/2019. Third, on the material date the accused was guarding the Regional Prison's Office at Lake Side area within Musoma Municipality. Fourth, in the course of executing his duties, the accused saw a person passing near gate. That person muted when asked by the accused to introduce himself. Fifth, as the said person climbed the fence to the Regional Prison's and the accused shot into the air as the means of stopping and warning him. Sixth, the police officers arrived at the scene few minutes later. The accused person informed them that he had seen and fired into air to stop a person who wanted to climb the entrance gate/fence to the

Regional Prison's Office. Seventh, the deceased met his demise when he was being taken to the hospital. Eight, the accused was arraigned before the Court with offence of manslaughter. Ninth, that the cause of death is *Severe intrathoracic haemorrhage* as per the Report on Post-Mortem Examination (**Exhibit P1**). In terms of section 192(4) of the Criminal Procedure Act, Cap. 20, R.E. 2019 (the CPA), the above facts and contents of Exhibit P1 were deemed to have been proved by the prosecution.

Now, pursuant to section 195 of the Penal Code (*supra*), the offence of manslaughter is proved by establishing that there is a person who died unnatural death and that, the accused person before the court unlawfully killed or caused the death of the said person. In view of the above agreed facts and document, the prosecution proved that, Simon Gidion @ Mtwale is dead and that his death was unnatural. The trial was conducted in order for the prosecution to prove the second ingredient which is premised on the issue whether the accused person unlawfully killed Simon Gidion @ Mtwale.

At the hearing, the Republic was represented by Ms. Agma Haule learned State Attorney whereas, the accused who was also present received the legal services of Ms. Mary Joachim, learned advocate. As the law demands, I sat with three assessors who aided the Court in this matter. There were Mrs Perus

Masokomya, Mrs Agness Magambo and Mrs. Mecky Charles. I acknowledge and appreciate the role played by the ladies assessors.

In order to prove its case, the prosecution called three witnesses. The first witness is **G. 1500 DC Hassan (PW1)**, a police officer who was on patrol with other police officers on the material date. He deposed that, in the course of executing their duties, they arrested the deceased and one girl around 0300 hours. Upon arriving at Musoma Central Station, the deceased jumped from the police's vehicle and fled to unknown place. Few minutes later, PW1 heard a gunshot. He came to learn later that the deceased was shot at the Regional Prisons' Office. PW1 testified that he witnessed the examination of the deceased body. During cross-examination, PW1 stated that he did not see the deceased running. He also stated that during patrol all police officers were armed and that, they are justified to use guns whenever there is breach of peace or the need arises.

B. 7170 CPL Boaz (PW2) testified as PW2. This is a prison officer who was guarding with the accused at the Regional Prisons' Office on the material day. According to him, each of them was armed with SMG gun which had 30 bullets. While PW2 stood at point A, the accused was at point B near the entrance gate and the distance between them was 30 paces. It was PW1's evidence that he heard the accused uttering; "*Simama jitambulishé*". Later on, he heard two gunshots at two different intervals.

PW2 went on to adduced that, the accused told him that he had shot into the air to stop a person who was climbing the fence to the entrance gate of the Regional Prisons' Office and that he was not sure whether that person was shot or not. PW2 deposed further that the police officers who were after a person who had escaped from their custody arrived ten minutes later. It was PW2's evidence that the accused told them what he had done to the person who climbed the fence/gate.

During cross-examination, PW2 testified that he did not witness the accused shooting the accused. He went on to state that the accused was justified to shoot into the air and that a person who fails to comply with the order requiring him to stop can be shot. Responding to the Court's question, PW2 stated that the accused person took the necessary steps or precaution before shooting into the air and that he wanted to stop the deceased from entering the office. He further deposed that the accused was not negligent in executing his duties.

The prosecution closed with evidence of **E6610 DCPL Robert (PW3)**, another police officer who was on patrol with PW1 and other police officers on the material day. He deposed that, on the fateful day at around 0300 hours, the deceased and his lover one Anna were arrested at Maisha Guest House within Musoma Municipality on allegation. The deceased was alleged to have assaulted the said Anna. PW3 stated that, upon arriving at Musoma Central Station, the

deceased jumped from the police vehicle and fled to unknown place. He deposed that, the police officer could not see the direction taken by deceased due to darkness. Few minutes later, they heard two gunshots from area where the Regional Prisons' Office is located. They proceeded to that office and met the accused and PW2. It was PW3's evidence that the accused told them to have shot into the air to stop a person who climbed the entrance fence to that office.

He went on to state that the deceased was found 15 meters from the gate to the Regional Prisons' Office and taken to Musoma Hospital where he met his demise. PW3 testified that the deceased had injuries at the back.

When cross-examined by the defence counsel, PW3 stated that the accused was justified to require the deceased to introduce himself. He went on to state that, upon failing to comply with the said order, the proper recourse was to shoot into the air and shoot him because he (the accused) was not aware whether the deceased was armed or not.

In his sworn evidence, the accused person featured as DW1. He testified that on the material day at around 0300 hours, he saw a person running to the place where he was guarding and ordered that person to stop and introduce himself. DW1 admitted that he shot into the air with intent of stopping that person from jumping over the fence. He also deposed that, he shot into the air for the second time because the said person proceeded to climb the entrance gate/fence.

He admitted that he came to learn later that one of the bullet hit that person. When cross-examined by the prosecution, DW1 deposed to have executed his duties effectively and that he took required steps or precautions were taken before shooting because he was not aware whether the deceased was armed. When asked as to why the deceased was shot at the back, DW1 stated that it was dark and that he did not intend to shoot him.

I summed up the case to the three assessors who aided the Court in this case. They were of unanimous opinion that the accused's act was not unlawfully. Their opinions were premised on the reasons that the accused is a prison officer who was guarding the office on the material date. That he was issued with a gun to defend himself and the Government properties in the course of executing that duty. The deceased failed to comply with the order that required him to stop and introduce himself. The incident happened during the night and the accused was not aware of the deceased's intention and whether he was armed. In view therefore, the ladies assessors were of the opinion that the accused was defending himself and that took the required precaution before shooting into the air. Thus, all assessors opined that the accused was not guilty of the charged offence.

I have dispassionately examined the evidence adduced by both parties and considered the opinion by the ladies assessors. As indicated earlier, the accused person is charged with offence of manslaughter under section 195 of the Penal

Code (supra). For better understanding of the discussion at hand, I find it useful to reproduce the said section. It reads:-

*"195.-(1) Any person who by **an unlawful act or omission** causes the death of another person is guilty of manslaughter.*

*(2) Any **unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life** or health, whether the omission is or is not accompanied by an intention to cause death or bodily harm."*

(Emphasize supplied),

Reading from the above cited provision, it is the law that the offence of manslaughter stands where unlawful act or omission of one person causes the death of another person. Pursuant to the information in this case, the accused person is said to have "unlawfully killed" Simon Gidion @ Mtwale. This implies that the accused was charged of causing the death of the Simon Gidion @ Mtwale by "unlawful act" and not by unlawful omission. For that reasons, I will consider issues related to section 195(2) of the Penal Code. I find one issue worthy of consideration in this case, whether the deceased was killed due to the accused person's unlawful act.

The Penal Code does not define the term "unlawful act". According to the Black's Law Dictionary, 8th Edition, page 1574, unlawful act term is defined to mean a conduct that is not authorized by law or violation of civil or criminal law. In other

words, an act that is authorized by the law is not unlawful. To the contrary, such act is lawful because it can be justified by the respective law.

In that regard, an act that causes the death of another person becomes unlawful if that act is not authorized by law or violates the law and not otherwise. The duty to prove that the act that causes death is unlawful lies on the prosecution and not the accused person.

In our case, the evidence adduced by both parties suggests that the accused caused the deceased death in the course of executing his duties of guarding the Regional Prisons' Office. The evidence from both sides suggests that the accused person was defending himself and the office he was assigned to guard. Is that act lawful?

It is the law that a person is not criminally liable if he use reasonable force in the course of defending himself or his property. That person is guilty of manslaughter upon proving that he caused the death of another as the result of excessive force used in self defence. This defence is well stated in sections 18, 18A, 18 B and 18C of the Penal Code which are reproduced hereunder:

"18.-Subject to the provisions of section 18A, a person is not criminally liable for an act done in the exercise of the right of self defence or the defence of another or the

defence of property in accordance with the provisions of this Code

18A.-(1) Subject to the provisions of this Code every person has the right-

(a) to defend himself or any other person against any unlawful act or assault or violence to the body; or

(b) to defend his own property or any property in his lawful possession, custody or under his care or the property of any other person against any unlawful act of seizure or destruction or violence.

(2) In this section, **the expression "property of any other person" includes any property belonging to the Government** or a public corporation or an employer or any property communally owned by members of the public as a co-operative society or a village, whether or not that village is registered under the Local Government (District Authorities) Act.

18B.-(1) **In exercising the right of self defence or in defence of another or in defence of property, a person shall be entitled to use only such reasonable force as may be necessary for that defence.**

(2) A person shall be criminally liable for any offence, resulting from excessive force used in self defence or in defence of another or in defence of property. (3) Any person who causes the death of another as the result of excessive force used in defence, shall be guilty of manslaughter."

18C.-(1) The right of self defence or the defence of another or defence of property shall extend to a person who, in exercising

*that right, causes death or grievous harm to another and **the person so acting, acts in good faith and with an honest belief based on reasonable grounds that his act is necessary for the preservation of his own life or limb or the life or limb of another or of property, in the circumstances** where-*

- (a) the lawful act is of such a nature as may reasonably cause the apprehension that his own death or the death of another person could be the consequence of that act;*
- (b) the lawful act is of such a nature as may reasonably cause the apprehension that grievous harm to his own body or the body of another could be the consequence of that unlawful act;*
- (c) the unlawful act is with the intention of committing rape or defilement or an unnatural offence;*
- (d) the unlawful act is with the intention of kidnapping or abducting; or (e) the unlawful act is burglary or robbery or arson or any offence which endangers life or property.*

(2) Where in the exercise of a right of defence in accordance with this Code, the person exercising that right is in such a situation that he cannot effectively exercise that right without risk of harm to an innocent person or property, his right of defence extends to the running of that risk.” (Emphasize supplied).

In view of the above, one can conclude that use of reasonable force in the course of self defence or defending the property is lawful act. In the case of **John**

Nyamhanga Bisare vs R [1980] TLR 5, the Court of Appeal stated underscored that the following factors must exist for the defence of self defence to be invoked;

1. that most likely and on balance of probabilities the accused might have been over powered by the assailant given the circumstance;
2. that on the face of it the assailant's weapon was more lethal than the accused's;
3. the accused had exhausted all the reasonable precaution and means to escape the tragedy; and
4. that immediately after the tragedy, the accused had demonstrated a degree of remorse reasonable expected of him.

When the above position of law is applied to this case, it is in evidence that the accused being a prison officer was given SMG gun with 30 bullets in order to guard the Prison's Regional Office. Now, pursuant to PW1 and PW4' evidence that the deceased escaped from the police custody on the material night. That is when he ran to the area where the accused person was guarding. It is the prosecution evidence through PW2 that the accused did not shoot him immediately. To the contrary he ordered him to stop. No person who saw the accused person shooting the deceased. What happened thereafter is deduced from the accused's evidence. He shot into the air because the deceased was climbing the fence/gate to the office. He also shot into the air for the second time because on the account that

the deceased continued to climb. This time the deceased decided to run away. The accused came to learn later that the deceased was hit. He did not hide that fact. He admitted that fact before his fellow prison officer and the police on the very night. He also admitted that fact before and during the trial. In that regard, the accused had demonstrated a degree of remorse expected of him.

Again, there is no prosecution witness who adduced that the accused's act was not justified. PW2 and PW3 are members of prisons and police forces respectively. They deposed that the accused was justified to shoot into the air or even shot the deceased in the circumstances which he faced.

Further to that, the prosecution did not give evidence to prove that excessive force was used by the accused. Witnesses from both sides testified that it was dark on the material night and that the accused was not aware whether the deceased was armed and his intention of jumping the fence to the office. Be as it may no person who saw the accused person shooting the deceased. His defence that he shot into the air was not contradicted. The prosecution did not adduce evidence to show that a gun shot into the air cannot hit any person.

Having considered the above evidence, I concur with the ladies assessors that the accused person is not guilty of manslaughter. I am convinced that the accused used reasonable force. As a prison officer, he took the necessary precautions and measures before shooting into the air.

That said and done, this Court finds **B. 9815 WDR Asterius Charles**, not guilty of the offence of manslaughter under sections 195 and 198 of the Penal Code (supra) and acquits him of that offence.

DATED at MUSOMA this 15th day of July, 2021.



E.S. Kisanya
JUDGE

Court: Judgment delivered this 15th day of July, 2021 in the presence of Ms. Agma Haule, learned State Attorney for the Republic, the accused person and Ms. Mary Joachim, learned advocate for the accused. Ladies assessors present.



E.S. Kisanya
JUDGE
15/07/2021