

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT RUANGWA

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO 55 OF 2020

THE REPUBLIC

VERSUS

MT 101694 PASCAL YUSTIN @LIPITA

JUDGEMENT

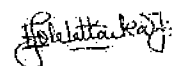
Date of Last Order: 31/3/2022

Date of Judgement: 16/6/2022

LALTAIKA, J.:

The accused person herein, **MT 101694 PASCAL YUSTIN @LIPITA** is charged with murder contrary to sections 196 and 197 of the Penal Code [Cap 16] R.E 2019. The particulars of the offence are that on the 10th day of February 2020 at Nang'ondo Village within Nachingwea District and Region of Lindi did murder one **MT. 114230 PTE BASILISA d/o PAISON ULAYA.**

The accused person took plea on 28/4/2021. He denied committing the offence hence the matter had to go for full trial. The prosecution called seven (7) witnesses and tendered a total of nine (9) exhibits in support of its case. At the hearing, the Republic appeared through Mr. Yahaya Gumbo,



learned State Attorney. The accused person on the other hand, was represented by Mr. Stephen Lekey and Mr. Emmanuel Ngongi.

The brief facts of the case are that the accused and the deceased were a married couple and members of the Tanzania People's Defence Forces (TPDF). Since 2018 when they celebrated their Christian marriage in Iringa, the couple had been mostly in a distant relationship as the deceased was working in Nachingwea, Lindi while the accused was at Mlale in Songea. Initially the deceased applied for transfer from Nachingwea for the purposes of joining her husband in Songea. It turns out that she faced many difficulties. As a result, the accused decided to take up the challenge and process his own transfer instead. In January 2020 the accused was successfully transferred from Songea to Nachingwea even though, allegedly, their marriage was experiencing many challenges. Hardly one month later, the accused allegedly murdered the deceased. The onus was on the side of the prosecution to prove this allegation. The next paragraphs are centered on such an attempt.

The first Prosecution Witness (PW1) was MT 113879 PTE Andrew Daniel Mago. He stated that on 10/2/2020 at 3:30 PM while he was on his daily duties as an armorer on duty at the KJ **843 Nachingwea**, a Tanzania People's Defence Forces (TPDF's) Military Station, he issued a gun make SMG No **1038890** to the accused person **Private Pascal Yustin Lipita**. PW1 stated further that the gun was accompanied by a magazine and 30 bullets and that he recorded such handing over in a roaster. PW1 identified the roaster as a black book bearing the words "Armor and Weapon Roaster Book" on the front page written by a red marker pen. PW1 prayed

John M. Mago

to tender **the Daily Armor and Weapons Roaster Book for 843 KJ Nachingwea as an exhibit.** The same was admitted as **Exhibit P1.**

PW1 testified further that as he finished issuing weapons, he locked the armory and he went for a rest in the barracks. At around 5:00 PM (17:00 hours) he heard shootouts. Seeing young **Jeshi la Kujenga Taifa** [JKT] soldiers running around, he asked them what had happened and he was told that Private Pascal Lipita had shot dead Private Basilisa Ulaya.

PW1 testified that as the armorer on duty that day, he thought it prudent to go and notify one **Lt. Simba**, the overall station in charge on duty that day, about the incident. On his way to notify Lt. Simba, PW1 met the accused along with Lt. Simba and other soldiers in the armory area. It is PW1's evidence that upon being persuaded, the accused agreed to put down the gun and he was immediately arrested.

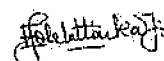
PW1 testified further that as the armorer on duty, he opened up the armory in order to return back the weapon. Upon inspection, he found that **only 11 bullets were left out of the 30 bullets he had signed out for the accused person earlier.** It is PW1's evidence that he filled in the number of bullets returned in the Daily Armor and Weapons Roster Book and the accused person signed against such information. PW1 testified further that after the signing by the accused, he set aside the weapon, locked the armory and continued with other activities. To windup examination in chief, PW1 testified that he knew the accused as a fellow soldier at **KJ 843 Nachingwea.** He identified the accused by touching him on the left shoulder.

Hobelitta Kujenga

On cross examination, PW1 testified that he **was a recruit in the same course, the 33rd INTAKE with the late deceased** and that he knew that the accused and the deceased were husband and wife but he was not aware that they had disagreements in their relationship. He testified further that while he gave the weapon to the accused person at 3:42hours, the time the weapon was returned was not indicated as the Daily Roster's column for time for returning the weapon appeared blank.

The second Prosecution Witness (PW2) was MT 87443 SGT Kasamwa Petro. PW2 testified that he was working in Nachingwea KJ 843 as an armorer "boharia". It is PW2's evidence that on 10/3/2020 he received instructions from **Lt. Col. Nyagalu Michael Malecela** to make necessary preparations to handover to the police a gun suspected to have been used in the killing on 10/2/2020. As an armorer, he took the initiative to prepare the hand over form through which he handed one gun make SMG No – 1038890 to the Nachingwea District Police. The witness mentioned one SP Majengo as the police officer he handed the weapon to and identified the form through, among other features, his handwriting and signature.

The witness prayed for the form to be admitted as part of the exhibit and the prayer was granted after protracted legal exchanges between the learned counsels. Thus, ***Form for Issuance of weapon dated 10/3/2020 was admitted as Exhibit P2.*** Moreover, PW2 identified the gun he had handed over to SP Majengo. On cross examination, PW2 admitted that the handing over form did not include a description on the size of the gun. On further cross examination, PW2 averred that one month had lapsed from the day the killing happened to the day that he issued the



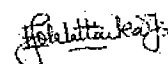
weapon and those four armorers, including him had been working as custodians of the weapons.

The third Prosecution Witness (PW3) was F6440 Detective SGNT Peter a police officer working with the office of the Regional Crimes Officer [RCO] for Lindi in the Cybercrimes unit. PW3 testified that on 17/3/2020 he was ordered by the RCO while in the office of the RCO to get ready to travel to Dar es Salaam for a task related to the crime of murder that had happened in Nachingwea and registered as NA/IR/191/2020.

It is PW3's testimony that acting on the RCO's order, he went to OCD's office in Lindi meeting an armorer PC Kulwa who gave handed him the gun AK47 Number 1038890 along with 18 bullet cartridges and an empty magazine upon signing a special form known as PF16 Court Exhibit Registry.

It is PW's testimony further that he took off to Dar es Salaam. Upon arrival in Dar-es Salaam, he went to the Forensic Bureau (FB) located in the Posta Area where he handed over the items and were immediately assigned file number FB/BALL/LAB/35/2020. Thereafter PW3 went back to Lindi, his work station to continue with his daily duties.

PW3 went on to testify that following yet another order of the RCO, he went back to Dar es Salaam to collect the items he had left at the Forensic Bureau. It is PW3's testimony that on 7/4/2020 he received the gun, an empty magazine and **21 empty bullet cartridges**. PW3 was quick to explain that; those 18 cartridges were the ones he took for investigation and the additional three (3) had been used for laboratory test. He explained further that whereas the 18 cartridges were labelled Q1 to Q18, each one



with its own number, the other three were LABELLED T1 to T3. Upon arrival back to Lindi, PW3 asserts that he handed over the items to the exhibit keeper PC Kulwa upon signing the PF16 one of the Police Forms.

It is PW3's testimony that on 22/3/2022 when he reported back from the Police College Dar es Salaam where he went to study for the Sargent's course, he was called by the RCO for Lindi and ordered to go to the exhibit keeper to pick up the exhibits he had handed over in 2020 namely: gun, magazine and bullet cartridges suspected to have been used in the murder incidence in Nachingwea. PW3 testified further that he was also ordered to bring the PF16 Court Exhibit Register to Ruangwa High Court as a part of the evidence.

PW3 recognized the PF16, prayed to tender it as part of the evidence and the same **[Court Exhibit Register] was admitted as P3**. PW3 also prayed to tender as part of the evidence, the items he had brought to court from PC Kulwa the armorer at Lindi Police and, after another protracted legal exchanges among the learned counsels, the same were admitted as **Exhibit P4(a) Gun with number 1038890 Exhibit P4(b) 18 Cartridges labelled Q1 to AQ18, Exhibit P4(c) 3Carteges labelled T1-3 and Exhibit P4(d) Empty magazine.**

On cross examination the witness admitted that the magazine of an AK47 such as that of Exhibit P4(a) could carry 30 bullets and if 18 were the number of the bullets used, the unused ones ought to have been twelve (12).



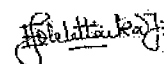
The fourth witness (PW4) was MT54347 Kashindye Shija Bundala, a long serving (38 years in total) member of the Tanzania People's Defence Forces (TPDF) working at 843 Nachingwea. PW4 testified that his duties at 843 Nachingwea included enforcing discipline among the soldiers and that he had been in Nachingwea since 4/6/2017.

It is PW4's evidence that on the **10th February 2020** in the evening hours at 17:00 he was seated under a tree near a shop located at his work station. It was then that he heard a motorbike from the kitchen side coming towards the shop. The deceased Private Basilisa Peason Ulaya was riding the motorbike. PW4 testified further that he then heard the gun being cocked up and he saw the accused shooting the deceased.

The witness described the shooting to the effect that the upon being shot down, the deceased fell down to her left-hand side. The accused followed her and shot her once again. Having witnessed the killing, PW4 left quietly to report the matter to Lt. Simba the then Officer on duty whose duties included receiving and acting upon various incidences and information.

PW4 insisted that he had seen both the deceased and the accused face to face. He insisted further that as soldier experienced with weapons, he saw the accused clearly cocking the gun. He testified further that the distance between where he was seated under a tree and where the shooting took place was about 30 meters.

It is PW4's evidence that he saw the accused returning the weapon he had used to shoot the deceased and thereafter the Military Police arrested



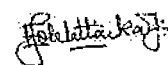
him and the Commanding Officer (CO) reported the matter to the police who in turn went to the scene of crime.

It is PW4's evidence further that when the police arrived, they were led by Mr. Majengo. He testified further that Mr. Majengo started picking up bullet cartridges. He got 18 of them. He also saw him moving around, taking some measurements and drawing a sketch map. Thereafter, he took the body of the deceased and packed it in the police car. The Police Investigator recorded PW4's personal statement and left with both the accused and the body of the deceased.

PW4 testified further that he knew **that the deceased and the accused were a married couple because, he could** remember that the deceased once wrote a letter requesting to be married off. She went home, got married and brought a marriage certificate. **It is PW4's evidence that the certificate indicated that the deceased was married to Private Yustin Lipita.** With regards to Private Lipita PW4 testified that he knew him as a fine and responsible young man who had been transferred from 842 KJ Mlale Songea to 843 Nachingwea as a Bee Keeping Expert.

The witness identified the accused by touching him on the left shoulder. On cross examination, PW4 stated that the purpose for issuing guns was to ensure security of the area one was assigned to guard and that anyone could turn into an enemy including a fellow soldier.

The fifth Prosecution Witness (PW5) was Super Intendent Peter Majengo, a police officer and the current OCD of Newala District.



PW5 testified that on 10/2/2020 around 18:00 while at Nachingwea Police Station assigning duties to other officers in his capacity as the OC-CID, he received a phone call from his OCD who was out of the station. The OCD informed him that there was a murder incident at the Nachingwea Military Station. He contacted JKT Nachingwea and he was told that a soldier had shot dead a fellow soldier.

PW5 testified that upon receiving such information, he took his working tools and headed to the scene of crime where he arrived at around 20:00 accompanied by some police officers in the investigation department. It is PW5's testimony that at Nachingwea JKT, he met Major Aloyce, Lt. Simba and **Kashindye Shija Bundala the Regimental Sergeant Major (RSM) of the Station**. PW5 testified further that he was briefed on what had happened to the effect that a soldier called Private Pascal Lipita had shot dead a fellow soldier Private Basilisa Ulaya. He was shown the exact place that the incident happened, coded the area to prevent other people from coming closer and instructed two other police officers accompanying him namely Detective Constable Julai and Detective Constable Josoline to help him inspect the scene of the crime. Outside the code-on tape stood the JKT leaders particularly Major Aloyce, RSM Bundala and Lt. Simba as well as some police officers who had accompanied PW5.

It is PW5's evidence that on scrutinizing the scene of the crime, what could easily be seen was the body of the deceased. It was covered by a *khanga* on the head. Other parts of the body were not covered. There was also a motorcycle next to the body. PW5 saw blood that was starting to clot but it was still fresh. Since the blood was coming from where the body of

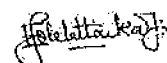
the deceased was lying, PW5 decided to remove the *khanga* from the body of the deceased so as to have a look at what had happened.

It is PW5's testimony that he saw that the head of the deceased was damaged. **The brain had come out of the skull.** Upon removing the *khanga*, the body of the deceased could be seen as that of a woman. She had plaited her hair and was on a Sleeveless commonly known as a "*singlend*" Tshirt. She also wore a pair of tracksuits. The motorcycle was partly on the body of the deceased on the side of her legs.

PW5 testified further that he started picking up cartridges. Since it was getting dark, he used a flash light to look for the cartridges. He picked up a total of 18 cartridges suspected to have been used in the shooting. Upon inquiring the whereabouts of the gun, PW5 was told that it was already returned to the armory by Pascal Lipita and had been shelved back.

It is PW5's evidence further that he was assisted to pick up the motorcycle and put it aside. He went back to scrutinize the body of the deceased and discovered that bullet holes were on the back and also on the front side of the chest, stomach and the thighs.

PW5 went on to testify that upon inquiring from the JKT Nachingwea leadership on who could provide him with more information on the incident, the leaders pointed out to RSM Kashindye Bundala. PW5 went out of the coded area to speak to the RSM who was outside the coded area. The RSM told PW5 as a leader in charge of the askaris, he had assigned the duties to them. Thereafter he went to seat under a tree in the smart area. He had



assigned Private Pascal to guard the shop area and for that purpose he was given an SMG No 1038890 with 30 bullets in a magazine.

While under the tree, the RSM narrated further to PW5, he saw the deceased coming on a motorcycle heading to the shop where the accused had been assigned to guard. He saw Private Pascal shooting the deceased and he also saw her falling down from the motorcycle. He also saw that the accused person kept shooting the deceased even after falling down. He sensed danger so he left from where he was seated through the other side of the shop to the office where he reported the incidence to the leaders.

It is PW5's testimony further that based on the information he received and observing the scene of crime, he drew a sketch map. PW5 could identify the sketch map he had drawn and spotted out his handwriting and signature. PW5 prayed that the sketch map he had drawn be admitted as part of the evidence. After a heated debate among learned counsels for both sides, the sketch map was admitted as **EXHIBIT P5**.

PW5 went on to testify that having drawn the sketch map and recorded the personal statement of RSM Kashindye, he wanted to be provided with the weapon used in the shootout but he was told by Major Aloyce that as per procedures obtained in the army, they couldn't give him the gun before seeking guidance from the Headquarters in Dar es Salaam. He took the body of the deceased into the police van ready to leave the barracks.

It is PW5's evidence further that he wanted to see the accused person and Pascal Lipita was brought to him. He asked him what had happened and why he shot dead his fellow soldier but the accused remained mute. He

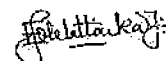


didn't want to say anything. PW5 thought the accused would open up if he took him somewhere else so the two of them moved from the scene of crime to the main office. Even there, the accused chose to remain silent.

PW5 testified that he took the body of the deceased along with the accused. They passed through Nachingwea District Hospital where the body of the deceased was kept in the mortuary and they proceeded to Nachingwea Police Station. It is PW5's testimony further that at the Police Station, the accused was received at the police counter, asked a few questions about his name and other details but chose to keep quiet. With such refusal to provide his information, PW5 narrated, it was impossible to lock up the accused person. PW5 decided to take him to his office. He used the personal statement of the RSM as the basis to open up a case against the accused. It was a murder case **number Nachingwea/IR/191**. The accused later opened up and told PW5 that he had killed Private Basilisa.

PW5 testified further that on 11/2/2020 he decided to write a letter to the Head of JKT Nachingwea to officially request the weapon that had been used in the killing incident "*tukio la mauaji*". The witness identified the letter and the ***Letter from Police Nachingwea*** KUMB: NAC/C.5/4/4/VOL.1/88 to CO 843 KJ Nachingwea was **admitted as Exhibit P6**.

It is PW5's testimony that he went to the Nachingwea District Hospital, met the District Medical Officer (DMO) and asked him to appoint a doctor who would conduct a postmortem to find out the cause of death of the deceased. To that end, the DMO appointed Dr. Faraja. Peter Nipwapwacha and he went to the mortuary accompanied by his assistant.



PW5 testify further that on 10/3/2020 he went to JKT Nachingwea to pursue the request for the weapon he had made earlier on through the letter he wrote. At the JKT Nachingwea, he reported to Lt. Canal Malecela who made an order to his officer in charge of the armory to prepare the weapon and the necessary documents. It is PW5's evidence that he was given the weapon, inspected it and he found out that the number SMG 1038890 was the same as the number he was given earlier. It is PW5's evidence that the gun he received was a complete set as it included the body, the hand grip, magazine, returning machine, "mdeki" used to clean the gun, the barrel which takes out the bullet and bat stock. It is PW5's testimony that the magazine was empty. Upon being shown the same, PW5 clearly identified Exhibit P4(a), P4(d) by the number he had assigned to namely 1038890.

PW5 also identified the accused in the courtroom by touching him on the shoulder. On cross examination, PW5 admitted that section 229(14)(b) of the Police General Order (PGO) required that in addition to the case number he included the exhibit register serial number and that the exhibit he had tendered had no such a number.

The Sixth Prosecution Witness (PW6) was Faraja Peter Nipwapwacha an assistant medical doctor grade one working with Nachingwea District Hospital, holder of an **Advanced Diploma in Clinical Medicine from Mambo Tanga** and a license Number AMOTC/TAG/382 issued by the Tanganyika Medical Board.

PW6 testified that on 11/2/2020 while attending out patients, he was called by the Medical Officer in Charge. He went to his office finding the DMO



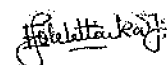
with a Police Investigator from Nachingwea Police who was introduced by just one name as Majengo.

It is PW6's evidence further that the Doctor in charge assigned him the task of undertaking postmortem of the body that had just been brought by the police. Upon arrival in the mortuary, he found that the body of the deceased was taken out of the mortuary refrigerator and put on the mortuary examination table and it was that of a woman, an adult, African who he was later told her name was Basilisa.

PW6's testimony is to the effect that he started examining the body from the head to the feet. After that physical examination head to toe, he realized that primary cause of the deceased's death was a large head wound that led to very *severe crush head injury* and the secondary cause was severe bleeding.

PW6 testified further that the next step was to fill in the postmortem report which he did on the same day. He identified the report by spotting the date and his signature. He prayed for it to be admitted as an exhibit. **The Report on Postmortem Examination Dated 11th February 2020 was admitted as an exhibit and labelled Exhibit P8**

The Seventh Prosecution Witness (PW7) H4088 DC Zakayo Joshua Okejo a police officer from the Tanzania Police Headquarters in Dar es Salaam working with the Forensic Bureau (FB) at the Ballistics Section. PW7 told the court that he had been a police officer for 9 years and in the ballistics section for 8 years. He was trained as a ballistics and explosives examiner as part of the internal training at the ballistics lab and that his daily



duties as a police officer includes, among others, to examine weapons, bullets, cartridges and explosives.

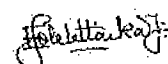
It is PW7's testimony that on 19th March 2020 while in his daily duties, a police officer number F6440 DC PL Peter from the RCO of Lindi's office came in with exhibits which are one-gun AK47 which has a 7.62mm diameters, 18 used cartridges of 7.62 millimeters accompanied by a letter with IR. No. NAC 191 of 2020.

PW7 testified further that the letter required him to conduct investigation to find out two things namely 1. whether the weapon was in good order and 2. Whether the used cartridges came from that purported gun.

It is PW7's evidence that upon receipt of the exhibit the first thing he did was to assign the exhibits with a lab number namely **FB/BALL/LAB/35/2020** thereafter he labeled them. He assigned the gun label Exhibit K1 and the eighteen (18) cartridges Q1 up to Q18 respectively then he started examination.

It is PW7's testimony that he in conducting the test, he took three bullets put them in the empty magazine and went to the shooting ground in the Field Force camp located at Ukonga Dar es Salaam. He started shooting off the three ammunitions and they all exploded proving the first question namely that the gun was in good order.

PW7 testified further that he took the three used cartridges and assigned them the labels T1 to T3 respectively and that the "T" means testified cartridges. PW7 went ahead and made a comparison with the 18

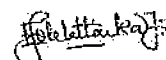


cartridges he had received from the RCO of Lindi hitherto assigned the labels Q1 to Q18 respectively whereby the letter "Q" stood for "questioned evidence". PW7 went on to testify that he made the comparison by taking the T1 to T3 and compare them with Q1 to Q18 using the **Forensic Solutions Microscope** also known as **Leica Comparison Microscope** where he discovered that the used cartridges T1 to T3 carried the same properties as Q1 to Q18. PW7 went on to outline the three shared properties as follows:

1. **Pin impression:** This is a mark left by the firing pin hearing the base of the ammunition.
2. **Injector mark:** When the injections happen, a mark is left on the base of the ammunition.
3. **Bleach face characteristics.** This is a scratch left when the bullet is fired up.

It is PW7's evidence that based on the three main common properties between T1 to T3 positive to Q1 to Q18 the cartridges were all a result of bullets fired from the same weapon.

PW7 testified further that to finalize his task, he had to prepare and fill up the Ballistics Report and he did this on 26/3/2020. The witness could identify the report based on the office logo, his signature and official stamp of the Forensic Bureau. He prayed for the same to be admitted as an exhibit. Since there was no any objection from counsels for the defence, without further ado, the Examination Report on Exhibits of NAC/IR/191/2020 from the Forensic Bureau dated 26/3/2020 with Reference Number



FB/BALL/LAB/35/2020 NAC/IR/191/2020 was admitted and marked as Exhibit **P9**

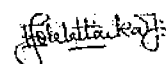
Upon closure of the prosecution case on the 28th March, 2022, this court ruled that the accused person, MT 1011694 Pascal Yustin Lipita had a case to answer. To this end, the Defence Case Commenced. There was only one witness and no exhibit tendered.

The Defence Witness (hereinafter DW1) was MT 101694 Private Paskali Yustin Lipita, a military officer with the Tanzania Peoples Defence Forces (TPDF) posted to the JKT command as a trainer.

It is DW1's testimony that he knew the late Basilisa Paison Ulaya as she was his wife. DW1 stated that they got married on the 16th June 2018 as they celebrated a Christian Marriage at the Tanzania Assemblies of God (TAG) Church at Kiwere, Iringa Rural District in Iringa. DW1 stated further that the couple had met and knew each other in 2013, started plans to become a couple in 2015 and got married in 2018.

It is DW1's testimony that by the time they got married, the deceased was still living in Lindi while working with 843 KJ Nachingwea. DW1, on the other hand, was at 842 KJ Mlale JKT in Songea, Ruvuma Region. The couple had to make arrangements to live together and that initially it was the deceased who had to move from KJ 843 Nachingwea to 842 Mlale JKT Songea. DW1 stated that the transfer was very challenging as she wrote three letters but did not get any response.

It is DW1's evidence that such difficulties experienced in securing transfer was a major concern and a source of conflict in their marriage. DW1



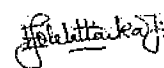
stated that at some point the deceased lost hope with her marriage as she thought that the transfer was becoming impossible. He stated that he could see some signs of despair. This, DW1 testified, became apparent in 2019 when he (DW1) came back from the leadership training he had attended in Zanzibar. In spite of such ups and downs, DW1 stated, the couple were in constant communication. DW1 testified that he used to buy food from Songea, put it in a car and she would receive it in Nachingwea. For example, he would buy rice, beans, *dagaa* and some other things for family upkeep and send them to his wife.

DW1 testified that another source of disagreement as a couple was on suspected or perceived infertility. DW1 testified that before going for the leadership course he sent her the money for treatment on infertility, she went for treatment and reported back to him that she was healed.

Upon receiving such confirmation, DW1 stated, he too wanted to go for a health checkup to ensure that he was not the one who was unable to make his wife pregnant.

DW1 stated that in his attempts to save his marriage, he decided to seek help from his pastor one Reverend Komba of Tanzania Assemblies of God (TAG) Songea who immediately linked up with his fellow pastor at the Evangelical Assemblies of God Tanzania (EAGT) Nachingwea where his wife was attending.

It is DW1's evidence that at some point, his wife accepted the invitation by Rev. Komba and they all met in Nachingwea hosted by Rev. Mpunga of EAGT Nachingwea. In that session, DW1 narrated, the deceased lamented

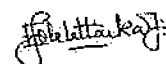


that he (DW1) had failed to deal with the issue of transfer and also other family matters and instead chose to delegate them instead. She gave an example of a house that DW1 was building in his home village in Iringa and had sent someone else to supervise wiring for electricity.

DW1 testified further that the deceased had reported in the meeting of pastors that he was calling her too often and that she was getting irritated for too many calls from him. DW1 stated that upon hearing all that, he decided to ask for forgiveness whereupon he knelt down in the meeting. He begged her for forgiveness but the deceased would not forgive him. DW1 stated further that after that meeting, their relationship kept dwindling. However, DW1 stated further, they were still in a relationship and kept communicating. Sometimes, DW1 recalled, she would call him just to know how he was doing and nothing else and that went on throughout completion of her special task at Tunduru.

It is DW1's testimony that on 14th January 2020 he finally got transferred from 842 Mlale JKT to 843 Nachingwea JKT as a Bee Keeping Expert. DW1 added that the transfer was a result of the application made by his wife. No sooner had DW1 finished testifying on transfer with signs of excitement than he started struggling with pain and waiving the defence counsel to go closer to him. The defense counsel confirmed that the witness was in pain and prayed for a short adjournment.

After the break, DW1 returned to the witness box somewhat looking better. He stated that JKT Nachingwea had wanted a person like him, a bee



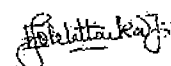
keeping expert and that is why he qualified for the transfer as there was no Bee Keeping Expert at Nachingwea JKT.

DW1 testified that on 29/1/2020 he left Songea for Nachingwea. He stated further that he went his wife's place at about 20:00 hours but she was not at home. Some neighbors told him that the woman who was living in that place had left as she had already built a house somewhere else. DW1 stated that upon hearing this, he got a bit shocked but decided he had better go to the barracks. To this he took a motorcycle to the barracks arriving between 23:00 hours and midnight. DW1 testified that he was well received, was given a place to sleep and on the next morning at around 8:00 he went to report at the office concerned.

DW1 stated that upon reporting and producing the transfer permit, a male officer asked him whether he was the husband to Basilisa Ulaya. As he replied to the affirmative, the officer warned him that he had gone to Nachingwea for a job and not for a wife. DW1 however, could not remember the name of the officer.

DW1 testified further that on the same day of reporting, while writing down his particulars, the deceased came to bid farewell to her colleagues that she had finished the work she was doing that day and was leaving. DW1 asked her to wait for him outside the office. They met, exchanged greetings and he asked her why she was not picking up his calls and she kept quiet.

It is DW1's testimony further that he asked the deceased yet another question how comes she moved from where she was living without informing



him and the response was that he thought he had decided to come to the fire of hell on his own accord "*naona umeamua kuja mwenyewe motoni*". DW1 stated further that the deceased warned him thus now that you he had decided to come to his fellow men, he had only to wait and would meet them.

DW1 stated that he decided to report his marital challenges to Kashindye Bundala as he was also the in charge of discipline and the link between *askaris* and officers (meaning between junior and senior staff) and that he had hoped that he was in the position to bring the couple together. DW1 stated further that since he needed peace, he thought it wise to go and find out where his wife (the deceased) was living. He stated further that on a Saturday he went to the place she had constructed a house, he found a motorcycle outside the house, knocked but no one responded.

DW1 stated that although no one responded to his knocking at the door, he could hear some noises indicating that someone was inside. Nevertheless, since there was no one to welcome him, he decided to go back to his place. On the next Sunday, DW1 stated, he went back to the deceased's house. Upon arrival, DW1 narrated, he saw her leaving on a motorcycle. He called her but she did not pick up the call. Again, DW1 decided to go back to his place. DW1 stated further that he kept on trying to call her but he would hear a return voice that the number was closed later on he stopped calling her but hoped that the RSM was going to work on their marital challenges. DW1 stated that as days passed by, the deceased was living in her newly built house and he in a room he had rented.

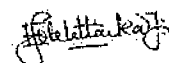
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DW1 testified that on **10/2/2020** there was a meeting that day in which many things were discussed including responsibilities and also the need for heightened security. DW1 stated further that in the meeting, it was insisted that security was to be heightened for 75% due to the then prevailing conditions in the southern part of the country that share the boarder with a neighbouring country experiencing security challenges. DW1 explained that to an armed guard, heightening security for 75% meant being alert, carrying one's weapon all the time and when on duty follow all the rules such as being where one is needed at the time required. He testified further that in that situation, one's weapon needed to be in good working condition and ready for use.

DW1 stated that when the security is heightened, one's weapon could be put in chamber meaning the gun is cocked on and made ready to fire up as time is reduced compared to firing it while it was not ready cocked on.

DW1 stated that at 17:00 hours when he finished eating supper, he went to lower the flag. He recalls that on that day five of the soldiers were assigned to guard the military camp and, on his side, he was supposed to guard the whole area of the shop and mess. DW1 recalls further that it was a rainy day and there was a heavy cloud.

DW1 stated that when he had made a round check and ensured that the environment he was guarding was secure, he heard a sound of the motorcycle coming from his back side. DW1 stated further that he had to turn around as the motorcycle had abruptly appeared before him and he felt scared. He did not know what exactly had happened that the motorcycle



suddenly went off. "*Pikipiki Ilizimikia kwenye gia.*" This made him even more frightened. DW1 went on narrating that when he looked closely, he saw his wife (the deceased) on that motorcycle and that she was on a sleeveless vest "sing-lend" the neck part of which was open such that a part of her breasts could be seen and a pair of shorts that were above the knees.

It was DW1's evidence further that he did not expect to see his wife in that place and dressed that way to this he wondered for a while how she had come to his work place against acceptable conduct and after gazing at each other for a few seconds she greeted him. DW1 stated that the way the deceased greeted him "HABARI YAKO" in a sharp voice was unusual to him, it sounded like there was something hidden so he sensed some danger.

DW1 testified that he replied to her greetings in a calm, respective voice that he was fine but she kept gazing at him. DW1 stated further that he waited for her to tell him anything but she did not. It is DW1's evidence that after gazing at each other for fewer seconds, he asked her if in the way she was dressed, she was not ashaming him as her husband. She replied that if the way she was dressed was too painful to him, she could take off the clothes and give him so he could put them on. DW1 stated that those words made him angry. He was enraged.

It is DW1's testimony that the people in the shop were not close by but they could hear what he and the deceased were discussing because, although he spoke calmly, she replied in a high voice.

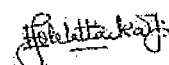
DW1 testified that he just found himself full of anger and found that he had shot down his wife. DW1 testified further that due to the situation he

Habibullah

had found himself in, he did not know what went on after the incidence adding that he was not in his normal state and it was like he lost his sense. He just found himself completely out of control and the shooting just happened. He stressed that he was not in his senses and after the shooting he found himself seating down. When he regained his senses, he went to the armory. Shortly thereafter, some people rounded him up, took the gun from him and started beating him up. He was handcuffed and locked up in the barracks cell. On cross examination, DW1 admitted that he was the one who shot dead the deceased and that the latter and himself had always exchanged unpleasant words. DW1 admitted further that he was a soldier who had been trained to be patient and that, as a married man, he had been through difficult situations before but endured.

During Final Submissions by Counsels, Mr. Gumbo submitted that he was aware of the principle in all criminal cases that the prosecution is tasked with proving the case beyond reasonable doubt. The learned State Attorney averred that the prosecution had done the same by tendering a total of 9 exhibits and 7 witnesses. To buttress his argument, the learned counsel cited the case of **Mohamed Hauruna @Mtupeni and another v. R.** Criminal Appeal No 25 of 2007.

Mr. Gumbo invited this court to consider the fact that the accused person had confessed shooting to death the deceased as the best evidence arguing that the best evidence is that of an accused person. He cited the cases of **Mawazo Anyandwile Mwaikwaja vs. R** Criminal App 45 of 2017 CAT at page 18 and **Jacob Asegelile Kanune vs DPP** Crim App 178 of 2017 at p14.



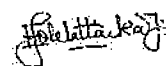
Linking the best evidence rule to the third ingredient of murder namely malice aforethought the learned State Attorney submitted that the confession of the accused was given voluntarily. He cited section 200 of the Penal Code Cap 16 RE 2019 and the cases of **Semburi Musa vs R**, Crim App 236 of 2020 CAT Kigoma, **Enock Kipela v. R** Crim App 150 of 1994 CAT Mtwara

Mr. Gumbo concluded his final submission by asserting that since the republic had proven both *mens rea* and *actus reus*, it was his prayer that the court convicts the accused as charged.

Mr. Lekey, the defence Counsel on his part, insisted that the prosecution had not proved the case beyond reasonable doubt.

The learned counsel averred that it was undisputed that the deceased Basilisa Ulaya was wife of the accused. He referred this case to page 6 of the Preliminary Hearing (PH) proceedings, the statement brought by the prosecution and agreed upon by his client. Mr. Lekey admitted that the late Basilisa didn't die a natural death. However, the learned counsel contended, the prosecution had not been able to prove that the accused is responsible for the death of the deceased as it was based on the eye witness testimony of PW4 which did not fulfil evidentiary requirement. To buttress his argument, the learned counsel cited the case of **Yohana Kulwa @Mwigulu and Others v. R**. Cons. Crim. App. 192 of 2015 and number 397 of 2016 at page 12.

It is Mr. Lekey's submission that PW4 had told the court that he saw the accused person sideways but he did not say the color of the clothes he

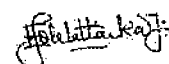


was on. Wondering how one could identify a person from sideways, the learned counsel opined that such testimony violated established principles of law related to identification.

Mr. Lekey also faulted the prosecution for allegedly failure to establish the chain of custody. He averred that it is a legal principle that the collection, keeping and transportation of exhibits must be documented and there must be paper trail to prove the same arguing that such an explanation was missing with regards to where the 18 bullet cartridges were kept from 10/2/2020 to the day they were taken to RCO Lindi 12/3/2020. The learned counsel cited the case of **Paulo Maduka and Other vs R**, Crim App. 110 of 270

It is Mr. Lekey's final submission further that in the matter at hand, **the accused person had used "provocation" as a defence**. The learned counsel averred that the onus was not on the accused person to prove provocation but rather he was merely required to raise reasonable doubts as to its existence something that, the learned counsel contended, the accused had been able to do. He cited the cases of **Bilekezi V. Republic**, Crim Appeal No 430 and **Kenga v. R** [1991] 1 EA 145 to support his argument.

It is Mr. Lekey's submission that the nature of provocation was to the effect that each case needed to be treated differently as provocation varied from one community to another. To fortify his argument, the learned counsel cited the case of **Damian Ferdinand Kiula @ Charles** [1992] TLR 16.



In the alternative, the learned counsel opined that should this court finds that the utterances of the deceased were not sufficient to cause provocation, it is his prayer that this court finds that the republic had failed to prove malice aforethought. He cited the case of **Mashaka Mbezi v. Republic** Crim App 162 of 2017.

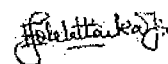
Upon summing up of the case, all the three assessors returned the verdict of guilty of the accused. They cited the accused person's own confession as the main reason for their verdict.

I have dispassionately considered submissions by both counsels and keenly scrutinized the evidence adduced throughout the trial. There are four issues that require my determination:

- (i) Whether there was death of a person
- (ii) Whether the death was unnatural
- (iii) Whether the said death was caused by the accused
- (iv) Whether the accused caused the death with malice aforethought

To begin with the first issue, it is undisputed throughout the prosecution and defence evidence that the death of MT. 114230 PTE BASISILA d/o PAISON ULAYA occurred on 10th day of February 2020 at Nang'ondo Village within Nachingwea District and Region of Lindi. I find it unnecessary to spend much time on this first issue.

This brings me to the second issue on whether the death was natural. It is the prosecution's case that the deceased was shot dead on the 10th day of February 2020 at Nang'ondo Village within Nachingwea District and



Region of Lindi. **PW6 Faraja Peter Nipwapwacha** had conducted postmortem examination and found out that the death was caused by a large head wound that led to very *severe crush head injury* and the secondary cause was severe bleeding. This evidence is corroborated by that of PW4 MT 54347 Kashindye Shija Bundala an eye witness who had witnessed the accused person shooting the deceased. It is corroborated further by the evidence of PW5 Supper Intendent Peter Majengo who had found the body of the deceased lying at the scene of crime, gruesomely covered by blood and took the same to the mortuary for further actions.

The third issue I am inclined to determine is whether the accused is responsible for the death of the deceased. It is obvious that the prosecution exerted their best efforts to prove this aspect as evidenced by consistency of the testimonies of the seven prosecution witnesses. More importantly it is the accused person's own confession on the same during defence that makes this issue less contentious. The accused person who, during preliminary hearing had pleaded not guilty leading to this trial, changed course during trial admitting that he was the one who shot dead the deceased whom, he asserted, was his wife. I do not intend to spend much time on this issue either. Suffices it to state that, as argued by counsel for the respondent Mr. Gumbo, confession of the witness is the best evidence. That is why, unsurprisingly, the revered assessors returned a verdict of guilty citing the accused person's own plea of guilty.

Having responded to the third issue in the affirmative, I now turn my attention to the fourth and last issue namely whether the accused had caused the death of the deceased with malice aforethought. Needless to say,

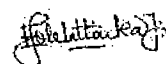


that for reasons that will become apparent later in this judgement, I intend to spend a considerable time on this issue.

In analyzing this issue, I painted an imaginary picture of the accused as a husband on one side and a man in uniform on the other. As a husband, he had vowed to love his wife through thick and thin. As a man in uniform particularly a member of the Tanzania People's Defence Forces, the accused had been inducted through discipline and had vowed not to engage in any conduct that would tarnish the image of the military. Whatever led to his "rebellion" against both of these respected institutions namely marriage and military and their respective vows must be investigated. I am inclined to address each of these in turn as I do bellow.

In addressing the accused person's commitment to his marriage and family values in general, I must admit that although there was no dispute that the accused and the deceased were a couple, counsel for the respondent in his final submission quipped that the accused had not produced a marriage certificate to that effect. Whether that was done or not, unlawful and intentional killing of a human being whether spouse, relative or even an outright stranger remains a capital offence in our law books. I do not think producing a marriage certificate would have made any difference.

Be it as it may, PW4 MT 54347 Kashindye Shija Bundala had stated that the deceased once wrote a letter requesting for permission to get married. She was granted the permission and when she reported back, she produced documents indicating that she got married to the accused.

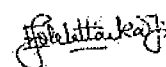


Misunderstanding among couples apart, I have all reasons to believe that the deceased and the accused had the best intentions for each other. It is clear from the testimony of DW1 that he had pursued his transfer from Songea to join his wife in Nachingwea for a long time. He would not have accepted the transfer if he hated his wife. The accused had also testified that, in the course of trying to save his marriage, he brought together two pastors one from TAG Songea and another from the EAGT Nachingwea to a reconciliatory meeting. To me this is not the picture of a cruel, hateful and vengeful husband who would have been expected to shoot dead his wife.

DW1 had stated that he knew where the deceased had moved to and had in fact attempted to visit her in her new place. To me this means that the couple were still communicating and if the intention of the accused was to cause violence, he knew precisely where to find the deceased, fulfil his ill motive and minimize chances of ever been discovered.

As I have already alluded to above, misunderstandings among couples are as common as clouds in the sky. Unlike typical marital violence that led to killing of a spouse, it is not indicated anywhere in the records that the accused had threatened to kill the deceased before. It is my considered view that the killing must have been sudden if not impulsive. There is nothing to suggest that the same was premeditated. Assuming that this is the case, what then had triggered the attack? Mr. Lekey, **the defence counsel had stated that the accused's action was caused by provocation.**

In the course of building his argument Mr. Lekey stated that the deceased had appeared in demeaning clothes and spoke to her husband in



a disrespectful manner. The learned counsel stated further that the accused person is a member of the Hehe tribe known to terminating even one's own life let alone that of someone else should they be provoked. With due respect, I do not agree with the learned counsel's reference to tribe. This is being too stereotypic.

Be it as it may, no one knows whether there were other utterances which remain undisclosed which utterances provoked the accused even further leading to the killing. It can be recalled however that DW1 had struggled quite a bit during the defence case. At some point he was unable to seat so he begged for permission to testify while standing and vice versa. Halfway towards completion of the defence case, DW1 became too weak that his counsel prayed for a short adjournment something which was unhesitatingly granted by this court.

Luckily, he regained his strength and the defence case came to completion. No one knows whether, had the accused been in perfect health, he would have assisted the court better in discovering what exactly transpired a few seconds before he pressed the trigger of the SMG, he was holding causing the death of an innocent young lady in uniform. Nevertheless, I take note of the invocation of the defence of provocation for further analysis.

The second imaginary picture of the accused I painted in my mind is that of a soldier. It is known that men and women in uniform are some of the most disciplined individuals there are. Discipline is so important in the military that it cannot be substituted by any other qualification. It is almost

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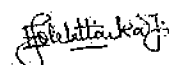
like a second name to all *askaris*. This is exhibited in the way orders from individuals of superior ranks are received and implemented. One cannot but admire the highly disciplined way in which men and women in uniform relate to each other whether in or out of the barracks.

There is no question that the accused was a disciplined *askari*. PW4 had stated that he was in charge of discipline and found the accused to be a well-mannered individual. On cross examination, PW4 stated further that he was shocked to learn that the accused had committed such an act. It came as a shock to him because the accused was the least expected person to commit such an act given his disciplined lifestyle.

DW1 had also stated that in 2019 he was sent to Zanzibar to pursue a leadership course. This means that not only PW4, the RSM had confidence in the accused as a disciplined soldier but also the TPDF in general. That is why they took the trouble to take him to a leadership training hopefully with expectations that he would come to save his country better.

It was PW4's evidence that on the fateful day he had a meeting with the accused and other *askaris* for the purposes of improving security in the barracks. The accused was attentive and he was later issued a gun for the purposes of guarding a particular area namely the shop that supplied essential commodities to members of the barrack.

Both PW4 the RSM and DW1 the accused agree that the killing happened during work hours and within the area under the guardianship of the accused. It was not the accused who, out of malice aforethought, went out looking for the deceased in order to kill her. I do not want to sound like



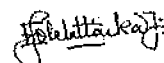
the deceased is to blame for riding her motorbike towards the accused but this just shows that if the accused had the intention of killing the deceased, he would have followed her immediately upon receipt of the gun or in the most imaginable situation, he would have used one of his visits to attack the deceased in her own place outside the military area.

PW5 Peter Majengo had testified that the accused had remained quiet from the time he met him at the scene of crime all the way to the police station to the next day. Several attempts were made to get him to provide even the most basic information to enable opening up of the police case but to no avail. I can imagine that a lot was going on in the mind of the accused.

Having failed to paint a picture of the accused in premeditation for killing, I am inclined to take the issue of provocation just a few more steps further as I hereby do. Section 202 of the Penal Code Cap 16 R.E. 2019 defines provocation as follows:

"The term "provocation" means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to who he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

It is trite law that the burden of proof does not lie on the accused to establish a defence of provocation. See **Republic v. Ismail Napose** [1999]



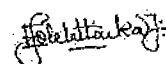
TLR 8. It was upon the prosecution, on learning that the accused had invoked the defence of provocation, to prove the absence of the same.

In the instant matter, the prosecution, in addition to drawing the attention of this court to a number of decisions expounding on various aspects of provocation, was supposed to prove that the action taken by the accused within a few seconds after exchanging words with the deceased was a natural act of violence.

A careful read through the testimony of DW1 would reveal that, a large part of their frequent disagreements as a couple, revolved around infidelity. DW1 had stated that he had been told by one of his superiors that he had moved to Nachingwea from Songea for the purposes of working and not to follow his wife. DW1 had asserted further that the deceased had warned him that he had come to the hell of fire on his own accord "**umejileta motoni mwenyewe**".

Chances are, in my opinion, the accused was provoked along those parameters. It was the wisdom of the Court of Appeal of Tanzania in the case of **Richard Venance Tarimo v. Republic** [1993] TLR 142 that the deceased uttered words "**Mimi sichungwi. Kama huko Dar es Salaam una wanawake wengine na mimi nina wanaume**" were considered capable of causing provocation and conviction for murder was reduced to manslaughter.

It is my finding that the prosecution has failed to prove the absence of provocation raised as a ground of defence by the accused. The offence of murder contrary to section 196 and section 197 of the Penal Code cannot



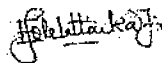
stand when the defence of provocation is successfully invoked. However, since all other elements of the offence have, in my opinion, been successfully proved the position of the law as per section **300(1) and (2) of the Penal Code [Cap 16 RE 2019]** is conviction on a minor offence. In the matter at hand, a minor offence to murder is manslaughter. See **Kelvin Haule v. Republic** [2005] T.L.R 53 where the Court of Appeal of Tanzania proffered that "in mathematical terms... killing on provocation is manslaughter..."

All said and done, I part ways with ladies and gentleman assessors and hold that in terms of section 300(1) and (2) of the Criminal Procedure Act, the accused **MT 101694 PASCAL YUSTIN @LIPTIA** is guilty of manslaughter.

Consequently, I convict **MT 101694 PASCAL YUSTIN @LIPTIA** of manslaughter contrary to section 195 and 198 of the Penal Code.

It is so ordered.

E.I. LALTAIKA



JUDGE
16/6/2022



IN THE HIGH COURT OF TANZANIA
MTWARA DISTRICT REGISTRY
AT RUANGWA
ORIGINAL JURISDICTION
CRIMINAL SESSION CASE NO 55 OF 2020
THE REPUBLIC
VERSUS
MT 101694 PASCAL YUSTIN @LIPTIA
PROCEEDINGS

Date: 16/6/2022
Coram: Hon Dr. E. I. Laltaika, J.
For the Republic: Yahaya Gumbo, SA
Counsels for the Defence: Stephen Lekey and Emanuel Ngongi
Accused: Present under custody
BC: Zuena Nandule

Mr. Gumbo

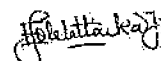
My lord and the assessors, the matter is coming for judgement. On the side of the republic, we are ready.

Mr. Lekey

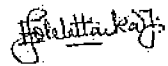
We are also ready my lord.

Court:

The judgement is read out loud in the open court



E.I. LALTAIKA

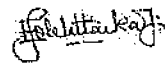


**Judge
16/6/2022**

Court

The accused is convicted of manslaughter c/s section 195 and 198 of the Penal Code.

E.I. LALTAIKA



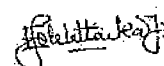
**Judge
16/6/2022**

PREVIOUS RECORD

Mr. Gumbo

My lord and the assessors, we on the republic would like to say that we have no any previous record of the accused. However, since your court has convicted the accused on manslaughter under section 195 and 198 of the Penal Code, it is our prayer that a tough sentence is meted by this court.

My lord and the assessors, initially, the accused was charged for murder contrary to section 196 and 197 of the Penal Code. This court has found the accused guilty of manslaughter. My lord, precious life of a person has been lost. The Constitution of the United Republic of Tanzania of 1977 Constitution (Article 14) provides for the right to life. My lord this right cannot be abrogated. It originates from God. Should.



My lord, the right to life of Basilisa Ulaya has been denied by the accused. It is our prayer that your court makes a stiff punishment. As will be explained later, the accused had been trained as a soldier. The deceased was a young lady. She had not spent even 10 years in the military.

The military has lost its best soldier. She was still young. Given her age, and the fact that we greatly need female soldiers, her death is a great loss to the TPDF [Tanzania Peoples' Defence Forces] and the nation at large. My lord in addition to the fact that TPDF has lost one of her best soldiers, our country has also lost a worker and a contributor of economic development.


The deceased was involved in keeping the peace of our country and its people. Moreover, the deceased had a family. The family dependent on her. She was of great service to her mother and her younger siblings. As a civil servant she earned a salary which was a crucial way of helping her family. As a result of the taking away of the life of the deceased, the dependents have missed the service.

My lord, in general we pray that the accused be severely punished to save as a lesson to all his colleagues. I mean men and women in uniform. To make sure that they take care of the peace without killing them as per their vows and work ethics. This will prevent any future calamities. Finally, my lord, we pray for a penalty that would serve as a lesson.

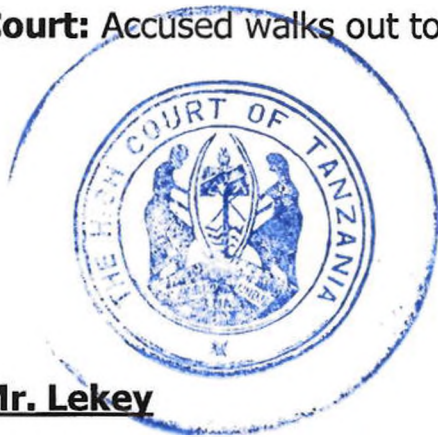
Mr. Lekey

My lord my client prays for a short health break.

Court: granted



Court: Accused walks out to attend a call of nature under custody



E.I. LALTAIKA

E.I. Laltaika

**Judge
16/6/2022**

Mr. Lekey

My lord as the court has seen, it is undisputed that our client is responsible for the death of the deceased. However, for very specific reasons, we pray that your court uses **section 38(1) of the Penal Code Cap 16 RE 2019**. This section empowers your court to either issue absolute discharge or conditional discharge. We pray for a conditional discharge.

As the republic has admitted, our client is not a habitual criminal. He is a committed soldier and a husband who loved his marriage. My lord this soldier is now 31 years old. This is a time when his energy is needed in building the nation. He has elderly parents above 55 years. They need him in their daily upkeep.

My lord our client has also informed us that he is sick due to the beating he sustained in prison. He was beaten up because two prisoners had escaped. As a result, all the prisoners were beaten up including him. My lord we believe that the court will find that the accused needs close care and this is available outside the prison. My lord as our client could be observed as DW1, he is remorseful. He testified that upon realizing that he had killed his wife, he sat down. My lord, the remorseful Lipita had admitted that he was

E.I. Laltaika

the one who caused the death of the deceased. He also admitted before you as DW1.

My lord, your court and the court of appeal have often regarded admission as a courageous act requiring commendation and that such commendation would come as a way of reduced punishment. In the case of **LUCAS JOHN V.R. CRIM APP 8 2002 NC 2004 TZCA 15**, the CAT when reviewing HCT decision that had disregarded confession, it was of the opinion that the HC would have considered confession and should have arrived to a reduced or lesser stringent sentence.

My lord there is another reason: time spent by the accused in remand. Since the eventful day to date it has been more than 2 years. The CAT in the case of **Mathias s/o Masala v. R Crim App 274 2009** (this was referred in **R. v. Grace d/o Boniface Crim Sess. Case 23 of 2019. NC 2021 TZHC 6242**) had explained that the time spent in remand is a mitigating factor worthy of consideration.

My lord we pray that the court finds that by now, conditional discharge is the right sentence to our client. That's all my lord.

E.I. LALTAIKA



E.I. Laltaika

Judge

16/6/2022

E.I. Laltaika

IN THE HIGH COURT OF TANZANIA
MTWARA DISTRICT REGISTRY
AT RUANGWA
ORIGINAL JURISDICTION
CRIMINAL SESSION CASE NO 55 OF 2020
THE REPUBLIC
VERSUS
MT 101694 PASCAL YUSTIN @LIPTIA

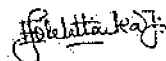
RULING ON SENTENCE

16/6/2022

LALTAIKA, J.:

This court has, pursuant to section 300(1) and (2) of the Criminal Procedure Act Cap 20 R.E. 2019, made a finding that the accused person **MT 101694 PASCAL YUSTIN @LIPTIA** hitherto charged with the offence of murder contrary to sections 196 and 197 of the Penal Code [Cap 16] R.E 2019], is guilty of the lesser offence of manslaughter contrary to section 195 and 198 of the Penal Code.

It was the prosecution's case that on the 10th day of February 2020 at Nang'ondo Village within Nachingwea District and Region of Lindi the accused did murder one MT. 114230 PTE BASISILA d/o PAISON ULAYA. The deceased was wife to the accused.



The accused person took plea on 28/4/2021. He denied committing the offence hence the matter had to go for full trial. The accused confessed that he had shot dead the deceased using a sub-machine gun SMG but invoked the defence of provocation.

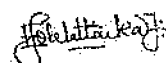
On completion of the trial, it is the holding of this court that in terms of section **300(1) and (2) of the Criminal Procedure Act**, the accused MT 101694 PASCAL YUSTIN @LIPTIA is guilty of manslaughter.

In sentencing the accused for manslaughter, I have considered both aggravating and mitigating factors advanced by the learned counsels.

The accused is charged with causing death of his spouse and a fellow soldier. As alluded to by the learned counsel for the republic, taking away life of anyone against the law has consequential ramifications for the family and the nation at large.

The late Basilisa was a very special young woman. She was a woman in uniform. Being a soldier is a calling that only a few have the courage to respond to. She was also very special in her family, community and our country at large. As explained by the learned counsel for the republic, losing Basilisa must have been a very painful experience to her parents and siblings. This explains the seriousness the offence with which the accused is charged.

The defence counsel has prayed for conditional discharge citing severe beating in jail that has, allegedly, impacted negatively on the health of the accused. The learned counsel, however, has not produced any evidence in support thereof. Besides, I am also not convinced that the accused is too sick to serve a custodial sentence as he has been under custody all along.



There is no doubt that as a trained soldier, the accused has exhibited gross irresponsibility. The gun entrusted to him was to be used for security purposes. His inability to control his anger no matter how provoked he was is a matter for concern. I am inclined to order a custodial sentence as I am shortly going to do. I hope and trust that the accused will, during his life in prison, learn that there are many ways of controlling one's anger. This includes commitment to a prayerful life and daily devotion.

That said and done, I sentence you **MT 101694 PASCAL YUSTIN @LIPTIA** to one (1) year in jail. I also order that Exhibit P4(a) Gun with number 1038890 Exhibit P4(b) 18 Cartridges labelled Q1 to AQ18 Exhibit P4(c) 3Carteges labelled T1-3 and Exhibit P4(d) Empty magazine be returned to the Tanzania Peoples' Defence Forces (TPDF's) KJ 843 Nachingwea for military purposes.

It is so ordered.



E. I. LALTAIKA

E. I. Laltaika
JUDGE

16/6/2022

E. I. Laltaika