

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TANGA DISTRICT REGISTRY
AT TANGA**

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 45 OF 2019

THE REPUBLIC

VS

- 1. GUNTRAM S/O NDUNGURU**
- 2. MBEZI S/O MTOI**
- 3. LAURENT S/O HENDRY @ SWAI**

JUDGEMENT

Date: 22ND JUNE 2022

BEFORE: HON. LATIFA MANSOOR, J

The Accused persons, Guntram Ndunguru, Mbezi Mtoi and Laurent Hendry Swai were prosecuted with the Offence of Manslaughter contrary to Sections 195 and 198 of the Penal Code Act, Cap 16 Vol. 1 R: E 2002. It is alleged by the prosecution that the Accused persons, on the 14th day of July 2018, at Magari Mabovu Street, Kwenjungo Area in Handeni



District, in Tanga Region, killed NASIBU MZIRAI. A person convicted of this Offence is liable to suffer life sentence. The Accused persons denied having committed this Offence and as such, a plea of not guilty was entered.

The background of the case is that on the fateful day on 14th day of July 2018 at Magari Mabovu Street in Kwenjugo Area in Handeni District, the deceased, NASIBU MZIRAI, a boy of about 14 to 15 years old was arrested and attacked by a mob suspected to have attempted to steal chicken from the house of one Guntram Ndunguru, the 1st accused herein. It is alleged that the deceased was beaten and assaulted by the Accused persons herein and two others who are at large. That, it was the 1st Accused that had found the deceased at his poultry farm trying to steal the chicken, he shouted for help, i.e he called for "mwizi" and the four others joined in torturing the deceased. They caned him, kicked him, and ordered him to walk upside down. Then the five people took the deceased to his parents. His parents asked him why he was stealing, he begged to be forgiven, and the five people left the deceased

at his house. The deceased complained of a headache, he was given pain killers by his uncle one Bakari Mzirai, and went to sleep but the next morning his condition worsened, he was taken to hospital but died on 16th July 2018. The Doctor who performed the examination of his body said the death was due to head injuries, he was beaten by blunt objects, but he had no wounds on the head. He had marks on his back and on his buttocks and his left eye had red marks. The Doctor said he did not open the skull to see exactly what the cause of death was, as his relatives did not agree for his skull to be opened. The Doctor also said, the cause of death could also be due to meningitis. The accused persons were arrested and charged for manslaughter.

When the Charge was read and explained to the Accused, each one of them pleaded not guilty. A plea of not guilty was entered in respect of each Accused thereby setting in issue all the ingredients of the offence charged. Resultantly, Prosecution had to prove each element in the Offence charged to secure a conviction against the Accused persons.

The elements of the offence of Manslaughter which needed to be proved by the prosecution was as follows:

1. There was the death of a human being.
2. There was unlawful causation of death.
3. Participation of the accused persons in causing the death.
4. There was no intent to cause death.

Manslaughter occurs if a person for an unlawful object, does anything that he knows is likely to cause death, and by doing so causes the death of a human being, even if he desires to effect their object without causing death or bodily harm to any human being.

During Trial, the Accused persons were represented by Counsel Noelina Bipa and later by Counsel Warehema Kibaha whilst the State was represented by Learned State Attorney, Mr. Paul Kusekwa.

The Prosecution bears the burden to prove not only the fact that the offence was committed but that it was committed by the Accused persons or that the Accused persons participated in the commission of the alleged Offence. The standard of proof is beyond reasonable doubt.

The Prosecution called a total of Four (4) witnesses. Namely, Dr Hudi Shehdad (PW1), Nelson Nicolaus (PW2), Bakari Mzirai (PW3), and G3377 D/CPL Ernest (PW4), and tendered two exhibits, a postmortem examination report of the deceased (Exh, P1), and the Sketch Plan of the Crime Scene (Exh. P2). Thereafter, Prosecution closed its case.

Out of the Four witnesses by the prosecution only one, that is the evidence of PW2 Nelson Nicolaus had pointed out the way he saw the accused kicking and torturing the deceased. This witness recognized Ndunguru and Swai kicking the deceased, and he saw all the three accused persons and other two people who are not in court ordering the deceased to walk by using his hands, while they held his legs. Nelson told the Court

that he knows the 1st and 3rd accused by their names, but he did not recognize the rests. He says there were about five people and all of them took the deceased to the house of Mzee Mzirai, they knocked the door, and they told Mzee Mzirai that they found the deceased stealing chicken from the house of the 1st accused and that they had already punished him. Another person who recognized the accused persons was PW3 Bakari Mzirai an uncle of the deceased. He says about six people went to his house with the deceased, it was Ndunguru, Swai, Mbezi and Ahmad, he did not recognize and did not know the fifth man and the sixth man who went with them. They all confessed before him that they had caught the boy ready handedly stealing chicken from the house of the 1st accused and had beaten him. That Bakari Mzirai (PW3) received his nephew, the deceased was complaining of headache, he gave him pain killers and went to sleep. The boy's condition had worsened, he took him to hospital, but he died on 17th July 2018.

The evidence of PW1, Dr Hudi Shehdad had categorically said the cause of death could be the head injury or that there was a possibility that the cause of death was head injury, and he also said there was also a possibility that he did not die due to head injury. He was uncertain as to what caused the death of the accused. The Doctor said, he wanted to perform further examination of the deceased by opening the skull, but the relatives refused.

The evidence of PW4, who is the police investigator of the crime, he said, he was at the mortuary when the body of the deceased was examined by the Doctor, but, he did not see the head injuries, but the Doctor said the injuries were internal injuries and not visible on the surface. The rest of his evidence is the report he found in the file and a repetition of what was stated by PW2 and PW3. He did not see the murder being committed. He interrogated the 1st accused who said he saw a thief at his poultry farm, he shouted for "mwizi", and many people responded to the call of mwizi, and it was the mob that had beaten and assaulted the deceased. It was the

1st accused who mentioned the 2nd and 3rd accused not as assailants but the people who helped him to take the deceased to his parents' house. PW4 searched for the 2nd accused, he got him and interrogated him. The 2nd accused admitted having seen the incident, but he denied participation in assaulting the deceased. He also apprehended the 3rd accused, who also admitted having seen the incident but denied having participated in assaulting the deceased. He admitted not conducting any identification parade, and only arrested the 2nd and 3rd accused since they were mentioned by PW3, Bakari Mzirai. He also admitted that the first information received at police which was recorded in the file by the OCCID is that the deceased was assaulted by a mob, "wananchi", and there was no report from the OCCID that these accused persons had participated or were among the people in the mob.

That was all for the prosecution, the accused were found with a case to answer, and they were put to their defense.

Each accused gave his own Defense. The 1st accused said he saw a man in his poultry farm trying to steal chicken. He shouted "mwizi" and the person left running and dropped the chicken outside the house. He collected the chicken back to poultry and went back to his room. While inside, he heard noises coming from outside, he went out and saw a person being attacked by a mob. The 1st Accused said he managed to cool down the mob, and they all agreed to take the deceased to his parents instead of setting him on fire. He testified that he did not see any of the Accused in the mob and did not see them beating the deceased. He said there was a riot, and a mob of people were attacking the deceased and he managed to control the riot, he stopped the mob from beating the deceased and took him to his parents. He says he does not know the co-accused and never mentioned them to police.

DW2 says he is the Truck Driver, and he usually goes to work in Korogwe and comes back at night hours, and he lives in Handeni Town. On 14th July 2018 he was in his truck heading

home from Korogwe and passed by Magari Mabovu where he saw a mob of people gathered. He parked his car and went down to inquire what happened. He says he knows Mzee Mzirai as he was his primary school teacher, and Bakari Mzirai as the driver of trucks but he did not know Nasibu Mzirai. The people were gathered in the house of Mzee Mzirai. He saw Mzee Mzirai interrogating his grandson, the deceased, and after knowing what was going on, he left the scene and went home. He says he does not know any of the accused, and he met them for the first time after he was arrested and charged for this offence.

DW3, the 3rd accused, Mr. Laurent Swai, says, he is a businessman, he works at Handeni Town, and he lives at Kwenjugo Area in Handeni. From his work to his home, he usually passes through Magari Mabovu Area. On the date of the occurrence around 21.00 hrs. he was heading home from work, and when he reached Magari Mabovu Area he saw a mob, and recognized Nasibu being surrounded by a mob. The mob claimed that they had caught a thief. He managed to

cool down the mob, and they all agreed to take Nasibu to his grandfather Mzee Mzirai. He says he did not see anyone attacking Nasibu. Him and the Mob took Nasibu to his parents, and eventually he left. He said, Nasibu was fine, he was walking fine and talking fine. He said, he knows the 1st accused Mr. Ndunguru since he is a teacher, but he does not know the 2nd accused. He said since it was dark, he did not recognize if Mr. Ndunguru was among the people in the mob.

When the evidence of the prosecution and defense was concluded, the Court summed up the evidence before the assessors who all opined that the case for the prosecution was weak and could not prove the participation of any of the accused person in the commission of the offence.

On careful perusal of the evidence of the prosecution, it is the case for the prosecution that the deceased, Nasibu, was murdered by five people, three of them being these accused persons, at Magari Mabovu Area in Handeni District, and PW2 Nicolaus who was woken up by noises, he saw five men

beating and torturing the deceased, among the five people, he recognised the 1st and the 3rd accused persons, he did not recognise the other three. PW2 was the witness to this incident, who said the late Nasibu was not beaten by the mob but by the accused No. 1 and No. 3 who he recognised them at the occurrence. On the date of incident, the deceased Nasibu was assaulted by five people, two of them were the 1st and 3rd accused named by PW2, the eyewitness. The 1st accused, in his own defence said he saw the thief stealing his chicken, and had shouted "mwizi", he had instigated the mob to assault and murder and so the 1st accused was responsible for the attack made on the accused by the passers-by or the angry mob.

PW2 did not recognise the three other people who were torturing the deceased and the police ought to have conducted the identification parade for PW2 to identify the other three perpetrators. No identification parades were conducted where PW2 could have identified the three other assailants who he saw at the scene but could not recognise

them. Relying upon the identification and recognition of the accused by the witness (PW2) in the court who recognised Accused No. 1 and Accused No. 3 as the person who has assaulted the deceased, and the fact that the evidence of PW2 was corroborated by the evidence of PW3, Bakari Mzirai, the uncle of the deceased who said he had seen and recognised the 1st and 3rd accused that these are the ones together with other four people who had taken the deceased to his house after beating him until he passed the faeces/stool. In fact, it was the 1st accused who told PW3 that he had already punished the deceased for stealing his chicken, and that he should not punish him any further. The 1st accused indeed was the one whose house was entered by a thief and who shouted for help. Again, it was upon his own defence that he was there when Nasibu was being tortured, his evidence could not help to exonerate him from being among the mob who participated in beating and torturing the deceased. From the evidence of PW2, PW3, and his own defence, the prosecution was able to prove that the 1st accused participated in the mob.

Again, the evidence of the 1st accused, admitted having been in the place of occurrence, thus corroborating the evidence of PW2, the eyewitness and PW3, the parent of the deceased. That being the state of evidence adduced in the case, the question is whether the deposition of Nicolaus, the solitary eyewitness, is reliable, having regard to the attendant circumstances. He is the boy who resides in same area as the 1st accused, he knows the 1st accused very well since he is the teacher in the area for a long time. There were lights at the scene, the electricity lights which enabled him to identify and recognise the 1st and 3rd accused, and that he had time to interact with the 1st accused who was asking him if he knew the deceased, and he is the one who identified the victim. Apart from this, his evidence was corroborated by PW3, and the defence evidence of accused No. 1 and Accused No. 3, in which both has admitted being present at the crime scene and admitted having taken the deceased to his parents' home. The participation of the 1st accused in assaulting the victim was proved beyond reasonable doubt. The prosecution has

established beyond a reasonable doubt that the 1st accused was the perpetrator of the crime.

Accused No. 2 was not recognised by PW2, and since his defence was that he was at Mzee Mzirai and never been there when the deceased was being tortured, supported by the evidence of PW3 that he saw the 2nd accused at Mzee Mzirai, and since he was not identified by any witness of the prosecution at the scene when Nasibu was being tortured, this court is confident that the evidence of the prosecution could not connect the 2nd accused in the commission of the offence. The evidence of identification parade was to be done in respect of the 2nd accused as he was not recognised by the eyewitness at the scene of crime and though not substantive evidence, but its utility should have been for purposes of corroboration of PW2 and PW3 evidence regarding the presence of the 2nd accused in the participation of commission of the crime. The case against the 2nd accused was not proved beyond reasonable doubt.

The participation of the 3rd accused in beating and torturing the deceased was not proved by the prosecution. They could not prove as to whether the 3rd accused is the neighbour or a friend to the 1st accused, and how he went or reached to the crime scene. His residence also was not proved by the prosecution to get the clear picture on how he reached at the crime scene at night and so his involvement in the crime was not proved. His evidence is that he was passing by the area and saw a mob beating the deceased, and he decided to stop there to rescue the deceased since he knew him. The 3rd accused evidence managed to cast doubt on the evidence of the prosecution, thus, his participation in causing the death of the deceased could not be proved beyond reasonable doubt.

The prosecution was able to prove the participation of the 1st accused in torturing or beating the deceased, however, the deposition of Dr. Hudi Shehdad (PW1) who conducted the post-mortem on the dead body of the unfortunate victim leaves doubt that he suffered a homicidal death. The nature of the injuries found on the dead body of the deceased Nasibu

Mzirai aged 14-15 years old does not show that he suffered a homicidal death, as there were only marks at his back, and on his buttocks, there was no proof of head injury. The prosecution case was failed by the evidence of the Medical Expert. The Medical Officer could not record what exactly was the cause of death, it was only a guess work, he said it could be the head injuries or meningitis, he was uncertain. He even said, the victim was treated for meningitis without even being diagnosed and thus no proper treatment was administered. Proof of cause of death was left out by the Doctor, he only guessed. Again, no injuries were found on the head to conclude that he had internal injuries. No record of visible injury on the head was recorded in the report. He formed an opinion that the cause of death was the internal head injuries without examining the head. There was no Forensic Science Laboratory test to check whether there were at all brain injuries or head injuries that had caused the death of the deceased. Medical Report should tell us if he had confirmed

the cause of death but not bringing to court a report from guessing.

Reading the evidence of the Doctor, I am convinced beyond any manner of doubt that this doctor has, for the reasons best known to him, out and out supported the defense ignoring the principles of medical science on the injuries in question. He has crossed all limits of medical propriety by not stating the cause of death on the pretext that the relatives of the deceased had refused the skull to be opened. The medical certificate did not reveal that the cause of death was the torture or beating received from the accused. Thus, no reliance can be placed on the evidence of the Doctor as the question whether the injury received by the deceased on the head, if it caused death of the deceased, was not cleared up in the court by the postmortem report or even the statement of the Doctor presented to court for cross examination. It is not clear from the evidence on record as to what caused the death of the deceased, is it the fatal injuries received on the head, which injuries were not proved to have existed or the

meningitis or wrong medication given to the deceased by the Doctors.

The question then is what offence has been committed by the accused even if the cause of death of the deceased is not established. Although it was proved that the 1st accused was at the crime scene, and he was among the people who attacked the deceased but there was no proof that the kicking's, and canings on his back and buttocks have caused the death, the Doctor categorically said the marks or bruises on the deceased back and buttocks could not have caused death. Beatings, which was merely to beat the deceased, could not be murder or culpable homicide not amounting to murder but only of causing injuries. It has been confirmed by the Doctor's evidence that the meningitis or may be wrong medication given for treating meningitis or the internal head injuries caused his death.

As opined by the three wise assessors who sat with me, I equally find that the prosecution failed to prove as to what caused the death of the deceased.

It is trite law that when a person is accused of any offence, the burden of proving the existence of circumstances is upon the prosecution. The burden never shifts on the accused to prove his innocence beyond all reasonable doubt; he can only bring circumstances by creating a reasonable doubt in the mind of the Court.

According to section 100 and 101 of the Evidence Act, a fact is said to be proved when, after considering the matters before it, the Court believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that it exists. It will be seen that a fact may be said to be proved under one of the two possible situations. Either the Court believes that the fact exists, or the Court considers existence of the fact probable. There is no indication in section 100 and section 101 of the

Evidence Act that a fact can be said to be proved, even when the Court entertains a reasonable doubt as to whether the fact exists or not.

As opined by the wise assessors, since the prosecution failed to give the evidence in support of their case, and so they failed to prove the case beyond reasonable doubt, the accused persons are given the benefit of reasonable doubt and there will be miscarriage of justice if the accused are convicted on the serious offence in which the prosecution failed to prove the charge. Burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution. The failure on the part of the accused persons to establish all the circumstances of their innocence does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, if insufficient to establish the offence, may be sufficient to give the benefit of reasonable doubt in favor of the accused persons.

For those reasons, I find that there is no evidence adduced against the Accused persons to prove the charge against them. Categorically, the Prosecution evidence is insufficient to warrant the conviction of the Accused person for the Offence of Manslaughter Contrary to Sections 195 and 198 of the Penal Code Act Cap 16, Vol 1 R: E 2002.

Accordingly, the Accused persons cannot be convicted of the offence charged, and therefore I, ACQUIT you GUNTRAM NDUNGURU, MBEZI MTOI, and LAURENT HENDRY SWAI of the Offence of MANSLAUGHTER that you are charged with. Mbezi Mtoi and Laurent Hendry Swai are set free unless there are other Charges against you.

As for GUNTRAM NDUNGURU, since it has been proved by the prosecution that he was involved in the offence of assaulting the deceased, the provisions of section 300 (1) and (2) of the Criminal Procedure Act would apply and he is found guilty of the minor offence of assault occasioning actual bodily harm and hereby CONVICTED of the offence of assault occasioning

actual bodily harm under section 241 of the Penal Code, Cap 16 R:E 219, which reads:

Section 241. Any person who commits an assault occasioning actual bodily harm is guilty of an offence and liable to imprisonment for five years.

The Provisions of Section 300 (2) under which this Court has deployed in finding the offender guilty of the lesser charge of manslaughter reads as follows:

Section 300 (2) Where a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with.

The law allows the Court to convict the accused with an offence cognate and minor to the offence charged. See the case of In **Robert Ndecho and Another v. R, (1951) 18 EACA 171 at page 174**, which was quoted with approval in the case of **RICHARD ESTOMIHI KIMEI and EMMANUEL OFORO VERSUS REPUBLIC, CRIMINAL APPEAL NO. 375 OF 2016**, Court of Appeal sitting at Arusha, The East African case held that:

"In order to make the position abundantly clear, we restate again that... where an accused is charged with an offence, he may be convicted of minor offence, although not charged with it, if that minor offence is of a cognate character, that is to say of the same genus and species."

As stated hereinabove, the 1st accused, GUNTRAM NDUNGURU, is CONVICTED of the offence of assault under section 241 of the Penal Code, Cap 16 R:E 2019, the offence which is minor and of a cognate character and of the same genus and species to the offence charged.

DATED AND DELIVERED at TANGA this 22ND day of JUNE

2022.

HON. LATIFA MANSOOR
JUDGE
22ND JUNE 2022