IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT TARIME

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 70 OF 2022

THE REPUBLIC

Versus

MOKIRI WAMBURA @ MAKURU

JUDGMENT

06.10.2022 & 12.10.2022

Mtulya, J.:

In one of its precedents, this court observed that: *love is an intense feeling of deep affection, something unexplainable...it is beautiful, adorable and everlasting no matter the situation ...However, love has become perishable good which can rot and stink...when sweets turn bitter to the extent of killing each other* (see: **Republic v. MT. 81337 Sgt. Batsin Philip Sanga**, Criminal Sessions Case No. 25 of 2020). I think, in my opinion, the statement emanated from the mostly cited two (2) *Swahili* words in love affairs: *Mahaba Niue*.

Another incident depicting the same *Swahili* words, *Mahaba Niue*, was brought again in this court on a complaint of murder case filed in **Criminal Sessions Case No. 70 of 2022** between **Republic** and **Mr. Mokiri Wambura @ Makuru** (the accused). This

time the court is asked to reply an issue, whether: *kunyimwa unyumba kwa muda mrefu kunaweza kusababisha ghazabu za kumpiga mwanandoa na kupelekea kifo chake.*

This court has been receiving questions related to love affairs and *Mahaba Niue* since its establishment during colonial period under article 17 (1) of the **Tanganyika Order in Council, 1920** (the Order in Council) and has not been reluctant to provide replies as part of cherishing its current constitutional mandate enshrined in article 107A (1) and 108 of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] (the Constitution).

There is a bundle of precedents demonstrating the subject of love affairs and killing incidents (see: **Republic v. MT. 81337 Sgt. Batsin Philip Sanga** (supra); **Republic v. Godfrey Francis @ Mwesige**, Criminal Sessions Case No. 58 of 2017; **Shabani Rashid v. Republic** [1995] TLR 259; and **Benjamin Mwangi v. Republic** [1992] TLR 85).

The most recent decision in the series of precedents of this court on the subject is the precedent of **Republic v. MT. 81337 Sgt. Batsin Philip Sanga** (supra). In the precedent, this court had convicted the accused person for murder after having found

him to have killed the deceased with malice aforethought. The court, at page 17 of the typed judgment, reasoned that:

> *From the record, the accused shot the first deceased at her head and the second deceased at his head and wrist, which are crucial parts of the human body. Also the weapon used by the accused was dangerous. That shows the accused intended to kill the deceased.*

In the instant case, information registered by the prosecution shows that the accused is alleged to have murdered his wife, **Mwise Kyobe @ Gechibi** (the deceased) and attempted to murder his child, Nyakaho Mokiri @ Wambura (the victim), contrary to section 195 and 198 and section 211 (a) of the **Penal Code [Cap 16. R.E 2019]** (the Code), respectively. The event is allegedly to have occurred on 4th day of May 2020 and the scene of the crime is cited as Nyamatare Village within Serengeti District in Mara Region (the crime scene).

During the Plea Taking, the accused admitted commission of the offence, but claimed that it was without any malice aforethought and his learned counsel **Ms. Mary Samson** prayed for lesser offence of manslaughter in substitute of the murder whereas for the second offence of attempting to murder the

victim, the accused denied the commission of the offence. The first prayer on lesser offence to murder was protested by the Republic, enjoying legal services of **Ms. Janeth Kisibo** and **Mr. Davis Julius**, learned State Attorneys. Following the protest of the Republic, the case continued normally and after registration of all relevant materials and exhibits, it was vivid that the parties' dispute is on malice aforethought in the crime of murder of the deceased and intention on the offence of attempt to murder the victim.

In order to persuade this court to decide in favour of the Republic, Ms. Kisibo had summoned a total of two (2) witnesses, namely: Police Officer, **G. 4209 Assistant Inspector of Police Steven** (PW1) and Medical Doctor, **Dr. Willy Elias Mchomvu** (PW2), and five (5) exhibits, whereas the defence had brought one witness, the accused himself, without tendering any exhibits. In appreciating the present case, I will display the facts and exhibits of the case registered during the hearing of case, albeit in brief:

In his testimony, PW1 stated that he went at the scene of the crime with his investigation team immediately after the killing event on 4th day of May 2020, and found the house of the accused torched down and the deceased had already expired

whereas the victim was injured on the head. Following the investigation and consultation of family members, including the son of the accused, Mr. Wambura Makuru @ Mokiri (Mr. Wambura), it was revealed that the accused intentionally attacked his wife with *Panga* and accidentally attacked the victim with the same weapon. Noting Mr. Wambura is key witness of the event, he ordered Police Officers, **G. 8118 D/C Tabu Washa** to record Mr. Wambura's statement of the event and **H. 90 D/C Faraja** to draw a sketch map of the crime scene. PW1 testified further that the accused was arrested by villagers and police officers at the mountainous areas next to his home residence on the next, 5th May 2020.

On his investigation role, PW1 testified that he recorded accused's confession on the following day, 6th May 2020, at Serengeti District Designated Hospital based at Mugumu (the hospital) when he was admitted for treatment of heat-wounds emanated from the house fire. In order to substantiate his testimony, PW1 tendered in this case the sketch map of the crime scene (exhibit P.1), cautioned statement of the accused (exhibit P.2) and Wambura's statement (exhibit P.3).

PW2 on his side testified that he was summoned by the police to go at the crime scene to examine and prepare post-

mortem examination report of the deceased and he accordingly did as per medical procedures. According to him, the source of death of the deceased was severe heat burn and that the whole body, except the fore part of the body around chest areas, was affected by the heat, but her head skull and bones remained intact. From the crime scene, PW2 also passed-by at Kemgesi Heath Centre (the health centre) where he also found the victim attended by Dr. Hilal Said of the health centre.

PW2 testified further that the victim was injured at the head and left hand. In ending his testimony, PW2 tendered the post-mortem report of the deceased (exhibit P.4) and Medical Examination Report in Police Form Number Three (exhibit P.5) to form part of the record of the case. However, PW2 testified that he cannot state with certainty the extent of injuries on the victim's body as it is not reflected in exhibit P.5 and the injuries on the deceased's body as she was heat-burnt as shown in exhibit P.4.

In his defence, the accused (DW1) testified that on night hours of 4th day of May 2020 he was drunk and returned home to cherish *mambo ya unyumba* (conjugal rights) from his beloved wife. In his testimony, DW1 stated that he always drink Balimi beer when his pocket is high, but takes *dalasi* and *gongo*

when the pocket is down. According to DW1, the request on *mambo ya unyumba* was declined by the deceased and it was part of the political love affairs always raised by the deceased in refusing the same for several occasions hence *hamu ya mapenzi* (sexual desire) provoked him to attack the deceased. In his testimony, DW1 stated that in a month, he may be allowed once or twice to enjoy the matrimonial conjugal rights at the pleasure of his wife, by love political reasons of pains and sickness which cannot be established by medical science in hospitals of Mabiri and Sirori. DW1 testified further that it was *hamu ya mapenzi* which disturbed his human faculty to blow off the ability of human reasoning and cause a heat of passion to grab a match box which was next to his bed and set the house into fire for him and his wife to die together for love affairs.

According to DW1, when the heat increased and became intense, and after he was burnt by the fire on his head and hands, his human senses recovered and decided to leak a wall for penetration exit by using *Panga*. DW1 testified further that he first took the victim out of the house and he followed her in the course of escaping intense fire-heat. Regarding the wounds in the victim, DW1 testified that during struggles for exit, the deceased was pulling them back hence the *Panga* accidentally

wounded the victim on head. Finally, DW1 stated that he had escaped in the mountainous areas where he was spotted and arrested by the villagers.

However, during cross-examination, DW1 stated that after the event of fire in his house, he escaped to the mountainous areas of the village and it was impossible to inform his neighbours Yakobo Marungu and Bhoke Sondo to intervene and end the fire fracas, as Yakobo Marungu was absent and had no good relations with the family of Bhoke Sondo. DW1 admitted further that he had not taken any necessary steps to take the victim to hospital as he was far in the mountainous areas.

Following registration of material facts and exhibits in the present case, the learned minds were summoned to interpret the whole saga and criminal liability of the accused. Ms. Samson on her part submitted that the second offence was not established as the accused attacked the victim without any intention to injure and assisted the victim from the fire to outside the house. To the opinion of Ms. Samson, a person cannot intend to murder and at the same time taking efforts to rescue the victim.

Regarding the first offence, Ms. Mary contended from the materials brought in this case, there is no dispute that the

accused killed the deceased, but the contest is on malice aforethought as enacted in section 200 of the Code and interpreted in the precedent of **Enock Kipela v. Republic,** Criminal Appeal No.150 of 1994. According to Ms. Samson, the Republic heavily relied on exhibits P.2 and P.3 to establish malice aforethought, but exhibit P.2 cannot be relied to establish malice for three (3) reasons, namely: first, it breaches the directives of the precedent in **Enock Kipela v. Republic** (supra) as it is silent on amount of force used, number of blows inflicted to the deceased, extent of injuries, accused's utterance before or during the attacks; second, confession of the accused in exhibit P.2 was repudiated, and no corroboration was registered as per precedents in **Republic v. Hassan Jumanne** [1983] TLR 432 and **Ally Salehe Mgutu v. Republic** [1980] TLR 1; and finally, the accused was not ferried to the justice of peace after his confession to PW1 per requirement of the precedents in **Bushiri Mashaka & Three Others v. Republic,** Criminal Appeal No. 45 of 1991 and **Republic v. Massanja Karume @ Mohamed & Another,** Criminal Sessions Case No. 13 of 2018.

In the opinion of Ms. Samson, this court is asked to reply two (2) important issues which determine the dispute, *viz*: first, *whether prolonged refusal of sexual intercourse by a wife to his*

husband can cause heat of passion for provocation; and second, *whether any other person from the accused's community would have acted the same after the refusal to enjoy conjugal right from his wife*. According to Ms. Mary the facts in exhibit P.2 shows that there were prolonged refusals of conjugal rights from the deceased to the accused and exhibit P.3 shows that there were several unresolved matrimonial quarrels between the accused and the deceased which caused series and accumulations of upsets and angers to cause last straw attacks. Ms. Samson submitted further that after the refusal to enjoy conjugal rights, the accused had no time to cool down his tempers and wraths hence took a matchbox which was next to their bed and ignited fire into his house to cause his death and that of the deceased.

In the circumstances of the present case, according to Ms. Samson, the killing cannot be said to have tenets of malice aforethought and that any other person from the accused's community would have acted the same after refusal to enjoy conjugal rights from his wife. Finally Ms. Samson submitted that the accused was intoxicated and this court may regard the defence of intoxication as enacted in section 14 of the Penal Code.

On its part the Republic had marshalled Mr. Julius to interpret the events of the 4th May 2020 at the crime scene and the two offences of murder and attempt to murder. According to Mr. Julius, in the present case the accused confessed his guilty freely hence it is the best witness as per precedent in **Alex Ndendya v. Republic**, Criminal Appeal No. 340 of 2017. According to Mr. Julius, the accused confessed to have attacked the deceased and victim by use of *Panga* and the statement is corroborated by Mr. Wambura in exhibit P.3. In the opinion of Mr. Julius, after the attacks the accused set the house into fire and escaped the crime scene which shows he had malice as per precedent in **Enock Kipela v. Republic** (supra).

Mr. Julius stated further that the accused cannot benefit with the defence of provocation because the nature of the attacks, setting the house into fire and escape shows that he had prior plan to murder the deceased and attempted to murder the victim. Similarly, Mr. Julius submitted that the accused cannot enjoy the defence of intoxication as he voluntarily intoxicated with purpose to murder the deceased which is prohibited by the precedent in **John Ulirick Shao v. Republic**, Criminal Appeal No. 151 of 2019.

In ending his submission, Mr. Julius contended that the accused cannot be trusted as he has been changing his defenses from repudiated confession, complaints on refusal of conjugal rights to intoxication which show that he is telling lies to the court. According to Mr. Julius, lies of the accused corroborate the prosecution case as it was stated in the case of **Felix Lucas Kisinyila v. Republic**, Criminal Appeal Case No. 129 of 2002.

Before I embark on determining whether there is malice aforethought or not in the present case, it is important to take note of two (2) important matters, namely: first, the parties are in agreement that the deceased actually died and the accused is connected to the killing of the deceased; and second, the case is heavily relied in exhibits P.2 and P.3. This court, in its recent precedents delivered in **Republic v. MT. 81337 Sgt. Batsin Philip Sanga** (supra), **Republic v. Agiri Okeyo Opon @ Toyo & Another**, Criminal Sessions Case No. 129 of 2022; and **Republic v. Godfrey Francis @ Mwesige** (supra), had borrowed the practice of the Court of Appeal (the Court) in interpreting enactment of section 200 of the Code on malice aforethought in murder cases (see: **Enock Kipela v. Republic** (supra). The mostly cited text is found at page 6 of the judgment:

...usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing.

In the precedent of **Enock Kipela v. Republic** (supra), the Court had resolved that:

...the evidence which was accepted by the trial court in the instant case, proved that the appellant used a big stick, which wielded with both hands, and delivered three blows, on the head and chest. The deceased died instantly. There is, on the totality of the evidence on record, no room for more than one view as to the appellant's intent.

In the present case, two (2) important documents were tendered and admitted in exhibits P.2 and P.3, which point fingers to the accused on the allegation of murder of the deceased. The facts collected from the two (2) documents show the following narrations, in brief:

Exhibit P.2: *Tangia nimuoe mke wangu maisha yalikuwa mazuri na mwaka 2019 yalibadilika na kuwa maisha ya ugomvi kati yangu na mke wangu. Hivyo,* ***ilipofika majira ya usiku tulikula chakula na hapo ugomvi ulitokea tena ndipo nilipoamua kuchoma moto nyumba yetu*** *na kipindi moto unashika nyumba yetu ya nyasi, nilitumia panga kumkata mke wangu yakiwa ni maamuzi ya mimi pamoja na mke wangu kufa pamoja kwani sikuona sababu ya kuishi tena kutokana na* ***ugomvi wa kila mara hadi kufikia mke wangu kuninyima unyumba kwa kipindi cha mwaka mzima.*** *Nilimkata maeneo ya kichwani mara mbili na alitumia mtoto katika kujikinga na kwa bahati mbaya panga lilimkata mtoto wetu...****nilitenda kosa hilo kwa hasira na mauzi ya muda mrefu yaliosababishwa na mke wangu...baada ya hali ya moto kuwa mbaya, niliamua kutoboa ukuta wa nyumba na kumtoa mtoto nje kupitia eneo nililobomoa*** *na baada kutoka nje na mtoto,*

nilimwacha mototo na mimi kukimbia kuelekea milimani kujificha (Empasis supplied).

On the other hand, exhibit P.3 shows the following narrations:

*Ninaishi na wazazi wangu pamoja na wadogo zangu, isipokuwa dada yangu mkubwa Mkami Mokiri yeye ameolewa...**Baba yangu ni mlevi. Huwa anakunywa pombe za kienyeji (Gongo) jambo ambalo upelekea ugomvi kati yake na Mama yangu na mara nyingi** chanzo cha ugomvi wao ni kwamba **Baba anapata pesa huwa hataki kununua chakula badala yake unatumia pesa kwenye ulevi**. Hali hiyo upelekea **kila siku kuwa kwenye migogoro na siku nyingine ufikia hatua ya kumpiga Mama kwa kutumia fimbo au mateke**. Ugomvi huo umedumu kwa muda mrefu sana. Nakumbuka siku ya jumamosi usiku, tarehe 04.05.2020, majira ya saa 02:00hrs usiku nikiwa nimelala kwenye nyumba...mita saba kutoka nyumba anayolala Mama na Baba, nilisikia sauti ya Mama ikilia...Mama akilalamikia Baba kwamba umeamua kuniua kwa kunikata mapanga na kunichoma moto, basi naomba unitolee mtoto nife mwenyewe. Ndipo niliamka na nilipotoka nje nikaona nyumba ya Mama na Baba inaungua moto wakati huo*

Baba alikuwa ndani. ***Ndipo akatoboa ukuta kwenye nyumba na kumrusha mdogo wangu aitwae Nyakaho Mokiri...wakati namchukua mdogo wangu, Baba alitoka kwa kutumia tundu lile kisha kukimbia.***

(Emphasis supplied).

With the extent of injuries inflicted and source of death to the deceased and wounds to the victim, PW2 had described that source of death of the accused was severe heat-burn and that the whole body, except the fore part of the body around chest areas was affected by the heat, but *her head skull and bones remained intact*. Regarding the victim, PW2 termed the injuries as wounds on head and hand. However, PW2 testified that he cannot state with certainty the extent of injuries in the victim as it is not reflected in exhibit P.5 and the injuries in the deceased as she was heat burnt as shown in exhibit P.4.

I have consulted exhibits P.4 and P.5 for details of the subject matter. Exhibit P.4 shows the source of death is: *severe burn injury*, whereas its summary report shows that:

The lyina down with a blackish severe sculled of fine burn all over the body of an old woman at outside of totally burnt hut at the home residence of a local

community at Kemgesi/ Nyamatare Village with a loss of natural appearance and life.

Exhibit P.5 on the other hand shows the nature of complaints are: *cut and bleeding from the face* and left hand and the descriptions with regard to the site, situation, shape and depth of injuries sustained: *deep cut injury*. It is obvious from the record that that P.4 cannot assist much this court to have understanding of injuries caused by *Panga*, at least exhibit P.2 gives us where the weapon *Panga* was directed, on the head. However, during the hearing of the case, PW2 testified that he found the accused's head-skull and bones intact.

Similarly, exhibit P.5 declined to record the details of descriptions in terms of situation, shape and depth of injuries sustained. Of course, it helps this court in knowing where the weapon *Panga* was directed. In the circumstances of the present case, the precedent of **Enock Kipela v. Republic** (supra) cannot fit in totality of its listed factors. I am aware the Court stated at page 5 of the judgment that each case must be decided on its own peculiar facts.

However, the Court had put in place a very important clause at page 6 of the judgment that: *the totality of the evidence on record and room for more than one view as to the accused's*

intent (malice aforethought). Finally, the Court resolved that: *if there is doubt on the intention (malice aforethought) of the accused, the doubt is to be resolved in favour of the accused.*

In the present case reading P.2 and P.3 both give two possibilities. At first, they display the alleged intention (malice aforethought) of the accused. P.2 shows the following words:

> *Hivyo, ilipofika majira ya usiku tulikula chakula na hapo ugomvi ulitokea tena ndipo nilipoamua kuchoma moto nyumba yetu na kipindi moto unashika nyumba yetu ya nyasi, nilitumia panga kumkata mke wangu yakiwa ni maamuzi ya mimi pamoja na mke wangu kufa pamoja kwani sikuona sababu ya kuishi tena kutokana na ugomvi wa kila mara hadi kufikia mke wangu kuninyima unyumba kwa kipindi cha mwaka mzima.*

On the second level P.2 shows that provocation emanated from prolonged denial of conjugal rights, the last straw doctrine:

> *nilitenda kosa hilo kwa hasira na mauzi ya muda mrefu yaliosababishwa na mke wangu...baada ya hali ya moto kuwa mbaya, niliamua kutoboa ukuta wa nyumba na kumtoa mtoto nje kupitia eneo nililobomoa na baada kutoka nje na mtoto.*

The statement is supported by exhibit P.3 from the following extract:

Baba yangu ni mlevi. Huwa anakunywa pombe za kienyeji (Gongo) jambo ambalo upelekea ugomvi kati yake na Mama yangu na mara nyingi chanzo cha ugomvi wao ni kwamba Baba anapata pesa huwa hataki kununua chakula badala yake unatumia pesa kwenye ulevi. Hali hiyo upelekea kila siku kuwa kwenye migogoro na siku nyingine ufikia hatua ya kumpiga Mama kwa kutumia fimbo au mateke. Ugomvi huo umedumu kwa muda mrefu sana.

Reading the texts in P.2 and P.3, the intention of the accused is depicted, but again reading the same exhibits, they invite the defence of provocation. In that case, the remaining issue before this court is whether: *kunyimwa unyumba kwa muda mrefu kunaweza kusababisha ghazabu za kumpiga mwanandoa na kupelekea kifo chake.* This issue may invite different replies depending the circumstances of each case and the community in which the accused belongs. In the present case, the facts collected and *totality of the evidence on record shows more than one view as to the accused's intent (malice aforethought).* In cases, like the present one, the Court in the precedent of **Enock Kipela v. Republic** (supra) had resolved that: *if there is doubt on the*

intention (malice aforethought) of the accused, the doubt is to be resolved in favour of the accused.

In the present case, the Republic produced a doubt on prosecution case. During prosecution case hearing, PW1 testified that the accused after recording P.2 was taken before justice of peace for extra judicial statement recoding and was accordingly recorded. However, the prosecution declined to produce the same in this court without any reasons, despite several prompt by the defense on the subject.

I am aware the prosecution is at liberty to summon any witness or invite any exhibits, as it wishes in its choices, but when it comes to corroboration in confession situations, the practice of this court and Court of Appeal has been that the safest course is to have the confession repeated to justice of peace and the justice of peace be summoned to testify in court (see: **Bushiri Msahaka & Three Others v. Republic** (supra) and **Republic v. Massanja Karume @ Mohamed & Another** (supra). In the precedent of **Bushiri Msahaka & Three Others v. Republic** (supra), the Court directed that:

> *Those charged with the duty of investigating criminal cases are* ***reminded once again that upon an accused person intimating to make a confession,*** *the safest*

course to adopt is ***to have them repeat his statement before a justice of peace.***

(Emphasis supplied).

The move was followed without any reservations by this court in the precedent **Republic v. Massanja Karume @ Mohamed & Another** (supra), when it observed that:

> *The record of this case shows that the accused person was sent to the justice of peace to have his extra judicial statement recorded, but the justice of peace was not called to testify and extra judicial statement was not tendered...the police and prosecution did not heed to the advice of the Court of Appeal in* ***Bushiri Mashaka & Three Others v. Republic****, Criminal Appeal No. 45 of 1991.*

I am aware Mr. Julius submitted that the accused had freely confessed to commission of offence and that is the best witness as per precedent in **Alex Ndendya v. Republic** (supra). That is correct and the statement is supported by many other precedents of the Court (see: **Peter Sanga v. Republic**, Criminal Appeal No. 91 of 2008 and **Twaha Alli & Five Others v. Republic**, Criminal Appeal No. 78 of 2004). However, what is directed by

the Court in the precedent in **Bushiri Msahaka & Three Others v. Republic** (supra) is that: *upon an accused intimating to make a confession, the safest course to adopt is to have him repeat his statement before a Justice of Peace*. In the present case, the Republic had declined to abide with the directive despite being reminded by the Court and during the hearing of the case.

The Republic should also not ignore the tribes and traditions of the community of this side, Mara Region, which the accused belongs. It is generally accepted that males society of Mara communities are violent in nature, especially when are not respected by females. Tribes, culture, customs and traditions of the accused persons may be, in certain circumstances, be considered in our courts when determining disputes (see: **Republic v. Godfrey Francis @ Mwesige** (supra) and **Damiana Ferdinand Kiula & Charles v. Republic** [1992] TLR 16).

Again, *kunyimwa unyumba kwa muda mrefu* or *hamu ya unyumba* can appear minor issue to some quotas, but if looked at with the hindsight of what had been registered in the present case and sufferings of the accused for want of *unyumba*, could be a powerful dynamite sufficient to blow off the human faculty of reasoning to cause a tragedy. That is why my learned brother Mlyambina, J., sitting in this court at Songea Registry in the cited

precedent of **Republic v. MT. 81337 Sgt. Batsin Philip Sanga** (supra) observed that: *love is an intense feeling of deep affection, something unexplainable, [but] when sweets turn bitter [it may cause] killing of each other.* That justify the Swahili words: *Mahaba Niue.* In the present case, the accused is recorded to have said:

> *...ni maamuzi ya mimi pamoja na mke wangu kufa pamoja kwani sikuona sababu ya kuishi tena kutokana na ugomvi wa kila mara hadi kufikia mke wangu kuninyima unyumba kwa kipindi cha mwaka mzima.*

This is what the accused was pleading from his arrest to this court during Plea Taking. He admitted the lesser offence of manslaughter. However, the Republic prayed to establish the highest degree of intention, manslaughter, while well aware that they will decline to register the other side of the story recorded at Justice of Peace. I do not think, if that is accepted in searching justice to the parties. This court must be provided with all necessary materials that will assist in resolving disputes brought before it by the parties and that is the meaning of justice.

In the present case, I cannot be detained analysing the defence case in details for obvious reasons that the accused has

been pleading *hamu ya unyumba* had blown off his faculty of reasoning to cause provocation, to which I agree with him. The reason is obvious that there is already in place precedents regulating a claim of provocation in love affairs and two factor have been considered, namely: first, existing relationship between the accused and deceased; and second, the accused must admit to the killing of the deceased (see: **Shabani Rashid v. Republic** (supra) and **Republic v. Godfrey Francis @ Mwesige** (supra). In the present case, evidence are plenty displaying the two (2) factors of consideration, as I indicated above, the accused admitted killing of the deceased and were living in one roof as husband and wife.

In the precedent of **Republic v. Godfrey Francis @ Mwesige** (supra), the following confession was extracted from the accused:

> *....tulishindwa kuelewana na Neema Abdul.* ***Nikapandwa na hasira. Kisha nikajikuta namkata kwa panga bila kutegemea. Kisha akakaa chini. Nami nikaondoka****... baada ya kuona kwamba nimemjeruhi mpenzi wangu na ndugu yangu ndipo nikaamua kujichoma mwenyewe kwa kisu shingoni upande wa kulia ili nami nife, lakini bahati mbaya sikufanikiwa kufa.*

In the present case, the accused testified during the hearing of the case, that he was mentally disturbed to the extent that he wanted to die with his beloved wife. He was recorded to have said, in brief, that:

> *On 4th May 2020, at 01:00hours, I was in my home residence with my wife and children...I was drank and asked my wife conjugal rights, and she refused me. I was provoked. Next to our bed there was a matchbox, and decided to take and ignited fire without any knowledge... I wanted all of us to die in our house...after high heat burn, my senses recovered and decided to rescue my son...I used Panga to penetrate the hole for exit not to attack the deceased...we live with Panga in our houses for security purposes....I recorded statement and told the police the source of quarrels was conjugal rights....*

I see similarity of the instant case and the precedent in **Republic v. Godfrey Francis @ Mwesige** (supra), both in terms of reasoning and holding. The only distinction would be that in the case of **Republic v. Godfrey Francis @ Mwesige** (supra), this court enjoyed the statement of the accused both in extra judicial statement and cautioned statement. In the present case, that crucial evidence of extra judicial statement remained in the

custody of the prosecution and well aware of reasons of doing so.

In any case, I have seen the accused in this court. He was severely burnt in hands, face and head to the extent that, even writing and signing his name during confession recording and during proceedings in this court was impossible. In fact, the accused had several noticeable challenges in his physical appearance. The materials in the present case from PW1 and P.3 corroborate the appearance of the accused. We cannot say under normal circumstances a person with his good senses could remain in the house for heat-burn to the accused's extent. It should also be noted that mental health problems or provocation cannot be measured in laboratory or CT- Scan gadgets, but unusual conducts of individual person.

In any case, taking all facts related to the habits of the accused related to drinking of local brew *Gongo* in year 2020, the accused had already changed his humanity and immediate intervention was necessary before any tragedy could have happened. No wonder, during the World Mental Health Day, 10th October 2022, celebrated in the **First National Symposium on Mental Health in Tanzania** titled: *Afya ya Akili Kipaumbele kwa Wote* held at **Julius Nyerere International Conference Centre** on

the same day, Medical Doctor, **Dr. Patseda**, concluded that: *a large portion of addicted alcoholic drinkers are mentally disturbed and it is one of the risk factors in mental health challenges* (visit webpage: *https:youtu.be/nH16TjAHuq*-accessed on 10/10/2022).

The move is supported by mental health doctor, **Dr. Kapenya**, who has shown that *Wivu wa Mapenzi* may disturb human mind to cause tough decisions and killing of individual persons (see: *Dutch Welle Swahili - Radio Conversations* - 11th October 2022). The thinking of professional doctors is shared by ordinary persons in streets of Tanzania. A Tanzanian singer known by the name of Rush-boy ft. Dakota in his *Kidudu Mapenzi* Song is recorded to have said: *mapenzi ya siku hizi ni uchizi.* The song was supported by D-Voice in asking: *kwani kuachana shingapi?* This is a court of law and justice and must determine disputes from the facts and evidences adduced before it.

However, it cannot let the reality on ground supported by ordinary persons. The practice in common law jurisdiction has shown that courts of law should situate their decisions on realistic premises regarding matters affecting societies (see:

[2006] All FWLR 1313). The course was borrowed by this court in the precedent in **Stephen Ngalambe v. Onesmo Ezekia Chaula & Another**, Misc. Civil Application No. 5 of 2022.

On the second offence, this court cannot be similarly detained in searching for intention of the accused in attempting to murder the victim. The evidence is vivid that the accused did not intent to kill the victim. The evidence produced in exhibits P.2 and P.3 show that the accused accidentally attacked the victim and took all necessary steps to make her exit from the house. I am aware it can be stated that there is transferred malice, but the action of rescuing the victim from intense heat erodes the intention. It is also unfortunate that exhibit P.5 is not detailed as per required standards prescribed in Police Form Number Three (PF.3). It escaped necessary materials in the site, situation, shape and depth of injuries sustained.

Having said so and considering there are two important issues displayed in the present case, *viz*: provocation emanating from *hamu ya mapenzi*, and disturbed mental health caused by addiction in alcoholic drinking, I think, in my considered opinion, the accused did not attempt to murder the victim, but killed the deceased without malice aforethought. In the end, I convict the

accused with a lesser offence of manslaughter contrary to section 195 and 198 of the **Penal Code** [Cap. 16 R.E. 2019].

Ordered accordingly.

F.H. Mtulya

Judge

12.10.2022

This conviction order was pronounced in open court in the presence of the accused person, **Mr. Mokiri Wambura @ Makuru** and his learned Defence Counsel Mr. Paul Obwana and in the presence of **Mr. Davis Julius**, learned State Attorney for the Republic.

F.H. Mtulya

Judge

12.10.2022

ANTECEDENTS

Julius: My Lord, as per the offence of manslaughter, the penalty is obvious. This accused person, My Lord, killed a woman without any good reasons. Killing of women is highly prohibited. My Lord, *kunyimwa unyumba,* if allowed to be an exit to killers, it will encourage killings of human persons. My Lord this idea of addiction in alcohol, if allowed by our courts, many people will kill and find an exit. My Lord, the only solution to discourage the

killings of this nature is to give stiff sentences to accused persons, so that it could be a lesson to those who intend to do so. From our side that is all My Lord.

F.H. Mtulya

Judge

12.10.2022

MITIGATIONS

Obwana: My Lord, the defence prays for lenient penalty. We have reasons, My Lord:

1. He is the first offender;
2. The dispute originated from family issues and the accused has a total of nine (9) children who depend on him;
3. He is currently disabled from the event of fire. My Lord, his left hand side cannot work anymore;
4. My Lord, page 55 of the **Tanzania Sentencing Manual for Judicial Officers** displays three (3) status in sentencing and the accused falls in category three (3) for he had disturbed mental status not amounting to insanity; and

5. My Lord, the accused spent two (2) years and five (5) months in the custody, since he was first arrested on 5th May 2020.

My Lord, I pray so because the cited Manual in Item 6.9 provides for reduction of sentences already spent in custody to be taken into account and Item 2.3 of the Manual which provides for mandatory and discretionary sentences, which this court is empowered. My Lord, from all that I have said, I pray for a lenient sentence.

F.H. Mtulya

Judge

12.10.2022

SENTENCE

The accused was prosecuted for murder and attempt to murder, but was found guilty for manslaughter contrary to section 195 and 198 of the **Penal Code** [Cap 16 R.E 2019]. The reasons of conviction of the lesser offence were based on prolonged denial of conjugal right which had blown off the faculty of reasoning of the accused to cause provocation and addicted alcoholic behaviour which had caused him to deplete his mental health.

According to **Mr. Julius** such behaviour, if allowed in our societies, women will be in jeopardy and allow an exit to habitual drunkers or those who are denied conjugal rights by their wives. In his opinion, the accused may receive stiff sentence to discourage the behaviour. On the other hand **Mr. Obwana** thinks that the accused is first offender, currently disabled and has a large family of nine (9) children to take care and even the offence was originated from matrimonial disputes.

I have considered the antecedents and mitigations registered by learned minds. However, the sentence for persons found guilty of manslaughter is enacted under section 198 of the **Penal Code** and moves up to life imprisonment. Practice in this court and Court of Appeal has shown that ten (10) years may be an appropriate sentence (see: **Ramadhani Omary v. Republic**, Criminal Appeal No. 83 of 2018 and **Republic v. Godfrey Francis @ Mwesige** (supra).

However, in order to have certainty in the decisions emanated in this court, the Judiciary of Tanzania has introduced the **Tanzania Sentencing Manual for Judicial Officers** in December 2019 and at page 55, the Manual categorises appropriate sentences in manslaughter cases into three (3) levels of high, medium and low. The use of dangerous weapons,

death caused by domestic violence and killing of vulnerable persons, such women may attract a sentence range of ten (10) years to life imprisonment. Having said so, it is obvious that the accused, **Mr. Mokiri Wambura @ Makuru**, fits in high level of manslaughter, and hereby sentenced to ten (10) years imprisonment from the date of this order, 12th October 2022.

It is so ordered.

Right of appeal explained to the parties.

THE HIGH COURT OF TANZANIA MUSOMA

F.H. Mtulya

Judge

12.10.2022

This sentence order was pronounced in open court in the presence of the accused **Mr. Mokiri Wambura @ Makuru**, and his learned Defence Attorney **Mr. Paulo Obwana** and in the presence of **Mr. Davis Julius,** learned State Attorney for the Republic.

F.H. Mtulya

Judge

12.10.2022