

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

CRIMINAL SESSION CASE NO. 72 OF 2020

(Arusha Resident Magistrate PI No. 41/2019)

THE REPUBLIC

VERSUS

ABDALLAH SALIM @ SWAHA

JUDGMENT

05/10/2022 & 11/10/2022

MWASEBA, J.

The accused person, Abdallah Salim @ Swaha stands charged with the offence of murder contrary to Section 196 of the Penal Code, Cap 16, R.E 2002 [Now R.E 2022]. The prosecution alleged that on 2nd day of October, 2019 at Lucy Estate area within Arumeru District and Region of Arusha, the accused person murdered one Ramadhani Sadiki.

When the charge was read over to him, the accused, patently pleaded not guilty thereto.

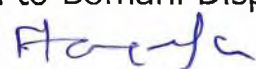
Throughout the hearing of this case, the Republic was represented by Ms Eunice Makala assisted by Riziki Mahanyu, both learned State Attorneys



while the accused person enjoyed the service of Mr Joshua Mambo, learned Counsel.

In proving the case against the accused person, the prosecution paraded a total of seven (7) witnesses, namely F 2467 D/Sgt Henry (**PW1**), Aloyce Paschal Balekule (**PW2**), Martin Juma (**PW3**), G 5176 D/Cpl Elias (**PW4**), WP 9662 PC Winifrida (**PW5**), SP David Mapunda (**PW6**) and Abel Ndago (**PW7**). The prosecution also tendered four (4) exhibits notably: weapons used in the commission of the offence (**P1**), Exhibit register (**P2**), Sketch map (**P3**) and Post Mortem Report (**P4**). The defence had only one witness, the accused person who appeared as **DW1** and did not have any exhibit to support his case.

Brief facts of the case are as follows: on 2nd day of October, 2019 at 8:30 Pm at Pombe Club at Lucy area while the people were drinking liquor, there was a commotion by words between the accused person and PW3 (Martin Juma) which led the deceased to intervene and stopped the accused from beating PW3, and thereafter PW3 left the scene. When PW2 and other people went on drinking the liquor, the accused person left the area, went to his home and came back carrying a bow and an arrow and there after shot in the deceased's chest (Ramadhan sadiki) who shouted "Umeniuu" and fell down. Afterwards, PW2 called a motorcycle and took Ramadhan to Lucy Police Station for PF3 and then to Bomani Dispensary



where the Doctor confirmed Ramadhan had passed away. They searched for the accused person who was found in his house attempting to commit suicide by cutting his throat then they took him to Lucy Police Station. After receiving the murder information, PW4 and PW6 (who are police officers from Usa River Police Station) went to the scene of crime with PW2 and other police officers and found the accused person arrested and the deceased's body was already at Bomani Dispensary. PW4 drew a sketch map of the scene of crime (Exhibit P3) and they found three arrows and a bow, one of the arrows had blood stains. The weapons were tendered in court and were collectively marked as exhibit P1.

Thereafter, they took the deceased to Mount Meru Mortuary and the accused person was taken to Usariver Police Station where the exhibits were handed over to PW5 (WP 9662 PC Winifrida) who kept them for a while since the storekeeper was not around. On 06/10/2022 PW5 handed them over to PW1 (F 2467, D/Sgt Henry) who is the storekeeper. Another incriminating evidence is that of PW7 (a doctor) who testified that after the examination was done to the deceased's body, the cause of death was Cardiac Respiratory failure caused by injury to lungs and heart as per exhibit P4.

In his defence, the accused denied to have committed the offence and he testified to have no knowledge of the deceased. He further stated that on

the material date he was at a Pombe Club at Lucy area and he drank two beers. The crime scene had a lot of people and a commotion happened but due to his intoxication he did not know what happened but found himself at Mount Meru hospital under the arrest of the police officers with his throat cut.

From the facts above, it is undisputed facts that the deceased was unlawfully killed, and that on the material date the accused was at Lucy area drinking some liquor with other people and there was a fight (commotion) which arose thereat. It is now time for this court to determine whether the accused is connected with the death of the deceased and if answered in affirmative whether the accused person unlawfully killed the deceased with malice aforethought.

Let me start with the first issue as to whether the accused person is connected with the death of the deceased. Reading from the evidence adduced by the prosecution witnesses, it is undisputed fact that the deceased was murdered on 2/10/2019 and as per the Post mortem report (exhibit P4) the cause of death was Cardio Respiratory failure due to the injury of the lungs and the heart. PW2 appears to be an eyewitness in this case as he is the one who witnessed the killing of the deceased. If I may recall the evidence of PW2 before the killing of the accused there appears to have been a fight between the accused person and PW3 and that it

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was the deceased who went to resolve their fight. PW3 left the scene of crime and the accused too. However, a short while the accused person came with a bow and arrows and shot the deceased. All these acts were witnessed by PW2 who was at the scene of crime (liquor shop).

PW2's evidence is corroborated by that of PW3, Martine Juma who actually did not witness the killing of the deceased but essentially established the circumstances leading to the killing of the deceased. His testimony suggests that the killing of the deceased was initiated by the fight that was between himself and the accused person. The deceased being the owner of the liquor shop at which the fight was taking place, went to resolve the fight between PW3 and the accused person. PW3 then testified to have left the scene of crime but a short while he heard commotion coming from the liquor shop and upon his arrival, he found the deceased being shot with an arrow.

It is imperative to state at this stage that the surrounding circumstances of this case shows that the incident happened at the liquor shop (Pombe shop) which was owned by the deceased and that at the time of the fight people were drinking liquor. It should also be noted that in his defence the accused person admitted that on the material date he was at the scene of crime and that there was a fight that occurred and he was drunk to the extent that he could not recall what happened there, except that

he found himself at the hospital with his throat cut. So, the accused person admits on the material date to be at the scene of crime and that there was a fight but since he was so drunk, he could not recall what happened.

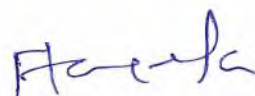
In his testimony, the accused person tried to exonerate himself from the commission of the crime by denying to be aware of the arrows tendered in court, nevertheless, my carefully perusal of the proceedings of the case shows that PW1, an exhibit keeper while testifying in court also tendered the weapons to wit; three arrows and a bow (collectively marked as P1) and the same were received in court with no objection from the defence. Moreover, PW2 an eyewitness in this case together with PW3 when testifying they informed this court of the whole incident and the involvement of the accused in the killing of the deceased. However, when the witnesses were testifying the defense were given an opportunity to cross examine all of them especially on the testimony that the accused is the one who shot the deceased with an arrow but for the reasons best known to the defense, they refrained from shaking the credibility of those witnesses. Further to that the prosecution evidence has also established the subsequent conducts of the accused person after the commission of the crime where this court is informed that after the commission of the crime the accused went back to his home and he was found cutting his

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throat attempting to commit suicide. The accused person in his defense denied to cut his throat and instead he stated that he does not know the person who cut his throat.

Considering all the above stated factors leading to the death of the deceased and taking into account the accused's own admission that on that particular date he was at the scene of crime and he was so drunk that he could not recollect what happened, drawing an inference that it was the accused who murdered the deceased is irresistible and in any way the accused cannot be dissociated with the deceased's death.

The next question is whether the accused killed the deceased with malice afore thought. The defense of the accused is basically one of intoxication. Even though the accused denies to have murdered the deceased on the other hand he stated that he was so drunk that he could not remember what transpired on the material date, common prudence suggests that since the accused was so drunk and could not recall what happened then he cannot escape from being associated with the death of the accused taking into account the testimony of PW2 who is an eyewitness in this case who witnessed the accused person killing the deceased with an arrow.



The law on the defense of intoxication is well settled. **Section 14 of the Penal Code**, Cap 16 R.E 2022 provides the way forward. In general, intoxication does not constitute a defence to any criminal charge save in circumstances elaborated under that provision of the law which is reproduced here under:

"14.-(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

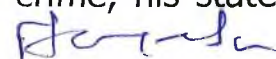
(2) Intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of, he did not understand what he was doing and-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

Reading the above provision of the law and from the evidence adduced by PW2 and PW3 that on the material date that there occurred a fight between the accused person and PW3 and it was the deceased who went to resolve the dispute. More over the testimonies of these witnesses together with that of an accused is such that the accused on the material date was so drunk that he could not know what.

Furthermore, from the conducts of the accused when he was killing the deceased and even after the commission of the crime, his state of the



mind can be assessed. That is, whether the accused was capable of forming the intent to kill or cause grievous harm to the deceased.

Malice aforethought is an important ingredient to be ascertained in order to establish whether the accused's acts were with an ill motive. **Section 200 of the Penal Code** (supra) provides that malice aforethought is deemed to be established by evidence proving any one or more of the following four circumstances: -

"(a) any intention to cause death of or to do grievous harm to any person whether that person is actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused by it;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence."

That position of the law was summarized in the case of **Enock Kipela vs Republic**, Criminal Appeal No. 150 of 1994 (unreported) that:



".....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:

- i) the type and size of the weapon, if any used in attack;*
- ii) the amount of force applied in assault;*
- iii) the part or parts of the body the blow was directed at or inflicted on;*
- iv) the number of blows although one blow may, depending upon the facts of the particular case, be sufficient for this purpose;*
- v) the kind of injuries inflicted;*
- vi) the attacker's utterances, if any, made before, during or after the killing; and*
- vii) the conduct of the attacker before, or after the killing."*

The evidence available is to the effect that the killing of the deceased was triggered by an act of the deceased resolving the dispute that was between the accused and PW3 and that perhaps could have been the reason which prompted the accused person to kill the deceased.

It has been the position of the law that, any death emanating from fracas reduces the seriousness of the killing with an intent (malice aforethought).

In the case of **Moses Mungasian Laizer @ Chichi vs Republic** [1994]

T.L.R. 220 the Court of Appeal of Tanzania stated as follows:

"Where death occurs as a result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder. "

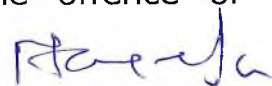


The same position was reiterated in the case of **Minani John & 2 Others vs The Republic**, Criminal Appeal No. 435 of 2018 (Unreported) where the Court of Appeal of Tanzania held that-

"There are a range of cases in which we had the occasion to underscore that where death occurs as a result of a fight, one cannot infer malice aforethought, with the effect that a charge of murder may be reduced to a lesser offence of manslaughter."

Moreover, I would like also to point out that the evidence analysed herein above leaves no doubt that the alleged state of intoxication on the accused prevented the accused person from knowing what he was doing taking into account that at the time of commission of the crime the accused person was under intoxication and he was also acting under the "heat of passion" as he was in a fight with PW3. Even after the commission of the crime the accused went away to his home and tried to commit suicide by cutting his throat. To me, the subsequent conducts of the accused are not of a person who could understand what he was doing, actually the accused was of unsound mind to know what he was doing.

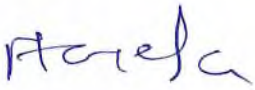
From what I have said so far, I am of the considered view that the prosecution is found to have satisfactorily established the accused's guilty of the offence of manslaughter unlike the offence of murder. I



consequently find the accused person guilty and convict him of the offence of Manslaughter C/s 195 of the Penal Code, Cap 16 R.E 2022.

It is so ordered.

DATED at **ARUSHA** this 11th day of October, 2022


N. R. MWASEBA
JUDGE
11/10/2022
