IN THE HIGH COURT OF THE UNTED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL SESSION NO. 85 OF 2019

(Originating from PI No. 5 of 2018 at the District Court of Ngorongoro at Loliondo)

REPUBLIC.....COMPLAINANT

VERSUS

HERBETH KARINTI SAIDEYA @ OMWANITA.....RESPONDENT

JUDGMENT

23/11/2022 & 7/12/2022

GWAE, J

One **Herbeth Karinti Saideya @ Omwanita** (hereinafter to be referred to as the accused person, stands charged with the offence of murder contrary to section 196 of the Penal Coe, Cap 16, Revised Edition, 2002.

The prosecution initially alleged that, on 05th day of December 2018 at Samunge village within Ngorongoro District and Region of Arusha, the said accused did murder one **Kabeta s/o Sabaya @ Kibaseya** (deceased person).

At the outset, I feel aspired to put it to the attention that, this case was partly heard by my fellow judge "trial predecessor) who was unable to complete the hearing within the period set in the session as scheduled on the reasons of unavailability of prosecution witnesses. However, following a crush programme of clearing backlog cases pending in the court, this case being among them. I was assigned to proceed with the as a trial successor Judge.

Since the trial predecessor, Judge had recorded the evidence of PW1 and PW2, I then proceeded with hearing of PW3. Nevertheless, before I proceeded with hearing and prior to hearing I reminded the accused person of the charge of murder against him, he patently pleaded guilty to the lesser offence.

Throughout the hearing of this case, the Republic was represented by **Miss Riziki Mahanyu** assisted by **Miss Yunis Makala,** both learned State Attorneys, the accused person, on the other hand, was represented by **Mr. Ngeseyan Lectony,** learned advocate.

In proving the charge laid against the accused person, the prosecution paraded a total of three (3) witnesses namely; Assistant Inspector Claudian

Makaranga (PW1), Dr. Hamidu Jaka (PW2) and F. 5838 D/SGT Ramadhani (PW3). The prosecution also tendered the following exhibits; Post Mortem Report (PE1), a Sketch Map (PE2) and two (2) statements of witnesses collectively marked as (PE3). On the other hand, the defence had only one witness, the accused, who appeared as DW1 and did not have any exhibit to support his case.

Brief facts of the case are as follows; on 7/12/2018 PW1, the police officers, received an information that a suspect of the fateful incidence which had occurred at Samunge area was at a place named "Magaidumu village" where he was hiding at the residence of one Isaya Saideya, the village executive officer (VE0).

Upon being furnished with such news, PW1 together with SP Mathayo went to Magaidumu village and met Mr. Kasonjoo Toroto, the Magaigaidumu village chairman who took them to the residence of the said Saideya. At the residence of Mr. Saideya, PW1 and his fellow police found two persons hiding in a living room and they arrested both and took5 them to Loliondo Police Station.

PW3 is the one who visited the scene of the crime and drew a sketch map (PE2). According to him, as they arrived at the scene of the crime, they found bloodstains. He also testified to be present during the examination of the deceased's body and that, it was the doctor (PW2) who conducted post mortem and one who informed them that, the cause of deceased's death was due to excessive bleeding on a cut wound that was caused by a sharp object.

PW3 also tendered two statements of one Exaud Steven @ Luley and Ibra Zabroni who did not appear in court despite the fact that, they were duly served. According to him, the statements of the two persons who witnessed the fateful incidence establish that, it was the accused who caused the death.

On the part of the defence, the accused defended himself. Essentially, the accused person blatantly denied to have deadly stabbed the deceased. He seriously contended that, the deceased was the one who deadly stabbed himself using his own knife when he (accused) was endeavouring to snatch the knife from him (deceased) in order to save his life. Moreover, the accused told the court that, he had once admitted to have killed the deceased without

malice aforethought before me (trial successor) and before Hon. Phillip, J (trial predecessor).

Having outlined the evidence adduced by the parties, the issue for determination by the court is;

> "Whether the evidence adduced by the prosecution and defence is sufficient to convict the accused person with the offence of murder c/s 196 or Manslaughter c/s 198 of the Code (supra).

In proving a case of murder, the prosecution has a duty of proving the charge beyond reasonable doubt in that, the person said or reported to haven been murdered, is truly and certainly dead and that, an accused person is the one who killed the deceased person and he did so with malice aforethought.

As already established through the accused person's pleas and through evidence adduced by both sides. It goes without saying that, it was the accused who indisputably caused the deceased's death in one or other. The issue whether the deceased or accused used knife in fatally stabbing is immaterial provided that, it is clear that, the deceased's death was occurred in the course of their fighting. Hence, the next vital question for the court's

determination is whether the accused person killed the deceased person with malice aforethought.

Considering the prosecution evidence in particular the statement of Exaud Steven (exhibit PE3), establishing that, he was an eyewitness during the commission of the crime. More so, taking into account that, the accused person's defence admitting to have killed the deceased without malice aforethought denoting that he did not intend to kill the deceased person, therefore, it follows that, there is no scintilla of doubt that, the deceased's demise was caused by the accused.

According to the provisions of section 200 of the Penal Code (supra) malice aforethought of a person accused of murder is established by either an intention to cause death or grievous harm or knowledge that, an act or an omission will probably cause death or grievous harm or an act or omission to facilitate flight or escape from custody. The Court of Appeal of Tanzania in the case of **Enock Kipela vs. Republic,** Criminal Appeal No. 150 of 1994 (Unreported) expounded the factors for the offence of murder stating 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 forced 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."*

In our instant criminal matter, it is not in dispute that, the death of Herbeth Karinti Saideya was unnatural and the cause of his death was a stabbed wound leading to severe acute bleeding. If at all, this court is to believe on the statement of one Exaud Steven which was received by this court as exhibit PE3. The court's holding must be, it was the accused who inflicted that, fatal wound by stabbing the deceased with a knife, something that is said to have been seen by the said Exaud. In the ordinary sense, this court finds no reason to disbelieve such documentary evidence as there was

no any other plausible evidence establishing to the contrary on the part of the prosecution.

However, through the statement of Exaud, the motive behind for the killing of the deceased has not been disclosed. Thus, leaving serious doubts regarding the accused person's guilt on the offence of murder. How could it be possible for the accused person to deadly stab the deceased person with knife without any reason? Here, a lot is left to be desired by the court as far as malice aforethought on the part of the accused person is concern despite the use of knife however; a number of blows are not clearly indicated in the Postmortem Report which would infer the accused's intention to kill. I have further warned myself regarding the weight of such statement (PE3) whose maker has not entered appearance in court during trial for cross-examination by defence.

On the other hand, the accused person vividly pleaded guilty to the lesser offence. Subsequently, he gave evidence during trial with effect that, the cause of the deceased person's death is fracas between the deceased and him and that, while fighting each other the deceased stabbed himself when he (accused) was trying to snatch the knife from him (deceased). It is trite law that, every witness is entitled to credence and must be believed,

Therefore, his or her testimony must equally be accepted unless there are good and cogent reasons for not believing him or her. The Court of Appeal of Tanzania in **Goodluck Kyando vs. Republic**, Criminal Appeal No. 118 of 2003 (unreported) authoritatively emphasized this position of the law. In our instant criminal case, the accused's assertion that, the deceased is the one who fatally stabbed himself would be discredited if more than one blows were indicated in the Postmortem Report (PE1) or any other pieces of evidence.

I have also considered the accused person's defence establishing that, before the commission of the offence, the accused person together with the deceased and two other persons namely; Exaud and Ibra as they were from work; they went into a bar and took some alcohol. Thereafter a fracas occurred between the accused person and the deceased as the deceased could not let the accused eat meat. Hence, the evidence of the defence is indicative that, both accused and deceased had taken alcohol and they were drunk and that, while they were on the way back home, fracas occurred between them.

In law, the offence of manslaughter is quite distinguishable from the offence of murder in that, the offence of manslaughter lacks an intention to

kill on the part of an accused person. The offence of manslaughter legally prevails where an accused person, whether during investigation or during trial, noticeably asserts that, he or she killed the deceased person out of his control due to provocation, intoxication, insanity or any other diminished responsibility. From the accused's evidence, the accused has established two defences; **firstly,** that, the accused person and the deceased did take alcohol immediately before the fateful incidence taking alcohol and **secondly,** that, there was fracas between the accused and the deceased as explained herein above.

Generally, it is settled law that, death resulting from a fight or fracas cannot constitute the offence of murder but the offence of manslaughter. It is so, in my view, simply because, a wrong doer had not intended or planned to kill another prior to the killing. In **Ackson s/o Mwakatoka & 2 Others v Republic** (1990) TLR 17, the court of appeal when faced the similar situation, had these to say;

> *"The extra judicial statement shows that there must have been a fight between the deceased and the third appellant who showed to the justice of the peace a scar on his forehead which he alleged was a result of a wound the deceased had inflicted on him before he (third appellant),*

attacked the deceased on the head with a stone. ***When death occurs as a result of a fight as it was in this case, unless there are very exceptional circumstances the person who causes death is guilty of manslaughter and not murder*** *(Emphasis supplied)"*

Also **Moses Mungasian Laizer @ Chichi vs. Republic** [1994] TLR 220 and **Minani John & two Others vs. The Republic,** Criminal Appeal No. 435 of 2018 (Unreported). In the latter case the Court of Tanzania held as follows;

"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."

In our instant case, carefully evaluating the evidence adduced by both sides, I am unable to hold that, there was an existence of the requisite malice aforethought on the part of the accused person save that, the deceased person's death was caused through a fight. In no way, a death resulting from a fight or fracas may safely lead to a conviction of an accused person of the offence of Murder unless other pieces of evidence are satisfactorily established

such as subsequent utterance of the words constituting an intention to kill prior to a fight, repetition of stabbing so on and so forth.

The above being said and done, I find that, the evidence adduced by both sides has satisfactorily established the accused person's guilt of the offence of manslaughter unlike the offence of murder whose thresholds have not been met. I consequently convict the accused person of the offence of Manslaughter contrary to section 195 read together with section 198 of the Penal Code, Cap 16, Revised Edition, 2002.

It is so ordered.

DATED and **DELIVERED** at **ARUSHA** this 7th day of December 2022

M. R. GWAE
JUDGE
07/12/2022