

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB- REGISTRY**

**AT TARIME**

**CRIMINAL SESSIONS CASE NO 90 OF 2021**

**THE REPUBLIC**

***VERSUS***

**WAMBURA S/O MNANKA @ SIMBANNE**

**JUDGMENT**

15<sup>TH</sup>FEB&22<sup>ND</sup> FEBRUARY, 2022.

**BEFORE F.H. MAHIMBALI, J.:**

The accused person, namely Wambura Mnanka @ Simbanne is arraigned before this court for the offence of murder which is based under section 196 and 197 of the Penal Code [ Cap 16 RE 2019] (the Penal Code). It was alleged by the prosecution that on unknown date of May, 2020 at Borega 'A' village within Tarime District in Mara Region, Wambura Mnanka @ Simbanne murdered Marwa Wambura. The accused person denied the charge levelled against him.

In this case, Marwa Wambura is dead and it is alleged that he was killed with malice aforethought by the accused person. The prosecution

called **3 witnesses** without any exhibit. The prosecution's witnesses were PW1 (name withheld for some good reasons to be known soon herein after) the eye witness; Grace Wambura Mnanka (PW2) mother of the deceased and also wife of the accused and Motera Mahuti Kimaroi Bhoke (PW3) who was informed the suspicious death of the deceased and reported it to police thus giving birth of this case. It is important at this juncture to state that the accused person is the father of the deceased and PW1 also husband of PW2. He is however the clan member to the clan headed by PW3.

The evidence adduced by the above prosecution's witnesses was as follows:

PW1 (name withheld to disguise her identify), a standard vi pupil at Kwinogo Primary School testified how she was raped by the accused person (her own father) in which she resisted by crying for help where upon the deceased responded to it. As the deceased person had entered into the room where PW1 was crying for help, he was astonished to see PW1 being raped by her own father. As the father had not expected to be seen/spotted by the deceased doing that barbaric act, he reacted by a hard kick to the deceased (witness boy) on his stomach as shame of being

spotted raping his daughter. Both the victim of rape and the deceased were warned by the accused person never ever to reveal about the incident to anyone. It is the testimony of PW1 that it is from that hitting by the accused, whereby the said deceased's health started deteriorating until he succumbed his demise on 5<sup>th</sup> June 2020 (in less than a month). The deceased appears not to have told anyone. However, it is the PW1 who then told her mother (PW2) and later the clan leader (PW3). It is from this evidence; the prosecution is believing that the deceased was murdered by the accused and wants this court to enter conviction as charged.

On the other hand, the accused person admits that the said Marwa Wambura is dead, but he died of natural cause as he was sick of diarrhea and not anything else. He tried his best to send him to dispensary and later Health center but he could not recover. However, they were referred to Tarime District Hospital for further medication and examination only to find that he had no money for that, thus he could not send the said son (deceased) to Hospital. He then died while at home.

In digest to the case's evidence, though not medically established, it is undisputed that the said deceased is dead as alleged. This is as per consideration of the testimonies of PW1, PW2, PW3 and DW1 (the accused

himself). What is disputed is the cause of death of the deceased and whether the accused person is responsible of murder. Whereas PW1 tries to persuade the Court that the accused person is responsible of the said death as he kicked hard the said boy on his stomach upon being spotted by him raping her, from that day on, the deceased fell sick and could not rise due to stomach sickness as he was complaining from that day on until he met his demise. On the other hand the accused person denies that responsibility and avers that the death by the deceased is by natural cause.

The said body was not examined by any medical practitioner to state the medical findings as what really caused the death of the deceased. Whether there was any treatment at the dispensary or health center as propagated, there is no that medical evidence to establish.

The central issue for consideration is whether given the evidence by the prosecution, the case has been proved beyond reasonable doubt? In the case Magendo **Paul and Another Vs The Republic [1993] T.L.R 219 (CAT)**, it was held inter alia that;

*"..for a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the*

*accused person as to leave only a remote possibility in his favour which can easily be dismissed"*

This was held in line with the philosophy enshrined in the case of A Chandrankat Ioshubhai Patel Vs the Republic, Criminal Appeal No. 13 of 1998 (CAT - DSM) in which it was held that;

*"remote possibilities in favour of the Accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of Criminal Justice if they were permitted to displace solid evidence or dislodge irresistible inferences"*

In the case of **Christian Kale & Another Vs. The Republic** (1992) T.L.R 302 CAT and **John Makorobera & Another Vs. The Republic**(2002) T.L.R 296, which insistently held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case not on the weakness of the defence case. In line with this principle of burden and standard of proof, another important principle becomes necessary as enunciated in the case of the case **of Mariki George Ngendakumana Vs The Republic**, Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported), which inter alia held that:

*"It is the principle of law that in Criminal Cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the Accused person who committed it"*

The offence of murder encompasses unlawful killing of another person (human being) with malice aforethought. In law, the killing becomes unlawful if the act or omission causing the death cannot be justified. On the other hand, the killing is with malice aforethought if the person who killed another intended to cause death or grievous bodily harm. Circumstances to be considered in establishing malice aforethought are well stated in section 200 of the Penal, Code Cap. 16 of the R.E. 2019 which provides as follows:

*"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-*

- a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the 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;*
- 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."*

For an offence of murder to be established, there must be cause of death. Since murder is killing with malice aforethought, the cause of death is essential ingredient to be established. The law under section 203 of the Penal Code, Cap 16, defines causing of death as hereunder:

A person is deemed to have caused the death of another person, although his act is not the immediate or sole cause of death, in any of the following cases-

- a) If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death; in which case it is immaterial whether the treatment was proper or mistaken if it knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

- b) If he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;
- c) If by actual or threatened violence he causes that other person to perform an act which causes the death of that person, the act being a means of avoiding the violence which in the circumstances would appear natural to the person whose death is so caused;
- d) If by any act or omission he hastens the death of a person suffering under any disease or injury which, apart from that act or omission, would have caused death;
- e) If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of another person.

In the current case, the issue for meditation is whether the act of the deceased of kicking hard the stomach of the deceased is the sole cause of the deceased's death? PW1 says that from the day the deceased had been kicked hard by his dad (the accused person), he was down complaining of his stomach pain and it got swollen. Treatments at the dispensary and



health center could not save him as he was needed for major examination and medication at Tarime District Hospital (see testimony of PW2 and DW1). PW2 testified that she told her husband of the need of sending the said little boy to Tarime District Hospital, but the accused person turned down by responding that *"either he dies or survives, he was not ready to send him to hospital"*.

In the digest to the testimony of PW1 and PW2, I am satisfied beyond reasonable doubt that what PW1 and PW2 testified is credible, truthful, reliable and trustworthy. In essence, I have no even a single doubt to raise against that testimony. It is trite law that every witness is entitled to credence and must be believed and his/her testimony accepted unless there are good and cogent reasons for not believing a witness. In the case of **Mathias Bundala vs Republic** , Criminal appeal No. 62 of 2004 CAT at Mwanza where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, the court held that:

*" it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness"*.

With what has been testified by PW1 on account of being raped by the accused person leading to the deceased spotting them and thereby the accused person reacted by kicking the deceased on his stomach to down and sickness. And further the testimony of PW2 that accused person even denied responsibility of sending the kicked boy to District Hospital as advised is nothing but credible testimony as observed and assessed by the Court.

In his defense testimony, the accused person is suggesting that the deceased died of diarrhea or cholera. His testimony is sweet saying but is not realistic. His assertion would be true had the testimony of PW1 and PW2 been to his side, but the way it is suggests a contrary view. Thus, it is unreliable story. It is mere a defensive statement.

All this taken into account, I am of the firm view that the deceased died unnatural death as per facts of the case and reliant to the evidence of PW1 and PW2. If a person inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living, the person causing the injury is responsible of the said death. I am

therefore of the considered view that, the death of the deceased in this case was unlawful or not certified by law.

The next important question which is also central is this whether the killer had malice aforethought. In responding this, the case of **Enock Kipela v Republic** Criminal Appeal No. 150 of 1994 (unreported) has discussed what entails malice aforethought, when the Court of Appeal held that:-

*"Usually an attacker will not declare 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 blows 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 attacker's utterances if any; made before, during or after the killing and the conduct of the attacker before and after the killing.*
- 7) The conduct of the attacker before and after the killing.*

With this, I am not certain whether in the circumstances of this case, the accused person established malice aforethought. There might be divergent views on this. This is because the conduct of the deceased prior and after the kicking the deceased may not suggest clear malice aforethought. As I am not certain to the extent of injuries caused in the said leg kicking, I hesitate to rule that there was malice aforethought as per law. The law is, "*in dubio pro reo*", i. e where there is doubt don't act. Though the act was unlawful, I am not certain that it was real murder. In the circumstance, I consider it as manslaughter.

Lastly, as per evidence in record it is undoubted that the accused person in this case is the one responsible of the said unlawful killing though in a high level. This is in consideration of the direct testimony of PW1 who witnessed the said hard kicking and also his refusal to submit the boy to the proper Hospital as advised for major examination and treatment.

This holding partly draws a concurrence opinion finding with the all assessors that the accused person is responsible of the said killing. While their view is based on the strength of the testimony of PW1 and PW2 being nothing but trustworthy, credible and reliable but linking the accused person with the charged offence of murder. I am persuaded both, by my

own conviction and the assessors' opinion that the totality of the evidence adduced during this trial (PW1) has left a real and justified impression that no doubt that the accused person is responsible of the killing of the said deceased Marwa Wambura. However, for the reasons stated above, I convict him of manslaughter contrary to section 195 of the Penal Code in lieu of murder as charged. I rule so, considering the whole of the prosecution's case. It is established that there is a person who died of unnatural death; the killing is unlawful and not certified by law. That there is no established malice aforethought as per law. That the accused person arraigned before the Court is the one who killed the deceased. The guiltiness on manslaughter is pursuant to section 203 (b) of the Penal Code for having inflicted bodily injury on another which then is the probable cause of the deceased's death.

DATED at TARIME this 22<sup>nd</sup> day of February, 2022.



F. H. Mahimbali

JUDGE

22/02/2022

**Court:** Judgment delivered this 22<sup>nd</sup> day of February, 2022 in the present of the Mr. Frank Nchanila, state attorney for the Republic, Ms. Marry Samson for the accused, Wambura Mnaka Simbanne, accused person and Mr. Gidion Mugo RMA.



F. H. Mahimbali

JUDGE

22/02/2022

Right to appeal is hereby explained to any aggrieved party.



F. H. Mahimbali

JUDGE

22/02/2022