ORIGINAL

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KASULU

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 14 OF 2021

REPUBLIC

VERSUS

TUMAINI S/O THOMAS AND ANOTHER

J U D G M E N T

18/02/2022&15/03/2022

L.M. MLACHA, J.

The accused, **TUMAINI THOMAS @ DHEBU** and **JONAS MBILIMI BIKWASHA** are charged of murder contrary to section 196 and 197 of the Penal Code, Cap. 16, R.E. 2019. It was alleged that they murdered Bahati Nicodemus on the 5th day of September 2020 at Nyachenda Village, Kasulu district, Kigoma region. They denied the charges. The prosecution had 5 witnesses to call and 2 exhibits to tender to discharge their burden of proof. The accused were the only defence witnesses.

PW1 Magwanila Kimilando and PW5 Dunia Buliba were at the scene of crime on the material date and time. Both of them said that they witnessed

what happened. It was the evidence of PW1 that on 5/9/2020 at 4:00 PM he was at a Local Pub owned by Mr. Heneriko Ngarama drinking alcohol (wanzuki). He was seated somewhere. Many other customers were also present, enjoying their day, consuming wanzuki. While seated, he saw the second accused (Jonas) pulling the deceased on the ground. The first accused (Tumaini @ Dhebu) joined the dispute. The deceased managed to escape, he run away. The first accused (Tumaini @ Dhebu) picked a local stool (Kigoda) and threw it to the deceased. They run after him and pulled him down. Jonas, the second accused had gumboots. He beat him using legs (kumkanyaga kanyaga). He saw both of them beating him using legs. They left thereafter. The deceased spent some 10 minutes on the ground and rose up slowly. He went home as well. He said that he could not see the part of the body which was hit by the local stool because the parties were in a motion (*wanakimbizana*). Describing the distance, PW1 said that he was seated in a distance which was later estimated by the court to be about 30 meters. He went on to say that there was no barrier in between. He leant later that the guy who had been beaten was dead. He said during cross examination that he witnessed the fight but did not know the source. He added that the deceased was very drunk but had his senses. The

accused were also very drunk. He stressed that it is the first accused (Dhebu) who strew the local stool. Further that, he saw both of them beating him using legs.

The evidence of PW5 shows that he was at the local pub consuming wanzuki. The accused and many others were present. While there, he witnessed the first accused, Tumaini, insulting the late Bahati. Jonas started the fight by pulling the late Bahati down (piga mtama). Tumaini came to beat him. He beat him using gumboots on the head. They went home leaving him on the ground. He rose up later and went home as well. He fell sick on the other day and died. All the people who were in the pub were arrested by the police, including himself. He was later released to become a prosecution witness to say what he saw.

Giving details of the area, he said that the pub is a house which is roofed but has no walls. There were just standing poles and the roof. He was seated in a distance which was estimated by the court to be about 10 meters. He could see what happened. He responded during cross examination and said that Jonas, the second accused beat him with a boot on the head as well. He added that they were very drunk.

PW4 Magreth Hamisi (35) is the wife of the deceased. She was at home on the material date when her husband came from the pub. He was in a bad condition and speechless. She informed his relatives. They came. His junior uncle (baba mdogo) questioned him as to what had happened in her presence. He said that he had been beaten by Tumaini and Jonas who are the accused persons. That, Tumaini, the first accused beat him with a local stool on the left side of the eye. Jonas beat him also. They took him to hospital where he died.

PW1, PW4 and PW5 could identify the accused in court.

PW2 Dr. Nyarunda Solomoni (51) was contacted by the police and given an order to examine the body of the deceased. He did so. The Postmortem Examination Report (Exhibit P2) shows that the skull was broken on the left side, above the ear. When he inquired he was told that it was broken by a 'Kigoda'. He saw blood coming out of the ear. He had the opinion that death was caused by bleeding in the brain. PW3 G6115 PC Juma who was present at the scene of crime drew the sketch map, exhibit P1.

It was the defence of the first accused (DW1) that he moved to the pub that day and met a lot of people. He saw Jonas and the later Bahati.

Bahati was dancing. He was drunk. He ordered wanzuki for himself. Bahati started to chase him with the aim of taking the wanzuki. He held his shirt. Jonas came to settle the dispute. Bahati who was very drunk fell down. They proceeded to drink. He left. They also went home. He got a report on the other day that the deceased was very sick. He moved to see him. He returned home to bring some contributions to assist in sending him to hospital. He was arrested later in the day accused of killing the deceased something which is not correct. He argued the court to set him free saying the deceased fell down mistakenly.

The second accused, Jonas Mbirimi Bikwasha (DW2), agreed to be at the local pub that day. He was in the company of the first accused, the deceased and many other people. They were drinking wanzuki. People were dancing. The deceased was very drunk. He held the shirt of the first accused. He moved to separate them but the deceased fell down on a bad lack due to the drink. He rose up and proceeded to drink. They proceeded to drink. He went home at around 3:00 PM and left them behind. He learnt on the other day that the deceased was sick. He was later arrested and associated with the crime. He defined the prosecution evidence as fake.

The honourable assessors were given a summary of the evidence as shown above to remind them of what was said in court and the exhibits tendered. They were also informed of the relevant legal positions. They then gave their respective opinions. The first assessor said that the evidence of PW1 PW5 and PW2 are contradictory. They don't show clearly who broke the skull. She found the accused not guilty. The second assessor gave a length description of the evidence and ended with two questions; when did he die? What was used to kill the deceased? He had no clear answers to these questions. He found the evidence of Dr. Nyarundura, Mzee Magwanila and Dunia Buriba to be contradictory. He said that it was not clear whether death was caused by the beat on the leg which fell himdown '*Mtama*' , the boots or the local stool (*Kigoda*). He added that a person who was drunk like the accused could fell on the way and get injured. He found the prosecution case as merely suspicious which he rejected. He found them not guilty and adviced me to set them free. The third assessor acquitted them of murder and made an opinion which could lead to a conviction of manslaughter but she did not go to that end. She said that there was evidence showing that the one who threw him to the ground was Jonas the second accused. And that both of them beat him using

legs. But, despite of being beaten, the deceased appear to have been the source of the dispute because he moved to the other guy (Tumaini). She concluded that death was not intentional. It was caused by the drink because all of them were drunk. She found them not guilty of murder and ended there.

I had time to study the evidence carefully. I find that the following facts are not disputed; **one**, that the deceased, the accused, PW1, PW5 and many other people were in the pub that day consuming alcohol (wanzuki); **two**, that, the deceased did not die of any disease, he died an unnatural death, he was killed. His skull was broken by a blunt object leading to bleeding in the brain and death; **three**, that, the accused and the deceased were in a *physical encounter* that day at the pub; **four**; that the accused and the deceased were drunk.

The issues for determination are these; **one**, who caused the death of the accused?; **two,** if the accused are the ones who caused the death of the deceased, whether it was intentional; **three,** whether the defence of intoxication can be invoked in defence of the accused; **four**, whether there is evidence proving the case beyond reasonable doubt.

I will start with the first issue, who caused the death of the accused? We have the evidence of both PW1 and PW5 who said that the accused attacked the deceased who fell down. PW1 said that prior to the incidence, there was a stool which was picked by the first accused and sent to the deceased. He could not see clearly the place where it hit him but PW4 said that the deceased made a statement shortly before his death (a dying declaration) and said that it hit him on the left side of the head below the eye. The doctor, PW2, said that the left side of the head above the ear was bent. The skull was broken. It is thus clear that the stool which was sent by the first accused hit at this area. Both PW1 and PW5 said that while on the ground, the accused came and beat the deceased by their legs. It was stressed that Jonas the second accused had gumboots which he applied on the head. On the other hand, we have the evidence of the accused who agree to have a physical encounter with the deceased but deny beating him. They said that the deceased who was drunk fell down accidentally. They denied beating him with the stool or gumboots.

Now who speaks the truth? This takes us to the credibility of witnesses. The facts must also speak for themselves. Going by the facts of the case which show that the deceased had a broken skull, I find it less probable

that he broke it himself as he was felling down. Logic defeats this story particularly where we are not told that there was a stone on the ground. I think the truth which is plain is that the skull was broken by a blunt object which was applied with a huge force. This can be the local stool or the gumboots and nothing else. But the deceased said that the place which was bent was hit by the local stool making it clear that the skull was broken by the local stool. The boots simply added the injury. It is thus my finding that the accused beat the deceased with a local stool and gumboots on the head thereby causing his death. With respect to the assessor, I don't agree that he was beaten by some other people on the way. There was no such evidence in court.

Next for consideration is whether the accused caused the death of the deceased intentionally. The evidence is clear that the accused and the deceased were drunk. It is also clear that there was a commotion between them before the deceased was pulled down and beaten by boots. The evidence shows that there was a fight between them. This takes us to two areas; death as a result of a fight and the defence of intoxication.

In **Jacob Asegelile Kakune v. The DPP**, Criminal Appeal No. 178 of 2017 the Court of Appeal reviewed its earlier decisions in **Mosses**

Mungasiani Laizer @ Chichi v. Republic [1994] TLR 222, **Stanley Anthony Mrema v. Republic,** Criminal Appeal No. 180 of 2005 (unreported) and **Aloyce Kitosi v. Republic**, Criminal Appeal No. 284 of 2009 (unreported) and said that where death occurs as a result of a fight the court should convict the accused of the lesser offence of Manslaughter not murder.

In **Jackline Exsavery v. R**., Criminal Appeal No. 485 of 2019, the Court of Appeal had this to say on the ingredients ofmurder at page 17;

> *'Two ingredients, actus reus and meus rea, constitute the offence of murder under section 196 of the Penal Code. Actus reus is the unlawful action or conduct. The second ingredient is the intension or knowledge of wrong doing, better known as malice aforethought (mensrea)'*

So, a mere act of causing the death of another does not constitute the crime of murder. There must be malice aforethought or intension to kill for the act to amount to murder. He must have intended. The leading case on this aspect is the decision of the Court of Appeal **Enock Kipela v. Republic**, CAT Criminal No. 250 of 1994. It was said that to establish malice the court must address its mind on the following areas; the type and size of weapon used, the amount of force applied, the part of the body

where it is directed, the number of blows, the kind of injuries, the attackers utterances and the conduct of the attacker before and after the killing. Where for example a person apply a knife on the chest or neck of the deceased and apply it by force once or several times, one can say that he intended to kill him because that was the probable consequence of what he did. Or where a heavy object is applied on the head with some force, it can be said that the one who did so must have intended to kill. But the court must observe the evidence closely to see if there was no fight between the parties for the position of the law is that death which is the result of a fight between the accused and the deceased cannot lead to murder but the lesser offence of manslaughter.

In our case, as it was hinted above, there was a fight between the parties taking us to the leaser offence of manslaughter.

The question now is whether the defence of intoxication can be invoked in favour of the accused so as to make them not guilty of manslaughter. The Court of Appeal had this to say in **Mohamed Ally @ Sudi Sudi v. R,** CAT Criminal Appeal No. 274 of 2017 page 9:

'... intoxication does not constitute a defence to any criminal charge save in circumstances elaborated under that provision of the said section'.

The court had in mind the provisions of section 14 (2) of the Penal code. Section 14(2) reads:

'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 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, temporary or otherwise, at the time of such act or omission'.

The law has set conditions under which intoxication can be available as a defence in a criminal offence. **One**, there must be evidence showing that, by reason of intoxication, the accused did not understand what he was doing; **two,** he must be so at the time of doing the act or omission. The accused must have been moved by intoxication to do what he did. There must be evidence showing that he was moved by his mental state of intoxication to do what he did or what he did not do which constitutes the crime charged. He must be under the state of intoxication at the time of doing the act. Time is important.

It is not correct for example to say that he was very drunk yesterday or in the morning and did not understand what he was doing. He must have been drunk *at the time* of doing the act or the omission. The amount of intoxication must make him unable to understand what he was doing. See the decision of the Court of Appeal in **Mwale Mwansanu v. The DPP**, Criminal Appeal No. 105 of 2018.

In our case, the accused were very drunk but knew what they were doing. They recall what happened. They mentioned people who were in attendance. They described what happened clearly. They cannot therefore, be said to have been drunk to the extent or getting a temporary insanity, so as not knowing what they were doing. The evidence of PW1 also support this view. That they were drunk but knew what they were doing. The defence of insanity is therefore not available to them.

Before going to the end, I find it proper to point out one aspect. Much as the accused is not supposed to prove his innocence but he has a duty to speak the truth. Reading through defence of the accused and their demenour at the witness box, I have discovered that the accused spoke open lies when they said that the deceased fell and injured himself. That was an open lie for a person cannot fell in an area which is not said to

have stones or hard substances and break his skull. Further, a person of a broken skull cannot raise and proceed to drink and dance. That is not possible and is a lie. The lies of the accused corroborate the prosecution case. See **Nkange Daudi Nkanga v.R.** CAT Criminal Appeal No. 360 of 2013 and **Felix Lucas Kisinyila v Republic** CAT (Zanzibar**)** CRIMINAL APPEAL NO. 129 OF 2002.

Where the prosecution has made out an affirmative case against the accused person and the accused in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused, in deciding on the question of his guilty. See **Ali Mpalilo Kailu v. Republic,** [1980] TLR 170 (Kisanga J. as he then was - High Court Mtwara). The lies of the accused in this case have added more weight to the evidence that the accused are the ones who beat and caused the death of the deceased and nobody else.

Finally it is my finding that there is good evidence to prove that the accused persons killed the deceased in a joint enterprise but for the reason of the fight between them and the deceased, they are not guilty of murder but Manslaughter Contrary to Section 195 and 198 of the Penal Code, Cap.

16 R.E.2019. A conviction for the lesser offence of Manslaughter is substituted accordingly. It is ordered so.

L.M. MLACHA

JUDGE

15/03/2022

Court: Judgment delivered in open court in the presence Mr. Benedict Kivuma state attorney for the Republic, the accused person and Mr. Joseph Mathias for the accused person.

Right of appeal explained.

L.M. MLACHA

JUDGE

15/03/2022