THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL SESSION CASE NO 12 OF 2021

(From PI Case No 5/2019 in the District Court Newala at Newala)

THE REPUBLIC ..... PROSECUTOR

VERSUS

MWALAMI ABDEREHEMANI..... ACCUSED

JUDGEMENT

10/02/2023 & 27/2/2023

LALTAIKA, J.

The accused person herein **MWALAMI ABDEREHEMANI** is charged with the offence of Murder contrary to Sections 196 of the Penal Code [Cap 16] R.E 2022. The particulars of the offence are that on the 22nd day of April 2019 at Maputi Village within the District of Newala in Mtwara Region he did murder one **BASHIRU YUNUS MNALI.** The accused person took plea on 28/4/2021 where he denied the allegations hence this trial.

This being a capital offence, the state fulfilled its obligation of providing free legal representation to the accused through **Mr. Hussein Mtembwa,**

learned Advocate. Prosecutorial functions of the Republic were rendered through **Mr. Gideon Magesa**, learned State Attorney. I take this earliest opportunity to register my sincere appreciation to both learned counsel for their commitment to professionalism and their insights that have contributed greatly to shaping this judgement.

The story behind the matter at hand is not difficult to connect. It centers on the accused and the deceased. Apparently, the duo knew each other. They both lived in the same village of Maputi in Newala District. In addition to being village mates, they shared one thing in common namely that they both had a romantic relationship with one **Latifa Selemani Ahmadi** a young woman from their village. Whereas the deceased was merely a lover, the accused had gone a step further. He had proposed to marry Latifa by offering a cash gift (known in the Makonde tradition as "kibisha hodi") of TZS 10,000. Having introduced himself to Latifa's family his relationship with his newly proposed fiancée received recognition. He was allowed to leave with his wife to be and live with her in anticipation of a formal wedding. However, he was warned against prolonging the wedding as living together without marriage violated religious ethics that Latifa's parents were committed to.

The accused and his fiancée allegedly rented a room in a neighbouring village where they lived while jointly running a barber shop. The accused, however, had an additional skill "*fundi ujenzi*" that enabled him to occasionally work as a mason. Whenever he got a masonry job, he would leave his fiancée alone in their room and headed for the job. Three days

before the alleged killing, the accused had allegedly been offered a temporary job *"kibarua"* at Kitangari Teachers College. He bid farewell to his fiancée and headed to Kitangari.

On the fateful day, the accused left his temporary job at Kitangari Teachers College to his home where they had been living with Latifa. Upon arrival in early morning hours, the accused did not find his fiancée in the room. He inquired her whereabouts, and his landlord told him that his wife had gone to her grandmother's place the evening before. Since it was a walking distance, the accused decided to walk to meet his fiancée at her grandma's place.

Upon arrival at the grandma's place *("kwa bibi")*, around 6:00 AM, the accused found the deceased lying on a bed dressed in shorts. The accused took that to mean the deceased was having an affair with his fiancée. He rushed to the nearby kitchen, picked up a hoe handle and proceeded to use it to hit the deceased fatally on the head. The accused then disappeared leaving the deceased groaning helplessly and in great pain. The deceased was rushed to Kitangari Health Center where he was pronounced dead on arrival.

Through ardent efforts of the Tanzania Police Force, Newala District, the accused was arrested several months later in the neighbouring district of Masasi. He was charged with murder as alluded to above. The remaining parts of this judgement are summaries of the prosecution and defence cases through testimonies of their witnesses, summary of final submissions by both counsel, this court's analysis of the resultant legal issues, verdict, and order(s).

In criminal cases, except in very rare circumstances, the onus is on the prosecution to prove, beyond reasonable doubts, the allegation levelled against the accused. In the highly spirited attempt to discharge this duty, the prosecution fronted five witnesses (herein after referred to as prosecution witnesses or PWs for short) and tendered in four exhibits. The prosecution case is summarized in the next paragraphs.

PW1 was Latifa Selemani Ahmadi, a-32 years old resident of Maputi, Newala District. She testified under oath that the accused Mwalami Abderehemani and herself had been in a relationship before. She stressed that the accused had been her fiancé for one year but by the time the incident happened, they had parted ways. She was no longer his fiancée. To support her claim, PW1 asserted that her father, whose name was Ahmad, had known that they were in a relationship, and he had also known when their relationship had come to an end.

Narrating on the incident, PW1 testified that on 22/4/2019 in the morning at 6:00 AM, the accused went to her grandmother's place, pushed open the door he had already destroyed in a previous visit, and went inside. Inside the house, PW1 recalled, the accused met her in the living room and started beating her up and knocked out her tooth. Then he proceeded to the bedroom where he found the deceased (whom she described as her lover) sleeping. The accused then went straight to the kitchen where he picked up a hoe handle "mpini wa jembe" with which he had bitten the deceased fatally on the head only to tell her later to go and pick up her corpse "Kachuke Mzoga wako."

PW1 insisted that she did not know what had motivated the accused to kill the deceased because, by the time of the killing, accused and herself had ended their relationship and each was living in their own place. PW1 testified further that when the incident happened, no one else was there except the deceased, the accused, and her.

PW1 was emphatic that by the time the neighbours had arrived at the scene of crime, the deceased had already run away. She insisted further that it was the accused and not anyone else who hit the deceased and ran away because she had known him before and had lived with him for a long time.

On cross-examination, PW1 stated that she knew the accused as her former fiancé or *hawara*, which means a person to whom she was not married to, but they lived together. PW1 testified further that the accused and her had been in a relationship for about seven months prior and had been living in accused's place.

On further cross-examination aimed at digging deeper into the status of their relationship, PW1 stated that the deceased had gone to introduce himself to her parents where he made a cash gift called *"hela ya hodi"* as a sign of proposing to her. There was no doubt, stated PW1, that the accused wanted to marry her because they had "such a good relationship." It was PW1's evidence further that on the fateful day the accused had attacked her, beat her up with a fist, and knocked out her tooth. The witness stated that she was taken to the hospital but was not given any treatment.

PW2 was G5599 D/C Bashiru a Police Detective with over 10 years of experience. Having solemnly affirmed, PW2 testified that on 22/4/2019 at approximately 8:00 AM, his former boss, Inspector Peter Zongo, instructed

him to go to Kitangari Hospital to see a civilian who had been reported to have been beaten up and was in a critical condition. Upon arrival, the medical staff informed PW2 that the individual, identified as Bashiru Yunus Mnali, had already died. The detective then returned to the police station and reported the news to the Officer in Charge (OCS). Together, they went to MAPUTI village to inspect the scene of the crime. The OCS ordered PW2 to draw a sketch map of the scene, which he did.

The sketch map, stated PW2, showed a house where the informer Latifa Selemani had been sleeping with the deceased, a nearby well, a neighboring house, and a piece of wood "kigongo" which was used to hit the deceased. After drawing the sketch map, PW2 made a legend and took measurements of the distances. PW2 was quick to inform the Court that the original copy of the sketch map he drew was lost while moving the file from one office to another. Nevertheless, he could identify a copy of the sketch map and prayed that the same is admitted as evidence. There being no objection from the defence side, a copy of the sketch map, was admitted as **Exhibit P1.**

During cross-examination, PW2 confirmed that the distance from the room where the killing took place to where they found the piece of wood was 10 meters, and it was about 30 meters from a neighbour called Maridadi's house to the room where the deceased was hit.

PW3 was Ahamad Ali Ahmad a 47-year-old peasant from Maputi Village, Kitangali Division in Newala District, Mtwara. PW3 mentioned that his father was Mzee Ali Ahmad, and he had nine siblings, including Selemani Ali, who passed away in 2005, leaving behind two children named Latifa

Selemani and Sandra Selemani. The family elected the witness as the guardian of the children, and he lived with them until they grew up. **Latifa (PW1)** later left to live with her maternal grandmother, Sharifa binti Abdallah, who was also deceased and was married to Mzee Mwalimu Chikumbigile, who had also passed away.

It was PW3's testimony that at one day, his daughter Latifa informed him that she had a fiancé named Moharami Abderehemani and that he came with her for official introduction. The duo gave the PW2 **TZS 10,000** as a traditional means of introduction. They promised to return to pay the dowry, but they never did. The witness later found out that his daughter was being beaten by her fiancé and tried to reconcile the couple. However, after the couple came to complain about each other, they ultimately parted ways. On the 22nd day of April 2019, the witness recalled, he received a phone call from Kitangali Police Station while he was visiting his aunt in Mikumbi Village, informing him that his daughter had been arrested for the murder of a person at her place. The witness went to the police station the next day.

On cross examination, PW3 stated that he knew the accused as the person who had been in a relationship with his daughter, named Latifa. He became aware of their relationship in 2018, although he couldn't remember the exact month. The accused and Latifa came to introduce each other around the middle of 2018, the witness recalled.

On further cross-examination PW3 stated that in the Makonde tradition, it was a positive thing when a daughter introduced her fiancé, as it indicated that the family was recognized and respected by the community. He confirmed to have received *"kibisha hodi,"* which signifies that the

accused had been permitted to leave with his daughter pending payment of dowry or pride price "mahari" which, in the Makonde culture, the exact amount to be paid is determined by the woman.

On re-examination, the witness sounding rather philosophical, stated that in his view, love can end at any time, even in a month, a week, or three weeks, especially if one party cheats or gossips. He reported that on 22/2/2021, he gave a statement to the police over the phone while he was farming in the village.

PW4 was Dr. Joseph Johnson Mushumbusi, MD. He testified under oath that on 22/4/2019 at 7:40 AM, while in his workstation at Kitangari Health Center, he received a patient who was in critical condition and unconscious, unable to talk. He took medical history extracted from informers who told him that the patient was hit by a blunt object, leading to a loss of consciousness. PW4 testified further that he conducted a physical examination and realized that the patient was swollen on the temporal region of the head, the area above the ear on the right side of the head, and that the patient had blood clots on the nasal cavity and oral region. He insisted that he examined some other areas of the body but could not see anything medically significant, and took vital signs including Blood Pressure, Heart beats, body temperature, and other body reflexes. As a result of such examination, the witness stated, he discovered that the patient was not alive.

It was PW4's evidence further that he filled out a PF3 since the patient was brought in with it, and that the OCS asked him to conduct a postmortem examination or autopsy, which he did in the presence of Afande Zongo and

relatives of the deceased. He concluded that the cause of death was ***severe traumatic brain injury***. Pursuant to the prayer of PW4 which prayer was not objected by the defence side, Report on Postmortem Examination Dated 22nd April 2019 was admitted as an exhibit and marked as **Exhibit P2**

On cross-examination PW4 stated that as a medical doctor, he needed to do three things to diagnose a patient, which are history taking, physical examination, and investigation. These steps, explained the witness confidently, are meant to confirm the diagnosis before moving on to managing the diagnosis. On further cross-examination, the witness testified that he had formed an opinion that the deceased was hit by a blunt object, based on observable features, as he was not present at the scene of the crime.

The Last Prosecution Witness, PW5 was PF 17674 ASP Peter Zongo, Assistant Superintendent of Police ASP based at Mtwara with 16 years of experience. Having solemnly affirmed, PW5 testified that on 22/04/2019, while at his office in Kitangari, he received information from a person called Latifa that someone had been beaten up and was taken to Kitangari Health Center. He instructed, DC Bashiru **(PW2)**, to go to Kitangari and find out the condition of the patient and issue a PF3 Form. However, PW5 narrated, DC Bashiru came back with the news that the patient had died. As OCS, PW5 stated, he proceeded to the scene of crime accompanied by DC Bashiru and the informer-Latifa.

Upon arrival at the scene of crime, PW5 stated, PW1 (Latifa) gave him a hoe handle that the accused was hit with. PW4 emphasized that he filled

up a certificate of seizure and the handing over form/receipt (chain of custody). He prayed the court to admit the documents as evidence only to face strong objection from Mr. Mtembwa, Counsel for the Defence. After a protracted legal debate only the Chain of Custody Record dated 22nd April 2019 was admitted as **Exhibit P3.** There being no objection the hoe handle was admitted and marked as **Exhibit P4.**

PW5 stated further that investigations were conducted leading to the arrest of Mwalami in a village in Masasi. The accused was interrogated by CPL Rahel, PW5 narrated, adding that CPL Rahel was involved in a severe accident and was unable to move or conduct any activity hence inability to testify in court.

On cross-examination, the witness confirmed that chain of custody is governed by law. He claimed that he conducted the impounding and handing over of the exhibit as per the law. The exhibit in question, testified PW5, bears the police logo and it is indicated that he was given the exhibit by Latifa on 22/04/2019 at 11:00 hours. On further cross-examination, PW5 conceded that PW1 was in a much better position to talk about the exhibit as she had firsthand information on the same. Nevertheless, the detective insisted, he had handed over the exhibit to the **exhibit keeper E735 CPL Omari** who had kept it since then. PW5 conceded further that the exhibit keeper was in a better position to tell the court how he had kept the exhibit and how it left his custody to court. Despite questions fired to him, PW5 stood his ground that he firmed believed that the chain of custody remained intact.

Upon closure of the prosecution case, a ruling of this court was to the effect that the accused had a case to answer. Consequently, Mr. Mtembwa informed the court that his client would testify under oath, and he intend to lineup four witnesses including the accused person. No exhibit tendering was envisaged. The next couple of paragraphs summarize the defence case including fierce attempts by the prosecution to challenge assertions in the form of unlimited cross-examination.

DW1 was Mwalami Abderehemani, a 24-year-old Barber, (*Kinyozi*) and mason (*fundi)*, resident of Kitangari, in Newala District. DW1 deposed that he was a resident of Kitangari village and worked as a barber and mason. He stated that he knew Latifa Selemani Ahmed, who was PW1 and his fiancé. According to him, they started their relationship in January 2017, which was around the same time he was given a salon to run by Afande Salehe in Maputi Village, Newala Mtwara. They began living together in February 2017 in his rented house and continued to do so until 2018 when they went to pay the "uchumba" money to Latifa's father with the help of his friend Mustapha Nyambi "Mshenga". After paying the money, DW1 recalled, they went back to living together in his place, where he engaged in economic activities such as running a salon, masonry, and farming until June 2018.

DW1 further testified that he started preparing for their wedding in 2019 with the help of his parents who gave him 330,000/= at the beginning of that year. He used some of the money to buy a kanzu and a bed and kept the rest. On 20/04/2019, he bid farewell to Latifa that he was going to work as a mason at Kitangari Teachers college and would return after a few days.

He returned on 22/04/2019 in the morning hours and found that Latifa was not at home. His brother told him that she had gone to her grandma's place a day before. He went to her grandma's place to retrieve the keys to their room and found Latifa there with another person **called Bashiru**. He knew Bashiru as he had brought him up and they were from the same village of Kitangari.

DW1 went on to testify that upon entering the room where he met Bashiru on the bed dressed in shorts "bukta" they started to quarrel, and Bashiru picked up a stick that was beside the bed. They scrambled to grab the stick, and he managed to take it from him and hit him with it in a place that he did not know. After the fight, he left to Masasi due to embarrassment.

DW1 admitted that he was angry when he found Bashiru with his fiancé and because Bashiru had beaten him up. He felt jealous of his fiancé because she had not slept at home and was with another man. He had spent at least two years with Latifa, and he had never been so angry before.

Upon being shown the *"mpini wa jembe"* he allegedly hit the deceased fatally with, DW1 stated that it was the first time he had seen the item and noted the difference between the hoe handle and the stick he previously used was that the handle was thicker. DW1 clarified that the stick he used was not actually a hoe handle but a walking stick. He denied the accusation that he had started by beating up Latifa and knocking out her tooth, stating that he had no grudges with her and was not aware of what was going on until she entered the room. He noted that Latifa was dressed in a light *Khanga* but could not recall what happened and only felt embarrassed,

leaving her in the same position. DW1 prayed that the court would reduce punishment instead of sentencing him to death by hanging, go for another [lighter] sentence as he regrated for the mistake he had made.

During cross examination, DW stated that there was no doubt that he had killed Mr. Bashiru and used a walking stick as a weapon, leaving the deceased in critical condition before running away from the scene out of embarrassment. He admitted that he went to Masasi, and the incident had occurred on April 22, 2019. However, he was only arrested on July 9, 2019, long after committing the offense, and did not report the incident to local leaders or the police. DW1 also mentioned that he and Latifa were cohabiting and living together until the fateful day. DW1 acknowledged that separation was possible in a relationship and that cruelty was one of the reasons that warranted separation. He also confessed to having misunderstandings with Latifa, but he never doubted her faithfulness before the incident. He clarified that on the 21st of April 2019 he bid farewell to Latifa and was working at Kitangari Teachers College. He returned home on the morning of April 22 but did not reveal the means of transportation.

Upon arrival, he was informed that Latifa had gone to her grandmother's place to do laundry. DW1 did not disclose that there were spare keys to the room, and he was living in his brother's place, which was rented. He did not mention the date they moved to his brother's house but stated that it was not far from Latifa's grandmother's place, and he walked there on foot. He asked the court to consider that he lived in Maputi, which was ten minutes' walk from his brother's place and where Latifa was.

According to DW1, the deceased was older than him and asked him what he was doing there before starting to beat him up. DW did not run away but instead grabbed the stick and began attacking the deceased. He was not sure where he hit him but learned in court that he hit him in the head. He left the deceased crying and in need of help but felt embarrassed and could not think of helping. He denied starting by beating up PW1 and stated that he did not know PW4 before, the medical doctor, nor did he have any grudges with him. DW1 knew PW5 before, and there was no grudge between them. He also denied having any hate towards his father-in-law. He also mentioned that he had no injury from the fight with the deceased.

DW2 was Jafari Abdu Salum, a 32-year-old resident of Maputi, Newala District. DW2 stated that he lived in Maputi Village in Newala District and was a farmer. He testified that he knew the accused, Mwalami Abderehemani, for a long time, as he was his relative, the son of his maternal aunt (*mama mdogo*). He said that since 2018, Mwalami had been living with him in his house. In February of that year, Mwalami came with Latifa and asked for a room, which DW2 gave them to live in. He added that Mwalami was living with his wife, but he did not know when they started to date, having only seen them together in 2018. The house had three bedrooms and a living room, and DW2 shared the same house with them.

DW2 testified further that Mwalami bid him farewell on 20/4/2019, telling him that he was going to Kitangari Teachers College for a job and that he would be back after three days. On 22/04/2019, at 5:00 AM, DW2 heard a knock, and when he went to check, he found Mwalami outside, asking

whether his wife was inside. DW2 replied that Latifa had gone to her grandmother's place for laundry, and Mwalami proceeded to their room, which was locked with a padlock. He told DW2 that he was going after Latifa at her grandmother's place, but DW2 did not know what happened after that, as he travelled to Morogoro on the same day. He also mentioned that the last time he saw Latifa was on 21/04/2019, when she told him that she was going for laundry.

During cross-examination, DW2 stated that he had not brought any document to prove his ownership of a house. According to him, it was around 2:00 PM when Mwalami bid him farewell, saying that he was going to work at the teacher's college. Although he had not mentioned the time when Latifa told him she was leaving, he clarified that it was in the morning. DW2 did not have a mobile phone, but he owned a three-bedroom house with six keys. Mwalami did not have a phone, and the whole day had lapsed since his wife left, but he did not inform anyone.

DW2 mentioned that he was related to Mwalami but did not provide the name of the *mama mdogo* uniting them. Probed as to why he kept referring PW1 as the "wife" of the accused, he admitted that he had never seen their marriage certificate and had not seen them for two years, except in 2018, when their relationship was good, and they loved each other so much. In his view, people who love each other cannot hide, and he had only seen them quarrel once due to a normal misunderstanding.

DW3 was Abderehemani Mfaume, a 52-year-old peasant, resident of Kitangari in Newala District. DW3 deposed that he knew Mwalami

Abderehemani (the accused) and that he was his son. He couldn't remember when he was born, but he knew that his mother was called Rehema Salum. The witness also mentioned that he knew Latifa, who was his daughter-in-law and was living with his son. He became aware of their relationship in 2017, 2018, and 2019 when they came to him and revealed that they were in love and wanted to get married.

DW3 advised them to introduce themselves to Latifa's father and gave them 80,000/= to conduct business and make a profit before approaching him. Later, DW3 narrated, he gave them TZS 330,000/= for their wedding, which they used partly to buy a bed. They then went to Latifa's father and gave him 10,000/= as a cash gift to introduce their relationship. They started living together in 2018, and in 2019, Mwalami called DW3 to inform him that he was leaving "Tifa", his wife. DW3 testified further that he later learned that there was a fight between their son and Bashiru (the deceased), and they were asked to pay the burial cost. DW3 participated in the funeral and paid for the costs but couldn't remember how much.

On cross-examination DW3 mentioned that he knew that sometimes love comes to an end, but his son never told him what kind of relationship challenge they had. He could not tell the exact month they started living together, and the last date was unknown. They were living in Maputi, and in 2018 they started staying at Jafari's place. No sooner had DW3 finalized his testimony than Mr. Mtembwa informed the court that he initially wanted to bring four witnesses but after consultation with his client, he prayed to close

the defense case. The court nodded with approval and the defense case was marked closed.

The last part was on final submissions by both learned counsel. Mr. Gideon Magesa, State Attorney on his part, stated that they were fortified by the fact that the prosecution had successfully discharged its function, and they strongly believed that there were no contradictions. He further stated that if the court found any contradictions, it would not go to the root of the case, citing the case of **Tafifu Hassan @Gumbe v. Republic** Crim. App 236 of 2019.

It was Mr. Magesa's submission that according to **section 146 of the Law of Evidence Act**, the number of witnesses was immaterial, and it was the credibility and weight of the evidence that was important. He cited the case of **Tafifu Hassan Gumbe** (supra), where it was established that there was no number of witnesses required to prove a given case, and a court of law could convict an accused person relying on the evidence of a single witness. He stated that all the witnesses were credible and had tendered evidence that could determine conviction or acquittal.

Mr. Magesa also noted that the prosecution had the discretion to choose witnesses to call, citing the case of **Gumbe (supra),** where the Court of Appeal Tanzania had held that it was the prosecution's right to choose witnesses capable of determining the responsibility of the accused in the charge. He believed that the five witnesses and the four exhibits had proved the accused's involvement in the killing of the deceased.

He also discussed the issue of lies of an accused person carrying further the prosecution's case, citing the case of **Mashaka Juma @Tatula versus R.** Crim App 140 of 2022. He noted that the prosecution believed that the accused person was not always truthful and had given false statements about owning a phone and the establishment of a saloon, which was contradicted by his father's statement.

Mr. Magesa also commented on the defense's failure to cross-examine the prosecution on important matters, such as the cause of death, chain of custody, and murder weapon. He believed that this indicated that the defense agreed with the version of the prosecution's story and was estopped from disputing it later. He noted that there were matters raised during the defense case but never brought to the attention of their witnesses to comment, leading to the conclusion that the defense agreed with their version of the story, as per the case of **Issa Hassan Uki** (2018).

Finally, he discussed what he prefaced as "the most important aspect" of his submission, namely whether the accused had the intention to kill the deceased. The learned State Attorney referred this court to the case of **Juma Kaulule v. R. Crim** App 281 of 2006, which listed six circumstances to consider when establishing malice aforethought. He believed that the republic had proved its case beyond reasonable doubt, citing the postmortem report, the type of weapon used, the number of blows, and the accused's conduct before and after the killing. He concluded that the prosecution had proved its case beyond reasonable doubt, as **per section 3(2)(a) of the**

Evidence Act, and that other exhibits were not tendered because they were issued out of time, such as the cautioned statement of the accused.

Counsel for the defence, Mr. Hussein Mtembwa submitted that the accused was facing a murder case contrary to Section 196 of the Penal Code Cap 16, allegedly committed on 22/04/2019. He explained that it was not disputed that DW1 and PW1 were once lovers, cohabited under one roof, DW1 had once paid money to the family of PW1 as a sign of fiancée relationship, that DW1 was in the scene of crime on 22/4/2019, the house where the death occurred were three people PW1, DW1 and the deceased, and the deceased had passed away.

Mr. Mtembwa stated that the key Prosecution Witness, PW1 Latifa, claimed that DW1 arrived in the scene of crime, entered the house, found her in the living room, proceeded to the living room where he saw the deceased, and went to the kitchen to pick up the weapon to heat the deceased with. However, he argued that PW1 had failed to establish malice aforethought, and her evidence was narrowed down by the evidence of DW1, DW2, and DW3. He added that PW1 made a U-turn that she only heard the deceased being beaten up while being cross-examined and that it was not clear the moonlight was to enable her to clearly identify the accused.

Mr. Mtembwa suggested that the story of the accused was the valid one since PW1 had stated that she was not in the room and did not see the deceased being bitten up. He claimed that DW1 had stated that the deceased was the first to erupt upon entering the room. He stated that since they were only two of them, it could be of interest to imagine what might have

happened a few seconds before the deceased was fatally hit by the accused. To this end, asserted the learned counsel, PW1's version that he had beaten the deceased several times was not true since she did not see. Mr. Mtembwa reported that the injury sustained as per the doctor's report might not have been caused by heating and may have been caused by falling or against the bed, and malice aforethought could be inferred from the injury or blows.

Mr. Mtembwa argued that it was doubtful how exhibit P4, the weapon, was handled, and the exhibit was not obtained from Latifa. He reported that PW1 continued to show bad intention against DW1, claiming that her tooth was unrooted, which he opined was exaggerated or outright lies. He accepted that the prosecution was at liberty to choose the witnesses but stated that in case of an important fact, the court may draw an inference. Mr. Mtembwa reported that DW1 had stated that he committed the offense of murder out of self-defense as per section 18 of the Penal Code and provocation as per section 201 and 202 of the Penal Code.

Having dispassionately considered submissions by both counsel and keenly scrutinized the evidence adduced throughout the trial, there are four issues calling for my determination:

(i) Whether there was death of a person
(ii) Whether the death was unnatural
(iii) Whether the said death was caused by the accused
(iv) Whether the accused caused the death with malice aforethought

The first issue is usually taken for granted. That should not be the case. Homicide means the killing of a human being. To state the obvious, there cannot be murder without homicide. In this line of reasoning, "[E]very homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law." See **Gusambi Wasonga v. Republic** [1948] 15 EACA 65.

The well-known Commandment **"Thou Shall Not Kill",** in fact refers to killing of a human being and not any other creature. It is therefore vital that a Court of law is satisfied that life of a human being has been terminated before proceeding to analyzing other aspects. In the case of **Mohamed Said Matula v. Republic [1995]** TLR 3 the Court of Appeal of Tanzania held that proof of stealing a child was insufficient to conclude that the said child is dead. In the instant matter, it is undisputed that one BASHIRU YUNUS MNALI, fellow Tanzanian and fellow human being, died on the 22nd day of April 2019 at Maputi Village within the District of Newala in Mtwara. All prosecution witnesses were consistent on this. Intriguingly, DW3 father of the accused, claimed to have contributed to burial expenses. It is unlikely, therefore, as infrequently reported in newspaper, a person by the name BASHIRU YUNUS MNALI would be found somewhere in the country long after we are done with this business. This takes me to the second issue.

The second issue for my determination is whether the death was unnatural. There is no dispute on this either. Throughout the trial, it became obvious that the death of BASHIRU YUNUS MNALI was not natural. **PW4, medical doctor** who conducted autopsy testified that the deceased met his

death due to **"severe traumatic brain injury."** PW1 had testified that the deceased was hit on the head by the accused. It is safe to assume that had there not been such an unfortunate turn of events, the deceased would not have met his death in such a gruesome way. I see no need to be detained any further on this issue and I choose to move to the third issue as I hereby do.

The third issue is whether the said death was caused by the accused. Although the accused had initially pleaded not guilty to the charge and distanced himself from the killing, systematic presentation of evidence by the prosecution have, by and large, reversed the narrative. The key witnesses to this aspect are PW1 and DW1. PW1 testified that DW1 was the one who attacked the deceased in the bedroom. DW1, the accused, on his part, conceded that he, indeed was responsible for the act but invoked self defence and provocation.

Admittedly, one inconsistence came to my attention while going through the records. In line with the Court of Appeal of Tanzania's frequent observation that where the testimonies by witnesses contain inconsistencies and contradictions, the [trial] court has a duty to address the inconsistencies and try to resolve them where possible; else the court must decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter, I cannot allow the inconsistence pass without a few lines. See **Mohamed Said Matula v. Republic** (supra).

The inconsistence is on **Exhibit P3** alleged by the prosecution to have been used by the accused to hit the deceased on the head. PW1 and PW5

referred to it as a hoe handle *"mpini wa jembe"* and simply as a piece of wood "gongo". DW1 on his side, while conceding to have hit the deceased, claimed that he used a walking stick and not a hoe handle. I had the advantage of observing the demeanor of the witnesses and gazing at the exhibit P3 during protracted legal exchanges between both learned counsel. In my opinion, the item did not look like any hoe handle that I know. PW1 while describing it for the purpose of identification, stated that the same had a "hole inside."

The "packaging" of this exhibit, to borrow the word from other areas of law, largely failed. It is strongly advised that prosecution witnesses familiarize themselves with physical exhibits they tender in court. Appellate courts rely heavily on how a given exhibit is described in the trial court. That said, I find that this contradiction is minor and does not go to the root of the matter. Our issue for determination is whether the accused caused the death of the deceased. Whether he used a hoe handle, walking steak or his own hands does not make a difference. What matters is that life of an innocent person was lost. This is presumed to be illegal unless "caused under justifiable circumstances example in self defence of property." See **Gusambi Wasonga** (supra). This takes me to the fourth and last issue which I intend to spend a substantial amount of time. I wish also to comment that going through the records, I was not impressed to see the letter "R" and "L" used interchangeably. For example, PW1 is referred to as RATIFA and later as LATIFA. This should be avoided at any cost.

Our last issue for determination is whether the accused had malice aforethought in causing death of the accused. Some undisputed contextual backdrop may be of help in analyzing this issue. The accused and the deceased knew each other. In fact, they had been living in the same village all along and the deceased was a senior brother to the accused. The latter testified that he was **referred to as "dogo"** [a word used in Kiswahili by older fellows when referring to their younger counter parts]. DW1 had testified that the deceased had asked him ***"Dogo umekuja kufanya nini?"*** (Directly translated thus: young man what are you here for?").

It is also undisputed that the accused and PW1 who is the key witness in the matter had had a romantic relationship. In fact, they had introduced themselves to their respective fathers and wedding bells were around the corner. It should be noted however that by the time the duo was planning for the wedding, the accused was merely 22 years old, and his would-be wife Latifa was much older and already had a child with another man. She testified that she was 32 by the time she stood at as a witness but mumbled quite a bit on how old she was then. This court later probed the accused on what motivated him to engage in a relationship with a woman older than him and he simply replied that it was because PW1 was giving her money.

I am trying to picture this: in normal circumstances, when a man is in a mission to catch his lover red-handed (***in-flagrante delicto*** as lawyers who love verbosity would say) with another man "kufumania" goes there armed and ready to face whatever would come in. It is clear in the records that the accused walked into the scene of crime without any weapon or

instrument. This, in my opinion, raises very serious doubts on premeditated killing which is an essential part of malice aforethought.

As I go on analyzing the mental picture I have created, PW1 had stated that upon seeing the deceased lying on the bed, the accused rushed to the kitchen where he picked the hoe handle Exhibit P3. In my opinion the "piece of wood" or "walking stick" or (officially in the language of the prosecution the "hoe handle") was not the deadliest weapon in a typical kitchen in a typical Tanzanian village. I can imagine availability of a kitchen knife or even a bush knife "panga". Premeditated killing, in my opinion, would have dictated going for a much deadlier weapon.

Turning the mental picture upside down once again, PW1 had stated that before the accused proceeded to the bedroom where he attacked the deceased, he started by beating her up in the living room and knocking out her tooth. The knocking out of the tooth story did not sound convincing to the learned defence counsel Mr. Mtembwa. He asked PW1 whether she had any documents from a hospital that had attended her, and the reply was to the negative. As doubtful as it sounds, I think if the accused had intended to kill the deceased, he would have proceeded straight away to his target. The tooth knocking business only helps in building the argument against premeditated killing.

I now turn to the two defenses namely self defense and provocation. I will start with self defence. **The Black's Law Dictionary** 9th Edition at p. 1481 defines self defence as:

> *"The use of force to protect oneself, one's family or one's property from a real family or one's property from a real or threatened attack. Generally, a person is justified in using a reasonable amount of force in self defence if he/she reasonably believes that the danger of bodily harm is imminent, and that force is necessary to avoid this danger."*

It is noteworthy that an accused person raising the defence of self defence is not expected to prove beyond reasonable doubt, the facts alleged to constitute the defence available to the accused. It is up to the prosecution to disapprove it. The defence succeeds if it raised some reasonable doubt in the mind of the court as to whether a right to self defence. See **Selemani v. Republic [1963] EA 446.**

In my imagination, I see two adults PW1 and the deceased deep in a romantic environment feeling highly irritated by unannounced visit of a younger fellow "dogo". If the two older lovers chose to fight the annoying *dogo* they would easily overpower him, and the story would have been different. To avoid flying the hot-air-balloon of imagination even further, I am fortified that the prosecution has not discharged their duty of disapproving the defence of self defence. In a persuasive English case of **Beckford v. R**. [1988] AC 130 Lord Griffith had the following to say on consequential effects of failure by the prosecution to disapprove a defence of self defence.

> *"It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial must be disapproved by the prosecution. If the prosecution fails to do so the accused is entitled to be acquitted because the*

prosecution will have failed to prove an essential element of the crime namely the violence used by the accused was unlawful"

In criminal justice, the strength of the prosecution case and not the weakness of the defence case is what determines the verdict. The only attempt made by the prosecution to disapprove the defence of self defence can be gleaned from PW1's testimony that the deceased was hit while sleeping. Unfortunately, the leaned State Attorney did not take this further. Probably because it was unlikely that at six in the morning, the accused would storm into the house unannounced, beat up PW1 in the living room *"sebuleni"* to the extent of knocking out her tooth and all that time the deceased was fast asleep. I find it difficult to buy this idea. I hold that the defence of self defence has been successfully raised. This takes me to the second defence namely provocation.

Section 202 of the **Penal Code Cap 16 R.E. 2022** defines provocation as follows:

"The term "provocation" means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to who he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

In addressing the court on this defence during final submissions, learned counsel for defence Mr. Mtembwa was faced with a technical hurdle. He was not sure how far the word "conjugal" could be stretched. I would have given more weight to this novel argument if we were seating in a family court and the dispute was on existence of marriage. Admittedly, however, Courts in this country and elsewhere in the commonwealth have found the defence of provocation available where infidelity or outright betrayal in the form of cheating among couples was involved. See for example the case of **Richard Venance Tarimo v. Republic** [1993] TLR 142 where words *"Mimi sichungwi. Kama huko Dar es Salaam una wanawake wengine na mimi nina wanaume"* uttered by the deceased were considered capable of causing provocation and conviction for murder was reduced to manslaughter.

Mr. Mtembwa spent so much time trying to convince this court that the word "conjugal" applied not only to married couple but also lovers or "hawara." The learned counsel's efforts to analyze the law are highly appreciated but I think that is tantamount to being unnecessarily tied up to technicalities. Nevertheless, the burden was on the side of the prosecution to disapprove the defence of provocation including untangling the semantics. +See **Republic v. Ismail Napose** [1999] TLR 8.

It is my finding that the prosecution has failed to prove the absence of provocation and disapprove the defence of self defence raised by the accused. The offence of murder contrary to section 196 and section 197 of the Penal Code cannot stand.

However, since all other elements of the offence have, in my opinion, been successfully proved the position of the law as per **section 300(1) and (2)** of the Penal Code [Cap 16 RE 2019] is conviction on a minor offence. In the matter at hand, a minor offence to murder is **Manslaughter**.

Consequently, I convict the accused **MWALAMI ABDEREHEMANI** of manslaughter contrary to section 195 and 198 of the Penal Code.

It is so ordered.

E.I. LALTAIKA
JUDGE
27/2/2023

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL SESSION CASE NO 12 OF 2021

(From PI Case No 5/2019 in the District Court Newala at Newala)

THE REPUBLIC ..... PROSECUTOR

VERSUS

MWALAMI ABDEREHEMANI..... ACCUSED

RULING ON SENTENCE

The accused herein **MWALAMI ABDEREHEMANI** hitherto charged with the offence of Murder contrary to section 96 and 97 of the Penal Code Cap 16 RE 2002 (now RE 2022) has on this 27th day of February 2023 been found guilty and convicted for the lesser offence of Manslaughter.

This court has, pursuant to section 300(1) and (2) of the Criminal Procedure Act Cap 20 R.E. 2019, made a finding that the prosecution failed to prove one element of the offence of murder namely malice aforethought. The court henceforth proceeded to convict the accused of the lesser offence of manslaughter contrary to Section 195 and 198 of the Penal Code hence this ruling on sentence.

No sooner had the court entered conviction than Mr. Enosh Gabriel Kigoryo, learned State Attorney submitted that the convict had no record of

criminality. Nevertheless, the learned State Attorney asserted, the convict had caused death of an innocent person and deserved stiff sentence.

Ms. Rose Ndemereje, learned defence counsel, on her side, prayed that this court unveiled mercy upon the convict as he was young and first offender. The learned counsel went on to argue that since the convict was young, he could benefit from other forms of punishment including a noncustodial sentence.

I have taken into consideration the aggravating and mitigating factors of the learned counsels. There is no doubt that the convict acted with cruelty. The piece of wood used tells a lot. The debate on policy directions needed to discourage fatal assaults using traditional weapons and other "instruments" becomes very relevant here. Anyone can pickup and kitchen knife and use it to terminate life of another. Stones, hoe handles and pieces of logs are awash. Neither training nor license is needed to use them. Although the community considers these weapons less dangerous than say guns, some policy analysts and legal scholars think otherwise. It is also very unlikely that death occasioned by such weapons was due to an accident. An insightful publication of the Institute for Law and Social Research **"Does the Weapon Matter? An Evaluation of a Weapon-emphasis Policy in the Prosecution of Violent Offenders** (Washington DC 2005) provides:

> *In our judgement...for weapons that are less lethal than a gun, there is reason to doubt that homicides have much of the nature of an accident about them. Thus, unlike cases of assault, there is no compelling reason (in the absence of further results) to view gun homicides as more serious than homicides with other weapons."*

The above policy direction is reflected in Tanzania on how the Highest Court views such homicides. In the case of **Richard Venance Tarimo v. Republic [1993] T.L.R.142** in which the accused had used a knife, the Apex Court had this to say on sentence:

> *"On the question of sentence, we agree with Mrs. Lyimo that this was a wicked assault... also agree that the sentence to be imposed must reflect this. With all these factors in mind, we* ***sentence the appellant to fifteen years imprisonment.****"* (Emphasis added)

The learned State Attorney Mr. Kigoryo has passionately addressed this court on the need to send a deterrence message to young people out there. There is no doubt that what the convict has committed is highly deplorable. Nevertheless, I have been told that he is young and a first offender. He has no record of criminality. He deserves some lenience. I show that lenience by reducing the five years spent in custody (from the 15 year's sentence meted by the Court of Appeal in the above cited case) as prayed for by the defence counsel.

All said and done, **MWALAMI ABDEREHEMANI** is hereby sentenced to serve a term of Ten (10) years imprisonment. I order further that **Exhibit P4 (**hoe handle be returned to PW1 **Latifa Selemani Ahmadi**.

It is so ordered.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
27/2/2023

Court:

Judgement delivered by my own hands in the open court in the presence of Mr. Enosh Kigoryo, State Attorney, the accused and Ms. Rose Ndemereje, Advocate, holding brief for Mr. Hussein Mtembwa counsel for the defence.

E.I. LALTAIKA

JUDGE
27/2/2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE
27/2/2023