THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT TARIME

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 149 OF 2022

THE REPUBLIC v. RYOBA MWITA MSETI

JUDGMENT

23.06.2023 & 27.06.2023

Mtulya, J.:

Mr. Ryoba Mwita Mseti (the accused) is a resident of **Kenyentaka Hamlet within Kewanja Village of Kemambo Ward of Tarime District in Mara Region** (Kewanja). The accused is a farmer at his home village, but also engrosses in shoe making and shining and roughly casual labour activities in other villages of Tarime District, when invited to do so by any villagers.

For shoe making and shining, the accused has specific office located at **Mnadani area of Mnadani Hamlet within Nyangoto Village in Matongo Ward of Tarime District, Mara Region** (Nyangoto). However, the accused has no specific office for his daily casual labour activities. Wherever, he is invited for casual labour, he will show up and accordingly does the job, of course with payment upon agreement.

The villages of Kewanja and Nyangoto are neighbors demarcated by Lamboni Road at Mnadani area. According to the villagers, the word Mnadani originated from its activities of busy schedules of exchanging good and services. In short, it is a market area with busy activities where villagers from different parts of Tarime District meet to exchange goods and services associated with pleasures. The display of Mnadani is as any other village market areas in Tanzania. Exchange of goods, services and finally pleasures in food and drinks. Mnadani, as per tradition, is not only a place of exchanging goods and services, but also a scene of happiness and entertainments.

However, on 1st April 2022, the villagers at Nyangoto had witnessed a sorrow incident of killing of one fellow in their village. It was a killing of **Ms. Tabita Mwita Nyamachura** (the deceased) caused by knife attacks from the accused. According to **Mr. Chacha Robert Matiko** (PW1), the accused attacked the deceased with knife several times at her stomach and witnessed the incident at night hours around 19:00 hours. According to PW1, at that time, the area had huge electricity light to identify the accused and before the attacking incident, he saw them at 18:00 hours moving from **Mama Mnyoro Club**, where liquors are sold, to **Mr. Mairo Chale** residence. In his testimony, PW1

stated that the accused is alcoholic, but when he saw him at 18:00 hours, he was in sober mind without any influence of alcohol.

According to PW1, it was fortunate that **Mr. Chacha Masicho Matiko @ Rasi** (PW2), Mnadani Hamlet Chairman was next to the crime scene and was immediately called to witness the incident. PW2 was summoned in this court and testified that on night hours of 1st April 2022, he was cell phoned by **Ms. Zainabu Marwa Mkami** to rush to the scene of the crime. According to PW2, after arrival at the scene of the crime around 19:00 hours, he found the deceased bleeding and her intestine was out of the stomach and the villagers had informed him that the accused had attacked the deceased.

Following the incident, PW2 had informed the police who came and transported the deceased to **Nyangoto Health Centre** where she was pronounced dead. PW2 testified further that he participated in arresting the accused on the same day at his residence in Kenyentaka Hamlet before even he dragged-off his clothes and a shoe making knife used in the attacks. During the arrest, according to PW2, the accused confessed to have killed the deceased, but prayed for mercy from the police officers.

According to PW2, the crime scene is located at **Wafugaji Road** where there are houses of **Mr. Mairo Chale** and **Mr. Maro Mkami**, but at the very end of the road there is Liquor Shop where villagers cherish their pleasures. Regarding the behaviors of the accused, PW2 joined hand with PW1 in testifying that the accused is alcoholic with preference in *bhangi*, *konyagi*, and *shimwaa*, and when drank, he is so stubborn and aggressive. In citing previous instances, PW2 testified that the accused had previously attacked **Mr. Joseph Mtongori** and **Ms. Tabita**.

In justifying the death and extent of knife attacks against the deceased, the prosecution had summoned **Dr. Denis Vedasto Muzahula** (PW3), who had attended and examined the deceased on 1st April 2022 at around 20:00 hours. According to PW3, the deceased was injured by sharp object at different parts of her stomach and hands and was in critical condition, and later around 22:00 hours, she lost her life.

To display the death and extent of injuries, PW3 had tendered **Postmortem Examination Report** (P.1) which shows that: *severe internal bleeding due to stubbing wounds* and its summary report depicts: *multiple stubbing wounds on the abdomen and left hand with obvious signs of internal bleeding*

and organs specifically on omentum and intestines. However, PW3 had declined to record number and measurements of wounds in length and width in exhibit P.1.

The defence on his part had marshalled one witness, the accused himself as DW1. According to him, on 1st April 2022, he woke up at his home residence and went to his place of work for shoe shining and around 15:00 hours he left the scene of work for *kushtua nyongo* at **Mama Mnyoro Liquor Shop**. At the shop, DW1 testified, that he took three (3) bottles of Konyagi, two (2) small sized and one (1) big bottle and swallowed all of them. According to him, he could not recall what then transpired until when he found himself at **Nyangoto Police Station** on the next day of 2nd April 2022 and was informed of the attacks and killing of the deceased by the police officers. DW1 testified further that in morning hours of 2nd April 2022, he was still unconscious and police officers were well aware of his situation hence could not record his statement early in the morning until 10:00 hours.

The record of present case shows that the accused is prosecuted for murder of the deceased contrary to section 196 and 197 of the **Penal Code [Cap. 16 R.E. 2019]** (the Penal Code). The incident is allegedly to have occurred at Nyangoto Village

within Tarime district in Mara Region. The accused has been admitting commission of the offence since his arrest at his home residence at Kenyentaka Hamlet on the same night of the attacks on 1st April 2022, as per evidence produced by PW2. He also admitted the same at Nyangoto Police Station on 2nd April 2022, and during preliminary hearing in this court on 18th November 2021. On 23rd June 2023, during the plea taking stage in this court, the accused had pleaded guilty of the offence but claimed to have committed the offence without *malice aforethought*. His request was turned down by the Republic.

According to the prosecution, the facts of the case display possibility of two (2) type of defences, namely: first, provocation; and second, intoxication, but it is unfortunate that the two defences cannot apply to the present accused. In explaining the elements of provocation, **Mr. Mutalemwa Kishenyi**, learned State Attorney for the Republic, submitted that the defence of provocation cannot apply in absence of wrongful act which provoked the accused and the facts of both sides support the move. In opinion of Mr. Kishenyi, there are elements of love affairs, but still facts are silent on important element of control of heat of passion.

Mr. Kishenyi submitted further that the accused cannot benefit from the defence of intoxication per decision in **Mwale Mwansanu v. D.P.P.**, Criminal Appeal No. 105 of 2018, which had produced four important elements for the defence to apply, *viz*: first, where the accused did not know what he was doing; second, that the state of intoxication was caused without his consent by malicious or negligent act of another person; third, the accused is, by reason of intoxication insane; and finally, that the intoxication is temporarily or otherwise or it cannot be established that such person had the capacity to form the intention to kill or cause grievous harm.

Finally, Mr. Kishenyi submitted that in the present case, this court has to determine an issue: whether the accused had *malice aforethought* during the attacks against the deceased. In the opinion of Mr. Kishenyi, taking the precedent of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 as a good practice, the accused must be convicted of murder. According to Mr. Kishenyi, the precedent in **Enock Kipela v. Republic** (supra) has set in place standard practice to detect *malice aforethought* in accused persons by looking at the type of weapon used, where it was directed, and number of attacks against the deceased persons.

On the other hand, the defence thought that the accused may enjoy the defence of provocation as the facts derived from PW1 show existence of fight between the accused and deceased. In substantiating his submission, **Ms. Pilly Otaigo**, learned counsel for the defence cited the precedents in **Isidori Stanislaus v. Republic** [1994] TLR and **Mwakajoka v. Republic** [1990] TLR 17, contending that the facts show that: first, the accused was unconscious of what was transpiring; second, the accused alcoholic behavior and attacks; and finally, conduct after the commission of the offence.

In the opinion of Ms. Otaigo, all witnesses in criminal trials enjoy the same status of credibility and reliability as it was stated in the precedent of **Goodluck Kyando v. Republic** [2006] TLR 363, hence the accused must be trusted from the materials he had produced since his arrest to the hearing of the present case.

I have perused the record and indicated precedents by learned minds. I think the parties are in agreement on the facts of the case, and specifically the materials registered by PW1, who had witnessed the accused killing the deceased. However, the parties are in contest on whether the accused killed the deceased with *malice aforethought*. The law regulating *malice*

aforethought is enacted in section 200 of the Penal Code and the standard interpretation is found in the mostly cited precedent of **Enock Kipela v. Republic** (supra).

In the indicated precedent of **Enock Kipela v. Republic** (supra), facts of the precedent show that **Mr. Enock Kipela** (Mr. Kipela) was convicted for the murder of **Desdelia Ndadavala @ Dosea Mgaya** (Mama Desdelia), the wife of **Mr. Adam Mangula** that had occurred on 17th January 1991 at Ikwete A Village in Njombe District. The evidence of PW2 in the precedent showed that Mr. Kipela had hit Mama Desdelia by use of a big bamboo stick three (3) times on her head and chest for allegation of cattle theft.

A postmortem examination report carried out on her body revealed that she had sustained fractures in the base of the skull and nasal bones. Her death, according to the undisputed opinion of the doctor who carried out the postmortem examination, was due to brain compression. Before delivering its, judgment, the Court had observed that there is no civilized country in the world in which the so-called mob justice is regarded as justice. Depending upon the particular facts of the case, an attack in the

course of administering mob justice which results in the death of the victim may, under the law of this country, constitute murder.

The Court finally, had produced a very crucial text with a total of seven (7) criteria in determining *malice aforethought*, at page 6 of the judgment, 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: (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 blow 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 attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing.*

In the precedent of **Enock Kipela v. Republic** (supra), the Court had resolved that:

> *...the evidence which was accepted by the trial court in the instant case, proved that the appellant used a big stick, which wielded with both hands, and*

delivered three blows, on the head and chest. The deceased died instantly. There is, on the totality of the evidence on record, no room for more than one view as to the appellant's intent.

However, the precedent of **Enock Kipela v. Republic** (supra), after listing the conditions at page 6, it had put in place two (2) important clauses: first, at page 5 of the judgment that each case must be decided on its own peculiar facts; and second, at page 6 of the judgment that in the totality of the evidence on record, there must be no room for more than one view as to the accused's intent (malice aforethought). Finally, the Court had resolved that: *if there is doubt on the intention (malice aforethought) of the accused, the doubt is to be resolved in favor of the accused.*

In the present case, Ms. Otaigo had cited the precedent of **Goodluck Kyando v. Republic** (supra), contending that all witnesses are entitled to credence and trust, to which I totally agree with her, especially from the facts related to intoxication. The facts shows that there are allegations of intoxication on part of the accused, hence there is a slight distinction between the Mr. Kipela, who had sound mind, whereas the facts in the

present case show that, *viz*: first, in totality of evidence, there is fifty-fifty scenario as to whether the accused knew what he was doing; and second, P.1 had declined to record number and measurements of wounds in length and width.

While I totally agree with Mr. Kishenyi on the question of *malice aforethought* in murder cases and the indicated precedent of **Enock Kipela v. Republic** (supra), but that practice has qualification on totality of the evidences registered in the case. Similarly, I support Mr. Kishenyi submission with regard to the defence of intoxication as enacted in section 14 of the Penal Code and precedent in **Mwale Mwansanu v. D.P.P** (supra).

The Court had interpreted the section and narrowed down the text of the enactment to a total of four (4) situations for the defence to apply, namely: first, where the accused did not know what he was doing; second, that the state of intoxication was caused without his consent by malicious or negligent act of another person; third, the accused is, by reason of intoxication insane; and forth, that the intoxication is temporarily or otherwise or it cannot be established that such person had the capacity to form the intention to kill or cause grievous harm.

However, the Court at page 26 of the Judgment had declined to state whether the principles are considered as a whole or any of them may be invited in course of deciding criminal cases. Its deriving text shows that:

> *The case of **Republic v. Michael Chibing'ati [1983] TLR 441**, ventured at interpreting section 14 (2) of the Penal Code...From the above excerpt, the circumstances where a defence of intoxication will be considered include.*

The excerpt cited by the Court is found at page 25 of the Judgment, but detailed at page 445 of the indicated precedent in **Republic v. Michael Chibing'ati [1983] TLR 441**, which shows that:

> *Coming to intoxication, it has to be stated generally that this does not constitute a defence to any criminal charge. In a murder charge, intoxication would serve as a defence in three circumstances, namely; where the person charged did not at the time of the act or omission complained of, know what he was doing and the state of intoxication was caused without his consent by the malicious or negligent act of another person; where such person is by reason*

of intoxication insane, temporarily or otherwise or where it cannot be established that such person had the capacity to form the intention to kill or cause grievous harm

Finally, the Court had resolved that:

Having considered the evidence before us, we are satisfied as rightly pointed out by the trial judge, that the defence of intoxication was an afterthought. The appellant's testimony if true, established that the intoxication was self-induced having gone to drink with friends on his own volition. Subsequently, the appellant was seen carrying his hoe and a machete and met people and greeted them and from the evidence of PW1 and PW2, there was nothing that showed he was in an intoxicated or confused state of mind.

In the present case, the evidences produced by PW1 and PW2 and supported by DW1 have shown the established behaviors of the accused leaves a lot to be desired. Again, the circumstances and activities of Mnadani area display more than a market area. The accused had testified that after swallowing the three (3) bottles he was unaware on what was going on, of course after 15:00 hours of 1st April 2022, and later he was seen

by PW1 around 18:00 hours stretching with the deceased along **Wafugaji Road** from **Mama Mnyoro Liquor Shop** towards the very end of the road where according to PW2, there is another **Liquor Shop** where villagers cherish happiness.

If the principle in the precedent of **Goodluck Kyando v. Republic** (supra) on credence of witnesses and precedent of **Enock Kipela v. Republic** (supra) are applied with regard to totality of evidence and doubts to be resolved in favor of the accused persons, it is obvious that the accused was unaware on what exactly was taking course after the three (3) bottles of Konyagi. A person of sober mind cannot kill and go back to his residence and remain inside with the same clothes and alleged shoe making knife.

In the end, and having said so, I think, in my considered view that the accused had killed the deceased without *malice aforethought*. I am therefore moved to convict the accused with a lesser offence of manslaughter contrary to section 195 and 198 of the **Penal Code**.

Ordered accordingly.

F.H. Mtulya

Judge

27.06.2023

This conviction order was pronounced in open court in the presence of the accused, **Mr. Ryoba Mwita Mseti** and his learned Defence Attoney, **Ms. Pilly Otaigo** and in the presence of **Mr. Mutalemwa Kishenyi** and **Mr. Lusako Mwaiseke** learned State Attorneys for the Republic.

F.H. Mtulya

Judge

27.06.2023

ANTECEDENTS

Mwaiseke: My Lord, for the Republic we say this court to sentence him according to the law. My Lord, this accused had used knife and directed the knife at the sensitive part of the body. My Lord, this type of attack is not new to this accused person. This court may consider that. He has been attacking villagers.

My Lord, this accused had attacked the deceased and left her at the scene of the crime without any support. My Lord, finally, we pray the sentence against the accused person to send a signal to all persons who kill others without reasons. That is our prayers My Lord. I pray to submit.

F. H. Mtulya

Judge

27.06.2023

MITIGATIONS

Otaigo: My Lord, we pray this court to consider the following: First, the accused has a family which depends on him. He has two (2) wives and nine (9) children. My Lord, the first wife had escaped and had left a total of six (6) children. My Lord, the other wife has three (3) children. All of them depend on him. Second, My Lord, the accused is aged fifty-two (52) years and we put him in a group of old aged people. Third, My Lord, the accused is sick suffering from back pains. He had received back bone operation and the operation still disturbs him. Fourth, this accused is still important in his society as he was shoe shine and shoe maker. Fifth, My Lord, the accused cooperated from his arrest to date. He did not want to keep this court busy.

Sixth, My Lord, in manslaughter, the law provides for life imprisonment. However, this court is guided by **Tanzania Sentencing Manual** which requires judges and magistrates to follow the same in sentencing accused persons. My Lord, this Manual has categorised offences into sets. The wrong of Manslaughter is displayed at page 47 and mental state of the offender falls under low level categories. My Lord, we pray, when

this court gives sentencing order to consider all that I have stated. That is all my Lord.

F. H. Mtulya

Judge

27.06.2023

Court: The law in section 198 of the **Penal Code** provides for liability up to life imprisonment in cases like the present one. However, practice derived from the Court of Appeal shows that the accused may be sentenced up to twelve (12) years imprisonment (see: **Ramadhani Omary v. Republic**, Criminal Appeal No. 83 of 2018), whereas this court has been preferring ten (10) years imprisonment (see: **Republic v. Godfrey Francis Mwesige**, Criminal Sessions Case No. 58 of 2017 and **Republic v. Mokiri Wambura @ Makuru**, Criminal Sessions Case No. 70 of 2022.

However, in order to avoid uncertainty and big gaps in sentencing accused persons who found guilty in criminal trials, the Judiciary of Tanzania has put in place the **Tanzania Sentencing Guidelines of 2023**, which at its page 37 specific offence of Manslaughter is cited with three (3) levels in resolving sentences. I have read the levels and finds that the accused falls under the first categories because he used dangerous weapon

knife and caused multiple wounds to the deceased, who was a woman. This category provides a penalty of ten (10) years to life imprisonment.

Having said so, and considering the antecedents of the prosecution and mitigation of the defence, I am moved to sentence the accused person to ten (10) years imprisonment from the date of this order. I do so to send a lesson to those who attack others with weapons to cause deaths.

It is so ordered.

THE HIGH COURT OF TANZANIA MUSOMA

F. H. Mtulya

Judge

27.06.2023

This sentencing order we pronounced in open court in the presence of the accused, **Mr. Ryoba Mwita Mseti** and his learned Defence Attorney, **Ms. Pilly Otaigo** and in the presence of **Mr. Lusako Mwaiseke**, learned State Attorney for the Republic.

F. H. Mtulya

Judge

27.06.2023