IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CRIMINAL SESSION NO. 17 OF 2022

(P.I. No. 28 of 2019 Ilala District Court)

THE REPUBLIC

VERSUS

STEPHEN TUMAIN MDUMA ..... ACCUSED PERSON

JUDGMENT

15 & 30/06/2023

NKWABI, J.:

The parties to this case are before this Court to determine two main specific questions. The questions are whether the death of Jackline Nuru Mwajombe was unnatural one and whether the accused person is responsible of the death of Jackline Nuru Mwajombe. The general question, however, is whether the prosecution has proved its case against the accused person beyond reasonable doubt, albeit for manslaughter.

The accused person with the aid of two other witnesses mercilessly fought the charge/information of manslaughter he stands charged with. He said on the material time, he was, despite being the lover of the deceased, like a good Samaritan who was at the assistance of the deceased up to Sinza Palestina hospital where the deceased was pronounced dead. On being told the hospital had no mortuary, he sent the body of the deceased, in

collaboration of two other persons, to Mwananyamala hospital morgue. He also said that during the whole incidence up to when the body was kept in the morgue, he was in contact by phone with some of the relatives of the deceased.

The untimely death of the deceased was reported to the police. The accused person was arrested and the investigation into what caused the death of the deceased was mounted. The prosecution is certain that the accused person is responsible for the death of the deceased, though he had no intention of killing the deceased owing to the circumstances pertaining the death as per **Francis Alex v. Republic,** Criminal Appeal No. 185 of 2017 CAT where it was stated that:

"Manslaughter is an unintentional killing ..."

When the case was called up for trial, the prosecution was represented by Ms. Grace Mwanga, learned Senior State Attorney assisted by Ms. Judith Kyamba, learned State Attorney. Mr. Ashiru Lugwisa, assisted by Mr. Emmanuel Ukashu, both learned advocates appeared for the accused person. The defence was able to file final submissions at the close of the defence case. The prosecution was unable to file their final submission.

On the basis of the evidence available in this case I reiterate that the main issue that need the determination of this Court in this case is:

> Whether the accused person is responsible for the unintentional killing of the deceased.

It is an overused law that the burden of proof lies in the prosecution to prove the offence beyond reasonable doubt, see the defence's cited case of **Mohamed Said Mtula v. Republic**, [1995] TLR 3 (CA) where it was underscored that:

> *"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."*

No doubt that it is established law that an accused person cannot be convicted on the weaknesses of his defence but the strength of the prosecution I having in mind the defence's referred case of **John Makolobela Kulwa Makolobela & Another v Republic** [2002] TLR at page 296 where it was held that:

> *"A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty*

and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt."

As rightly stated by the counsel for the accused person that the bone of contention lies on whether the accused person caused the death of the deceased.

The defence is challenging exhibit P1, the post mortem examination report, arguing that it is not corroborated by evidence showing what compressed the neck of the deceased to squeeze the life out of her. It is added that the uncertainty is caused by PW4 who said multiple factors could have caused the said compression.

I think that the criticism levelled against exhibit P.1 by the defence is, with greatest respect to the defence, baseless. Exhibit P1 clearly states that it is made under the authority of PF 99. PW4 is a medical practitioner described as medical consultant, at a prestige medical facility in Tanzania, Muhimbili National hospital. Her status and testimony cannot be easily trumped down just like that. It is the evidence in totality that will reveal what actually compressed the deceased's neck. In the premises, I am satisfied that PW4 satisfied the requirement enunciated in **Makame**

Junedi Mwinyi v. Serikali ya Mapinduzi Zanzibar [2000] TLR 456 where it was stated that:

> *"The position of the law is that expert evidence is admissible in cases where specialized knowledge is required and the competence of an expert witness should in all cases be shown before his evidence is properly admissible."*

The alleged discrepancies in the testimony of PW4 as to how many persons witnessed or attended the examination of the body of the deceased, are minor and do not go to the root of the matter and were adequately explained by PW4.

While the defence counsel paints a picture that PW7 did not want to record the caution statement of the accused person, the accused person himself, in his defence, said he refused to make his statement. The criticism therefore is unwarranted. Whether, the accused demanded there be a lawyer at the time of recording the statement, that was not cross-examined upon on PW7, so it is just an afterthought.

PW6 Lema, said they left the deceased with the accused person at the house of the accused person. He was not cross-examined by the defence counsel when he said he assisted the accused person in collaboration with

another person. So, it is not about six other persons as testified by he accused person who gave a lending hand to the accused person. Therefore, the accused person has not explained what happened after he was left alone with the deceased; what caused the death to be cause by compression of her neck.

There is also a criticism by the defence over the testimony of PW7, the investigator of the case that he did not see any object used to compress the neck of the deceased. I too think that this criticism is wanting in merits because compression of the neck could have been done by use of hand. After the prosecution has established a prima facie case against the accused person, though not required to prove his defence, the accused person ought to have brought cogent explanation as to what compressed the deceased's neck leading to her death as opposed to himself, see **Hatibu Gandhi v. Republic** [1996] T.L.R. 12. Instead of bringing such cogent explanation, the accused person testified false testimony in material particular. Further, the defence was tainted by irreconcilable contradictions on the accused person's arrest. The false testimony on defence corroborates the prosecution case as it was held in **Richard Matangule and Another v. Republic** [1992] TLR 5 (CAT). The Court of Appeal had these to say:

"... these deliberate lies and the refusal to give an explanation corroborate the case for the prosecution that the appellants are responsible for the death of the deceased."

See also **Pascal Mwita and 2 Others v. Republic** [1993] T.L.R. 295 (CAT) which quoted with approval **R. v. Erunasoni Sekoni s/o Eria and Another** (1947) 14 EACA 74 where it was stated that:

"Although lies and evasions on the part of an accused do not in themselves prove the fact alleged against him, they may, if on material issue be taken into account along with other matters and the evidence as a whole when considering his guilt."

I do not see anything wrong with the suspicion on the death by PW1 because that suspicion lead to reporting the incidence to the police, arrest of the suspect, investigation of the incidence and prosecution of the accused person. Also, investigation revealed that the deceased died an unnatural death. Because, the accused person, the lover of the deceased, was with the deceased prior to meeting her death, he had to bring cogent explanation to this Court to believe the version of the story about the cause of the death.

Another complaint that is raised by the defence against the prosecution case is failure to bring witnesses from Sinza Palestina hospital. This criticism, with respect to the defence, is lame. As I have already said, the post mortem examination was conducted at a prestigious hospital in Tanzania, the report is cogent. There is no need of calling more than one witness to prove a fact as per **Shenyau v. Republic,** Criminal Appeal No. 27 of 1993, CAT, (Unreported) where it was held that:

> *"No particular number of witnesses shall in any case be required for the proof of any fact."*

So, the decision in **Mujuni Joseph Kataria v. Samwel Ntambala Luangisa & Another** [1986] T.L.R. 62 cited by the defence counsel is inapplicable in the circumstances of this case. The criticism too about moving the body from Mwananyamala hospital to Muhimbili hospital is, with respect, baseless.

Much of the alleged bad blood between the accused person and the family of the deceased were raised during defence hearing, not during cross-examination of the prosecution witnesses who are the relatives of the deceased. The allegations on bad blood are an afterthought and are dismissed in terms of **Augustino Kaganya & Others v. Republic** [1994] TLR 16 (CA) it was held that:

"... in his defence the first appellant denied knowing the deceased leave alone killing him. He advanced defence of alibi and said that Yusufu, (PW2), told lies against him because there was enmity between them as he, (PW2), believed that he (first appellant) had reported to game scouts that he, (PW2), was manufacturing bullets illegally. This defence was apparently not believed by the learned judge and in our view rightly so. If there was indeed such enmity one would have expected him to cross-examine the witness, PW2, on the alleged bad blood. That he did not do so tends to show that his defence of enmity was an afterthought."

See also **Discile Ng'onga and 4 Others v. Republic,** Criminal Appeal No. 139 of 1993 (Unreported) (CAT) where it was stated that:

"PW1 is the only brother of the deceased who gave damning evidence against the appellants. But the witness had no interest of his own to serve in the matter as claimed on behalf of the appellants in this appeal. For it was not alleged, and there is nothing to suggest that PW1 was a suspect or that should the appellants be acquitted

he would be the next suspect. The fact that he was a brother of the deceased by itself did not make him a person with an interest of his own to serve. As such PW1's evidence, although being the evidence of a relative, required no corroboration either in law or as a matter of practice."

In any case, the evidence of the prosecution does not depend only on the evidence of relatives to justify caution as per **Gloria Ngónja & Another v. Republic,** [1998] T.L.R. 272 cited by the defence counsel.

Admittedly, in this case, no eye witness saw the accused person kill the deceased by compressing the neck of the deceased. Therefore, the prosecution case clearly depends on circumstantial evidence to prove that fact. In order for circumstantial evidence to ground conviction the test was stated in **Abdul Muganyizi v. Republic** [1980] T.L.R. 263 CAT where it was stated that:

"In a case depending purely upon circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of guilty."

Elsewhere it was stated in **Paschal Kitigwa v. Republic,** Criminal Appeal No. 161 of 1991, CAT (unreported), where it was underscored that.

> *"...it is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words of the accused. On this, numerous decisions have been made by the then Court of Appeal for Eastern Africa- see* ***R. v. Said Magombe (1946) EACA 1645 and Migea Mbinga v. Uganda*** *(1967) EA 71"*

My view, in this case, is backed by the position taken by the Court of Appeal of Tanzania in **Joseph Hamis & Another v. Republic,** Criminal Appeal No. 13 of 1990, CAT (Unreported):

> *".... We are firmly of the view that where cause of death is not medically established, that is not necessarily fatal to the charge. This is so if there is other cogent evidence, direct or circumstantial from which to arrive at a conclusion as to the cause of death. The deceased in this case had sustained a bruised neck, a cut wound on the head and a fractured neck. Considering the nature of*

these injuries, especially those on the neck, we are of the view that they cannot have been self-inflicted, and indeed there has been no suggestion whatsoever to that effect. We think that they were sustained in the cause of violence or assault on the deceased, and that the deceased must have died from the injuries inflicted, in the exercises of such violence or assault."

The neck of the deceased was compressed by external force to the extent that leading to fracture of the hyoid bone. That definitely cannot be self-inflicted. There is no suggestion in the evidence that the bruises to the neck and the fracture of the hyoid bone was caused by another person other than the accused person.

Having discussed the evidence of both parties as I have endeavoured herein above, I am satisfied that the evidence of the prosecution which is comprised of seven witnesses and one exhibit has proved the charge beyond reasonable doubt. The defence of the accused person which has three witnesses is unmerited, so it is dismissed. The three issues raised at the beginning of this judgment are answered in the affirmative. The unnatural death of the deceased was caused by asphyxia caused by external compression of the neck of the deceased by the accused person.

Consequently, the accused person is found guilty of manslaughter. I convict him of manslaughter contrary to section 195 and 198 of the penal Code, Cap. 16 R. E. 2022.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 30th day of June 2023.

J. F. NKWABI

JUDGE

PREVIOUS RECORDS

Ms. Kyamba: The convict is the first offender. We pray for severe punishment to address the offence also to be a lesson to the convict and other persons.

MITIGATION

Mr. Lugwisa: We pray for a lenient sentence for the following reasons;

1. The convict is the first offender,
2. The convict is remorseful of the offence. He is a person of good character.
3. He has been in remand custody for more than one year.
4. He is youthful and his family and relatives depend on him for a living.
5. The circumstances of the incidence call for a lenient sentence We pray the Court imposes a very lenient sentence. That is all.

SENTENCE

Court: I have considered the common ground that the convict is the first offender and that the killing ensured in the circumstances of intoxication as testified by PW6 and PW7. The prosecution prays for a stiff punishment while the defence plead for a lenient sentence among other he had stayed in remand for more than one year prior to his being released on bail.

Though in normal circumstances manslaughter offence attracts life imprisonment, the above narrated factors have to be considered in determining proper sentence in the circumstances. For instance, life imprisonment is to be reserved for manslaughter offence, which is of the worst of its kind, which however experts say that has never happened. I have also considered that the offence is severe because it was committed against a woman who is considered vulnerable.

Further, I have considered that the fatal incidence happened while the deceased and the convict were drunk

For the reasons above I sentence the convict to serve seven (7) years imprisonment which, in my view, addresses the offence and it is a deterrent for others persons from committing a similar offence.

It is so ordered.

Court: Sentence delivered this 30th day of June, 2023 in open Court.

J.F. NKWABI

JUDGE

Court: Right of appeal is explained.

J.F. NKWABI

JUDGE

30/06/2023