IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE SUB REGISTRY OF ARUSHA]

AT ARUSHA

CRIMINAL SESSION NO. 111 OF 2022

REPUBLIC

VERSUS

MKAMI STANLEY SHIRIMA

04/08/2023 ***&*** *08/09/2023*

JUDGMENT

BADE, J.

The Accused person herein was charged with the offense of murder contrary to **Section 196 of the Penal Code,** on 6th March 2020 at Mianzini area within the District and City of Arusha, where she is alleged to have killed Salome Zacharia Howea, the deceased.

The poor young girl was only 18 years old when she underwent the ordeal that took her life. Her fate was compromised when she took the job as a house help with the accused Mkami Stanley Shrima, tending after a family that had a teenage young girl (Sonia Said) and two younger children. On a fateful day, she was accused by her boss of stealing some money that was stored in a piggy bank commonly known as 'Kibubu'. According to the statement by the free agent which was tendered in court as **Exh P10,**

Sonia Said, the teenage daughter of the accused admitted to having taken the money after breaking the 'Kibubu' and gave TZS 50,000 to the deceased, which she tried to send to her mother but failed as she had the number wrong. So the beating was a means of coercing the deceased to give back the money taken. While there is no dispute that there was money lost from the Kibubu, there are contradicting versions on the amount lost, with Halima Mohamed statement through **Exh P10** saying it was TZS 1 million; the accused **DW1** through her sworn testimony in court spoke of losing TZS 2,500,000, and the testimony in **Exh P6A** the amount was stated to be TZS 250,000.

To prove the charge, the prosecution called a total number of 6 witnesses and recalled two of the witnesses who testified earlier to tender some exhibits (the club and the statement of a witness who could not be found). Amongst the witnesses were two Government Chemists who took and or received the samples from the Police Investigators; and did the DNA analysis of the samples from the deceased body in comparison to those of the accused, the Doctor who upon the death of the deceased at Mount Meru hospital, did a postmortem investigation on it, the Police Officers who investigated the circumstances around the death of the deceased, and the officers who were in the chain of custody of the seized exhibits that were obtained from the search of the accused's house or the samples of the

deceased body for the Chemist Lab analysis. The prosecution also put in evidence a total of 10 exhibits including 4 physical exhibits which are **a money storage box (kibubu) Exh P2, a mattress Exh P3, three pieces of torn notes Exh P4,** and **the club Exh P9** which was used as the weapon; and 6 documentary exhibits **F16 Extract Exh P1, Certificate of Seizure Exh P5, Postmortem Report Exh P6, Sample Receipt Notification Exh P7, DNA Analysis Report Exh P8,** and **Witness Statement (Halima Mohamed) Exh P10.** The defense side had one witness who was the accused person herself, and she tendered no exhibits.

The prosecution case was to the effect that the deceased person was employed by the accused person as a house help, whereas it is alleged she met her death as a result of violent beating and fierce attack by a club in all parts of her body, by her employer, the accused **Mkami Stanley Shirima,** as exhibited in the dying declaration made by the deceased person before she passed away, which was received in evidence as **Exh P6A** as well as the tendered statement of the free agent **Exh P10,** both of which corroborated the fact that the accused was violently beaten by her said employer.

Through their witnesses, the prosecution adduced starting with **PW1** who is a police officer, states that on 10th March 2020 she received the

exhibits P2 to P4 in her storage at the station which include 1) a 5/6 old blood-stained mattress 2) Split wooden money storing box (Kibubu), and 3) pieces of torn TZS 10,000 notes. She testified that she received these exhibits for storage and safekeeping, and on the 21st of March 2020 the said exhibits were taken from her by the Forensic department officer **PW4** so that they could be delivered for further investigation. While being cross-examined, the witness was positive in recognizing the items in the exhibit and explained he could show all the stains from the mattress which were swabbed by the forensic Detective who took samples for the forensic investigation. She also confirmed the said receipts as found in PF16, **Exh P1** which listed the seized items that were brought for storage and evidenced its being taken out to show an unbroken chain of custody on the items seized.

On his part, **PW2** Gwakisa Venance Minga, O/C CID a police officer, testified that he instructed DC Habibu **PW4** to record a statement from Salome Zacharia on the charge of Causing Grievous Bodily Harm against the accused person, but soon enough on the 10th March 2020 around 9:00 hrs, he received information from the one-stop Center Mount Meru Hospital that the said victim has passed away while still receiving treatment. Meanwhile, Mkami Stanley Shirima (the Accused person) was locked up. Afterwards, having proved that the deceased passed away, he instructed

the same Police Officer to take a cautioned statement from the accused person on a Murder charge. By the same date, about the afternoon, together with Det Abdalla, DC Jackson, and DC WP Pudenciana went to the residence of the accused person accompanying her in the search of her residence in Mianzini Juu, Elikiyurei Street. While at it and before conducting the inspection and search they found a ward councilor for the area, John Edward, and Ms. Halima Mohamed who was a resident of the same abode as the accused and the deceased.

During the search, they discovered a room at the back of the house, where they found a club (rungu) that had blood stains on the club side. They also found a 5 x 6 mattress that had visible blood stains, a money storage box (kibubu) which was forcefully split open on one side as well as 3 pieces of notes for TZS 10,000. They seem to be part of the same notes EM8820206. The other piece had no number at all. They have put all of these items into evidence as exhibits as explained above. He also confirmed that all the items seized on search and seizure were the same ones given to **PW1** for storage as exhibits as listed in **Exh P1** and **Exh P5,** and are the same that have been tendered in court. He was also firm during cross-examination on the identity of the accused person, that he went with her for the search of her house and provided her with a search and seizure certificate that was filled in, and the same was then tendered

in court as **Exh P5,** in which she signed amongst the persons present during the search and seizure exercise. He also admits to not have issued a seizure receipt to the accused, but gave a copy of the Certificate of Seizure as the person from whose place/house the seized items were taken

Further, the prosecution called the doctor who undertook the autopsy of the deceased body. Dr. Fred Michael Laizer testified as **PW3** and in his testimony, he had observed in his report that the deceased had died of a cause pinned to acute Kidney Injury, where he stated that, elaborating that while it can be brought about by many causes, the condition presented by the body of the deceased was indicative of Compartment Syndrome, which in consequence, results into having a part of the body to rot, and the obvious incidental reaction of having the Kidneys fail. It was his expert opinion that when a body gets big injuries, it excretes toxins that cause ***Rhabdomyolysis*** and trigger the Kidneys to fail. In response to a question asked by the defense side, he stated that; the water retained in the lung could be instigated by kidney failure as one of the causes, manifesting water that is retained in the lungs, instead of being taken out through the normal ways that it would normally get out like sweating and urine.

DC 4648 Habib Mohamed Shaaban testified as **PW4** and his testimony was to the effect that he handled exhibits and samples to preserve the same for

forensic investigation and send samples to GCLA or other government institutions for further investigation. His further testimony was that he took the statement of the deceased / victim who had been admitted at Mount Meru Hospital. Upon being consented by Doctor Xavery, he was allowed to take her statement. The said statement was admitted as **Exh P6A**. She had explained in the statement that she was beaten from the 06th of March 2020, and the reason for being beaten up as such is because she was accused of having stolen some money from her boss's piggy bank amounting to TZS 250,000. He testified further that after he was finished with the interrogation, he could not get the said victim to sign the document as her arms and fingers were too swollen to hold a pen, and thus he made her attach her fingerprints on the statement.

Upon hearing the whole of the prosecution case and that of the defense, I think the issues that need determining are i) whether the death of the deceased was unlawful; ii) whether it was proved beyond reasonable doubt that the said death was a result of the accused's doing that resulted in the unlawful ending of this citizen's life. iii) Whether an accused person had malice aforethought or acted with reckless indifference to human life; that is, she foresaw that it was probable that death would result.

Attending on the 1st issue, the accused person has been charged with the offence of murder which is defined under **Section 196** of the Penal code, [Cap 16 RE 2022] that:

> *"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."*

Based on the above provision, it is pertinent that for the prosecution to sustain a conviction in a murder case, it is duty-bound to prove beyond reasonable doubt the two elements of the offense of murder which are malice aforethought; and the actus reus itself, and inherently important, is the linking the said act of unlawful taking of the life of the deceased person with the accused person.

The Prosecution has established that there occurred the death of **Salome Zacharia Howea** who was living at Mianzini area, Arusha City. This evidence was firstly established by **PW2** and then corroborated by the remaining witnesses, **PW3** being the Doctor who conducted the postmortem and who was also observed by **PW4** who was the person who met the deceased while still alive at Mount Meru Hospital, and who had taken the statement of the deceased. The autopsy that was conducted resulted in the postmortem report **Exh P6** which showed that the deceased is not only dead, but also his death was unnatural. In the testimony of **PW3,** which was unshaken by the cross-examination from the

defence side, it was firmly established that the **Rhabdomyolysis** that the deceased was experiencing was a result of the decomposition of the tissues of her arms, which resulted further in the failure of her kidneys and the lungs (which was found to have retained fluids) brought about by the body failure to process the toxins from within the body through the normal ways that it would normally get out like sweating and urine.

The prosecution has also established through evidence that the circumstances of the case create inferences that whoever caused the body of the deceased to get to that stage of compartmentalization was either actuated by malice or acted with reckless indifference to human life; that is, she foresaw that it was probable that death would result as defined under **Section 200** of the Penal Code [Cap 16 RE 2019]. It is obvious under such circumstances the prosecution has managed to prove the unlawful death of the deceased. So the first issue is answered affirmatively.

Addressing the issue whether it was proven beyond reasonable doubt that the said death was a result of the accused's doing, the testimony of **PW4** through the statement made by Halima Mohamed **Exh P10**, where she related how she was an eye witness to the incident on the 5th March 2020 at Elikiyurai Mianzini, where the accused was beating two persons, Salome Zacharia (her househelp) and Sonia (her daughter) using a wooden club

(Rungu). It is her further testimony that the deceased received a series of beatings from the night of 5th of March to 6th of March, and that on the 7th of March her condition changed when the accused took the deceased to Mount Meru Hospital. Further, **PW4**, through the tendered dying declaration of the deceased **Exh P6A** she explained that she was beaten with a rungu (wooden club) over night, and that the accused would awaken her if she fell asleep and beat her some more, and that her condition changed on 7th March 2020 where she had to be taken to the hospital. These two pieces of testimony in **Exh P6A and P10** supports each other as well as further testimonies, even at the risk of repetition, of **PW3** which reveals that the cause of death was acute Kidney injury, which can be triggered by many causes but due to the condition of the body presenting swollen rotten arms, it excretes toxins that caused **Rhabdomyolysis**.

The defence side in its final summation, pointed to the doubts falling short the 'proof beyond reasonable doubt' test particularly on the issue of the doctor's opinion on the cause of death, insisting that the prosecution did not establish the toxicity report of the deceased's kidneys to prove whether they had toxins or not, and remove any doubt that its resulting failure that caused the death of the deceased had no other possible cause. The defence puts it that since there was no lab work that was done on the

samples from the deceased body to see whether the kidney failure could have been resulted from some kidney infection since the doctor mentioned this as another possible cause for kidney failure.

In my view, it was enough for the prosecution to provide supporting evidence on the autopsy report and testimony of **PW3**. The defence side if they wanted, could have controverted the testimony of **PW3** through another expert opinion from a qualified doctor, to establish the said doubt. As we stand this doctor's opinion has not been controverted to lose its credibility and I am satisfied that the Rhabdomyolysis had resulted in the kidney failure, as explained by **PW3** during cross-examination that gangrene was observed after the deceased's hands had undergone compartmentalization due to lack of blood circulation.

The other aspect that was controverted and over which the defence has used to cast doubt in the prosecution case is to do with the legality of the search and seizure of the accused home. In her testimony, **DW1** denied to have been to her house for the said seizure or search and also disputed that she ever signed **Exh P5.** I reckon from the outset that while the defence has raised the issue of there being no search warrant, I disregard this argument because it was never objected to during admission of **Exh P5**, neither did the defence side cross-examined **PW2** who tendered the exhibit, on the validity of the search and seizure, and who testified to have

brought into the crime scene the accused and conducted the search in the presence of the accused. **Exh P5** was admitted without any objection from the defence side regarding its legality on the lack of a search warrant.

Similarly, the defence cross-examined **PW2** on the aspect of issuing a receipt of the seized items to the accused in terms of section 38(3) of the CPA which requires issuing of a receipt acknowledging the seizure of the things bearing the signature of the owner of the premises or his near relative or another person for the time being in possession or control of the premises, and the signature of witnesses to the search if any. The defence brought to the court's attention the Court of Appeal decision in the case of **Ayubu Mfaume Kiboko and Another vs Republic**, Criminal Appeal No 694 of 2020, where the Court stated that the powers under the provision of section 38 of the CPA as captured by paragraph 1(a) – (c) and 2(a) of the Police General Order No 226 must be exercised in accordance with the law in force, specifically the provisions of the CPA, moving the court to expunge the Exh P5 since it contravened these laws.

While this court agrees with the logic and impetus of these provisions as pointed out by the defence, I am aware of the recent Court of Appeal decision in **Gitabeka Giyaya vs R,** Criminal Appeal No 44 of 2020, in a judgment delivered in Arusha in November 2022, where quoting with approval its previous decisions that non-adherence of section 38(3) of the

CPA is not fatal and it is inconsequential when there was issued a Certificate of Seizure, and all parties including the accused countersigned the same with supporting evidence from other witnesses who witnessed the disputed search. See **Ramadhan Iddi Mchafu vs R,** Criminal Appeal No 328 of 2018, **Abdalla Said Mwingereza vs R,** Criminal Appeal No 258 of 2013, and **Matata Nassoro vs R,** Criminal Appeal No 329 of 2019. In **Gitabeka's** case (supra) the Court elaborated further:

> *"In the case of the subject of this appeal, the appellant signed a certificate of seizure and there is evidence from PW1 and PW2 that he was found in possession of the elephant tusks during a transaction in which PW2 and one Aloyce Mtui posed as prospective buyers of the same. Given these circumstances, and in the light of the authorities referred to above, we find the omission to issue a receipt in terms of section 38(3) of the CPA or 22 (3) of Cap 200 not fatal, it is curable under the provisions of section 388 of the CPA. For the avoidance of doubt, we are aware that the term "shall" is used in both provisions. However, as the full bench held in* ***Bahati Makeja vs R,*** *[2010] TLR 49, the word "shall" in the CPA is not imperative as provided by section 53 (2) of the Interpretation of Laws Act, Cap 1 of the Laws of Tanzania, but it is relative and is subjected to section 388*

of the CPA. In the same token, we are of the view that "shall" in section 22(3) of Cap 200 is also not imperative."

This means the argument by the defense falls within the same ambit and thus it is a non-issue. As a matter of fact, in weighing the evidence, I am not convinced that the accused was not part of the search and seizure exercise that happened on 10th March 2020 which took place at the accused residence. The information contained in **Exh P5** is supported by the cogent testimony of **PW2** as well as the statement of Halima Mohamed as per **Exh P10** on its p3 where it states " ..... *kesho yake Mkami aliamka kwenda Hospitali* ***na hakurudi tena mpaka tarehe 10 Machi 2020 saa 17:30 alipoletwa nyumbani akiwa chini ya ulinzi wa askari polisi.*** *Wakati huo pia tulipata taarifa kuwa Salome Zacharia amefariki dunia.....*

Meanwhile, **PW2** testified that he had gone with other persons Det Corporal WP Pudenciana, Det Corp Jackson, and the accused to her house, and while there, other persons including Halima Mohamed and the ward councilor took part in the search. Since every witness deserves credence, I have not found any good enough reason to doubt **PW2's** testimony. The accused asserted in her testimony that she did not take part in the search and seizure of items in her house but she does recognize the Kibubu **Exh P2** and the torn notes **Exh P4** on one hand, and denies recognizing **Exh P3** the mattress and the club **Exh P9** that was used to beat the deceased.

It is my view that this refute is an afterthought, and I certainly refuse to buy this story.

This issue as to whether it was the accused's doing that resulted in the unlawful ending of this citizen's life also draws this court's attention to a remaining sub-issue that the remaining significant aspect for consideration and determination is who was responsible for the death of the deceased. In other words, the link between the death of the deceased and the accused standing charge before the court. Going through the evidence of **PW4**, who tendered in court the dying declaration of the deceased person **Exh P6A** testifying in essence that she was beaten and attacked fiercely using a club in all parts of her body by her employer Mkami Stanley Shirima, this fact received further credence through the statement of Halima Mohamed's **Exh P10** where she witnessed two persons, including the deceased being beaten by a wooden club (Rungu). On further credibility over this piece of evidence, **PW2** testified to have received a call on 8th March 2020 on the matter of the said Salome Zacharia Howea who have been attacked by her employer (the accused person), where they took her into custody on the charge of causing Grievous Bodily Harm before the death of the deceased, and as they started investigating on this charge, the victim of the said attack passed away while receiving treatment. On further credence, the Doctor, **PW3** had testified based on

the autopsy report **Exh P6** that the deceased had Rhabdomyolysis resulting from Compartment Syndrome meaning a part of the body (hands) had rotten as a result of the big injury it had, and subsequently a reaction of failing Kidneys. In further analysis, the testimonies of **PW5** and **PW6** including the **Exh P7 and Exh P8** that were tendered and received in court supported all the testimonies analyzed above. In essence, **PW5** and **PW6** put it in evidence that the blood samples taken from the swabbed items **Exh P2, Exh P3,** and **Exh P9**, were sent from and received (as per **Exh P7**) by the GCLA, and were analyzed, and a report made (**Exh P8**). The evidence in the DNA analysis confirmed that it is the blood of the deceased person in all the exhibits analyzed which matches against each other, as well as that of the accused herein. The weapon used had in it the blood of the deceased, and it is not only obvious that the deceased did not inflict the wounds upon herself, but the scientifically analyzed piece of evidence is supported by that of **PW2**, **PW4,** and the exhibits **P6A** and **P10** that were put in evidence. It thus my firm view that the issue that the acts of the accused caused the death of the deceased; and its sub-issue that it was the accused who inflicted those injuries are all answered in the affirmative. The prosecution has not only successfully carried their burden to the hilt in the evidential value of their case but also it is praiseworthy, as it links the accused with the commission of the said offense. It has proved

both issues beyond a shadow of a doubt and thus this court is well satisfied that all evidence points to the accused person.

In the case of **Magendo Paul and Another vs Republic, [1993] TLR 220**, the court made an observation with regards to what amounts to the proof beyond reasonable doubt as follows:

> *"If the evidence is so strong against an accused as to leave only a remote possibility in his favor, which can easily be dismissed, the case is proved beyond reasonable doubt".*

Now then this Court must consider whether the accused person had malice aforethought. Under the circumstance of this case as deliberated above, this issue has to be answered against the law that governs the aspect of proof of malice aforethought.

Malice aforethought is defined under **section 200 (a) of the Penal Code, Cap 16 [RE 2019] that**:

> *"Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances:*
>
> *An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

According to the above provision of the law, the basic element in proving malice aforethought is the existence of an intention to cause death. Therefore, there must be a pre-meditated or planned intention to cause

the death. In the absence of the accused person's premeditation to kill, the conviction cannot stand. A good explanation for proving the existence of malice aforethought in a murder case typically requires demonstrating that the accused had the intention to kill or cause serious bodily harm, and acted with a conscious disregard for human life, hinging on the need to prove or show the intent to kill. And it can be proven through direct evidence such as statements made by the accused indicating their evidence, or through circumstantial evidence; like the use of a deadly weapon or the nature of the accused actions leading up to the incident, and also on the proof of reckless indifference to human life, that is to say, demonstrating that the accused acted in reckless indifference to human life or any violence or use of dangerous weapon knowing that it could cause serious harm or death. Equally important, malice aforethought can also be proved through the evidence tendered, including forensic evidence such as DNA analysis and medical examinations, which can help to support the prosecution's argument that there was malice aforethought accompanying the offending action.

It has been the practice of this court and the Court of Appeal to establish malice aforethought when an attack is directed at a sensitive and vulnerable part of the body. The question then is whether the action that caused the killing that resulted in the demise of the deceased person in the

instant case within the provisions of section 200 of the Penal Code, Cap 16, as well as the holding in the authorities in the cases of **Enock Kipela vs Republic**, Criminal Appeal No. 150 of 1994, and **Bujigwa John @ Juma Kyriako vs Republic**, Criminal Appeal No. 427 of 2018. The Court of Appeal had observed:

> *"Usually an attacker will not declare his intention to cause death or grievous bodily harm, whether or not he had the intention must be ascertained from various factors, including the following:*
>
> *(i) The type and size of weapon that was used in the attack leading to the death of the deceased;*
>
> *(ii) The amount of force which was used by the attacker in assaulting the deceased;*
>
> *(iii) The part or parts of the body of the deceased where the blow of the attacker was directed at or inflicted;*
>
> *(iv) The number of blows that were made by the attacker, although one blow may be enough depending on the nature and circumstances of each particular case;*
>
> *(v) The kind of injuries inflicted on the deceased's body;*
>
> *(vi)The utterances made by the attacker if any, during, before or after the incident of the attack;*
>
> *(vii) and the conduct of the attacker before and after the killing."*

The Court also distinguished two exceptions in the quest for establishing malice aforethought, that is each case must be decided on its facts, and if there is a doubt between any two views on the intention of the accused, the doubts are to be resolved in favor of the accused person.

In the present case, I am convinced both exceptions may be entertained. The deceased together with the daughter of the accused have admitted to breaking the kibubu and took out the money found in it. There is a discrepancy though on the amount found and or taken, with one version putting the amount found at 250,000 (**Exh P6A**), another version putting it at 1,000,000 (**Exh P10**), and lastly, the amount was said to be 2,500,000 as per the sworn testimony of **DW1**.

In any case, whichever the amount, the same was never recovered. The gathered evidence is that the accused daughter gave 50,000 to the deceased, and never disclosed the whereabouts of the remaining amount. Obviously, the accused never wanted to believe that her daughter who was then 13 years old would have been the one to keep the rest of the money, and desperately needed for it to be recovered from the deceased. If the amount was TZS 2,500,000, one would have a motive to want to find all means to recover the same, which is consistent with the series of beatings she was giving the victim so that she would give back the rest of the money.

The accused person was so motivated to recover this reasonably substantive amount of money that she had a reckless disregard for human life. Her actions could make for an inference of the intention to cause the death of the deceased person since as a reasonable person, she ought to have not taken matters into her own hands, and must have taken precautions that even though the deceased had admitted to having broken the kibubu, she should have reported the matter to the respective authority to find the truth and if possible recover her money.

While testifying, **DW1** explained the deceased told her that she gave the money to a bodaboda guy, and they made an attempt to go look for it from this person. But this testimony is unsupported and does not have any credence. She meanwhile, admitted that it is true she beat the deceased person severally, but it was nothing like it is stated, and that she had only beaten the deceased person the same way she beat her own daughter, with the intention of disciplining them both as she was staying with them as her own family, and as such she took herself as a parent, finding it her duty to correct their behavior. Several issues arise out of this testimony; first, the deceased while young (she was 18), was not a child to be disciplined by the accused, and it is intrinsically wrong and unacceptable not just to beat a child, but to punish a young adult as such, second if both her daughter and the deceased person had admitted to having broken the

kibubu and took the money, what sort of punishment did she met out to her own daughter to recover the money? And lastly, it is against the law to take matters into one's hand, pure and simple.

The evidence of **PW5** and **PW6** positively identified the epithelial cells for DNA profiling of the accused person and those of the deceased. While **DW1** denied having used the wooden club **Exh P9** to beat the deceased, she did not put in defence the 'beating stick' that she claimed to have used to "discipline" the deceased and her daughter. In the absence of such rebuttal on the weapon used, I find the evidence weighty and glaring onto the accused on the type of weapon used to inflict the blows that caused the hands of the deceased to undergo compartmentalization syndrome that resulted in Rhabdomyolysis as testified by **PW3**.

In inferring the intention from the accused person's actions, I also look at the actions that she took after being informed that the deceased condition had changed, she was unable to eat and experiencing high fever, where she immediately took the deceased to the hospital for treatment. In the authority of **Enock Kipela's case** (supra) the conduct of the attacker before and after the killing is another pointer to the intention of the accused. I find the actions of the accused in bringing the deceased to the hospital negate the intention to murder her.

Legally speaking, the intention is said to have been formed when knowledge of a particular consequence is supported by the will to cause such a consequence. Every voluntary act is given effect due to the presence of determination and willingness to trigger that act. The key element of purpose is this certitude of willingness combined with knowledge of the effect. It really means the state of mind that precedes a conscious act. The criminality of an act cannot be disputed if an individual thinks, prepares, and implements the action at that stage bringing in the culpability of the accused person.

DW1 testified that she and her partner took the deceased and their daughter to a police station where the partner, the deceased, together with the daughter went inside, while she stayed out waiting for them, which in my view did show an attempt to get the duo to reveal the whereabouts of the balance of the money taken. Upon returning home and her partner leaving, she decided to induce the deceased into giving back the money through the infliction of pain by beating her repeatedly on her hands, and she admits giving her 3 blows on different occasions (from when they were asked and answered that they did not know about the whereabouts of the kibubu, to when they admitted to having taken it and brought back a broken kibubu, and then to when they were asked to give back the money found in the said piggybank). Her retort is just that she did not use the

weapon that was brought in evidence **Exh P9**, but rather a different kind of weapon.

This in my view, gives credence and supports the doctor's findings of the forming of rhabdomyolysis on the hands of the deceased, which had caused the death of the deceased through kidney failure. Despite this protruding fact and through all evidence as analyzed, I cannot help but think did the accused knew her acts were likely to cause the death of the deceased; and had she held real intention of killing her? I rather find she did not. I have neither been able to find that she had the necessary knowledge that her action would likely cause the deceased's death, nor that she wanted her dead in her determination of the will nor the certitude in her conduct, of the consequence of a person who intends to kill the deceased.

In the circumstances under which the injuries were inflicted, it is hard to say that the accused formed malice aforethought when she inflicted the injuries on the deceased. As amply pointed out by the evidence adduced before the court, the accused and the deceased were on good terms. The accused was leaving her children, one of whom was very tender with the deceased as the person who was looking after the house, and the children. There had been no quarrel before the kibubu went missing and then found broken and all the money taken. The deceased and the accused's daughter

admitted to having taken the kibubu and its contents. The injuries were inflicted out of desperation to induce the return of the money. In my considered view, there was no intention to cause death.

I am alive to the logical fact that while motive is not an ingredient of the offence of murder, it tends to strengthen the prosecution's case when proven, and similarly, lack of motive would negate malice. The presumption that the accused was likely to have been motivated by the loss of a substantial amount of money, is not supported by evidence that through this motive, she saw through her intention to murder the deceased. See **R vs Stephano Alois** [1972] HDC No. 199 and **Republic vs Asumin d/o Bakari,** Criminal Case No. 9 of 2016.

In the upshot, having considered the totality of the evidence placed before me, it is apparent that while the actus reus was found to be present, there was no malice aforethought in thinking, preparing, planning, and executing the actions that caused the death of the deceased. Subsequent to the lacking of the intention to prove the offence of murder, as supported by the case of **Republic vs Richard Benjamin Mndulwi,** Criminal Case no. 46 of 1997) [2003] TZHC 70, (TANZLII), I find the accused person not guilty of the offence of murder.

But that does not mean to say she is inculpable and blameless. Instead, in terms of section 201 of the Penal Code, Cap 16 RE 2022 I find the accused

to have killed the deceased person unintentionally and is thus liable for manslaughter.

In lieu thereof, I enter a substituted conviction for manslaughter contrary to section 195 of the Penal Code, Cap 16.

It is so ordered

A. Z. BADE
JUDGE
08/09/2023

Judgment delivered under my Hand and Seal of the Court virtually, this **08th** day of **September**, **2023** in the presence of both parties.

A. Z. BADE
JUDGE
08/09/2023

The right to appeal is hereby explained.

HIGH COURT OF TANZANIA

A. Z. BADE
JUDGE
08/09/2023