

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
THE HIGH COURT
(MUSOMA SUB REGISTRY)
AT MUSOMA
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE No. 154 OF 2022
THE REPUBLIC v. NYATAIGO MWITA @ MAKENDE
JUDGMENT

03.10.2023 & 11.10.2023

Mtulya, J.:

On 26th July 2021, a total of four (4) young men had appeared before a pub at **Nyamoko Village within Serengeti District in Mara Region** (the crime scene) to cherish their pleasures in drinks and food. **Ms. Lucia Ryoba Nyamhanga** (PW3), a lady of 26 years was readily available to grease their happiness for beers and other minor substances displayed in the Pub. The four (4) human persons had ordered Balimi species of beers for swallowing purposes at their levels and actually tanked down beers everyone at its levels. The record shows that they sipped in between one (1) to five (5) beers.

As usual, and indicated in the precedent of this court in **Republic v. Thomas Kibayi @ Mwita**, Criminal Sessions Case No. 156 of 2022, the communities of Serengeti District move along the streets displaying their weapons in their hands or waists. This time, two (2) of the four (4) young persons had in their waist sharp

weapons *knife* and *panga*. At around 23:00 hours, their pleasure had reached its peak and as usual questions and answers started. This time, it was on the question, who is a young boy among them. Practice available on record shows that, age, gender and economic muscles determine status of individual person within Serengeti District in Mara Region (see: **Republic v. Thomas Kibayi @ Mwita** (supra).

This question was not a simple question to the young persons. It was a tough question which wanted a solid response. Before a reply could take its course, a serious quarrel arose and finally a fight which led to the loss of life of one of them. The deceased was later identified as **Mr. Petro Juma @ Kisiri** (the deceased) and the death was confirmed by **Dr. Baraka Deogratias** (PW1), a medical doctor at Serengeti District Designated Hospital at Mugumu, (Nyerere Hospital). Noting the death was unnatural, the police investigated the matter and had brought the present case in this court pointing fingers to **Mr. Nyataigo Mwita @ Makende** (the accused) and **Mr. Petro Juma** (Mr. Petro) as the killers of the deceased.

In order to establish its case, the Republic has summoned a total of four (4) witnesses, including PW3 and PW1 to testify in favor of the Republic, whereas the defence had marshalled one (1) witness, the accused. PW3 testified that on 26th July 2021 she

welcomed four young men at her Pub, namely: the deceased, the accused, **Mr. Petro** and **Mr. Esami Maitaro** (Mr. Esami) to have their beers and around 23:00 hours a dispute arose between the deceased and Mr. Petro on issues related who is a young boy between them and went to extent of Mr. Petro attacking the deceased with knife at the stomach and aside the stomach. According to PW1, when the fight was in its course, the accused grabbed a *panga* weapon from the deceased's waist and attacked him twice on head, whereas Mr. Esami was holding the deceased tight.

According to PW3, it was **Mr. Nyanguru Samson Wambura** (PW4) who appeared and separated the fighters, but the deceased was already badly injured and could not walk properly to leave the scene of the crime and had collapsed at the residence of **Mnanka Mwita** (PW2). Following the incident, PW3 testified that she rushed to deceased's parents to inform them of the fight. On the question how she was able to identify the four (4) young persons, PW3 produced three (3) reasons, namely: first, they were her usual customers, who appear in the Pub in every now and then; second, they took long period of time enjoying their beers; and finally, there were two (2) bulbs of solar energy producing high intensity of light, both inside and outside the Pub.

The three (3) other prosecution witnesses, namely PW1, PW2 and PW3 were called to testify on their part. The testimonies of PW1 and PW2 were very brief. PW1 testified that he has examined the body of the deceased and recorded postmortem report which was admitted as Exhibit P.1 in the case and shows that the source of death is: *severe bleeding secondary to multiple cut wounds in face, linear and other oblique extended to the nose, right thigh and chest.*

PW2 on the other hand testified that on 26th July 2021, at around 23:00 hours, the deceased had knocked his door and upon opening, he found him bleeding and questioned him on what had transpired. According to PW2, the deceased had mentioned the accused, Mr. Petro and Mr. Esami as the source of the bleedings caused by their attacks against him. Following his condition, and noting the colon and ileum were flowing out of the stomach, he went and informed his parents, who initiated *bodaboda* transport to Nyerere Hospital. According to PW2, in the next morning, at around 05:00 hours, the deceased was pronounced dead.

PW4 on his part has testified that on the fateful day, 26th July 2021, around 23:00 hours, he was passing-by next to the Pub and heard a woman shouting a *Yowe* type of noise and followed the *Yowe* direction. According to PW4, upon arrival at the crime scene, he found Mr. Esami holding the deceased tight and Mr. Petro

stabbing the deceased with knife at different parts of the body, including the stomach and the accused was attacking the deceased on head several times. PW4 testified further that he asked them to let the deceased free, but the accused had threatened to attack him hence had left the crime scene for deceased's parents' residence to inform them of the incident. According to PW4, he was able to identify the accused, Mr. Petro and Mr. Esami as he knows them, and the accused specifically were together in building Nyamoko Village School and the crime scene was shined by two (2) big solar bulbs.

The defence on its side had marshalled one (1) witness, the accused himself (DW1), and testified that on the fateful day, 26th July 2021, he had left his home residence in noon hours for Mugumu Town and had returned around 21:00 hours. According to the accused, after the return, he slept until the morning hours of 27th July 2021, when he left for farming activities at his farmland. The accused testified further that he does not swallow any alcohol and does not know the deceased, Mr. Esami and Mr. Petro, PW2 and PW3 and that he did not attack any person on 26th July 2021 at 23:00 hours.

I have perused the facts of this case and the law regulating direct evidence and reliability of witnesses. The law in section 62 (1) (a) of the **Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act)

is certain and settled. It requires oral evidence to be direct and if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. In the present case, the Republic has brought a total of four (4) witnesses, and two (2) of them, PW3 and PW4, have testified to have seen the accused attacking the deceased with *panga* several times on the head. P.1 corroborated the evidences produced by PW3 and PW4.

Regarding reliability of witnesses, the law is that a witness who testifies consistently statements and his demeanor is inviting may be believed and his testimony accepted, unless there are good and cogent reasons for not believing him. That is the thinking of the Court of Appeal (the Court) in the precedents of **Sabato Thabiti & Benjamini Thabiti v. Republic**, Criminal Appeal No. 441 of 2018 and **Goodluck Kyando v. Republic** [2006] TLR 363. However, it is a settled law that a witness must show that he *had the opportunity to see what he claimed to have seen* (see: **Johana's Msigwa v. Republic** [1990] TLR 148 and **Republic v. Kamhanda Joseph Abel & Five Others**, Criminal Sessions Case No. 46 of 2018).

In the present case, PW3 and PW4 have testified to have seen the accused attacking the deceased and they know him from his several visits at the pub and involvement in construction of **Nyamoko Village School**, respectively. PW3 testified further that he

stayed with the accused and deceased for a long period of time serving them beers up to five (5) bottles of Balimi species. From the materials registered by PW3 and PW4, the accused is not a stranger to them. Their testimonies display more than an identification of witnesses for want of high intensity of light. It is a recognition.

According to the Court recognition is more satisfactory, more assuring and more reliable than identification of a stranger (see: **Kenga Chea Thoya v. Republic**, Criminal Appeal No. 375 of 2006; **Nicholaus Jame Urrio v. Republic**, Criminal Appeal No. 244 of 2010; and **Mussa Saguda v. Republic**, Criminal Appeal No. 440 of 2017). This court has considered the thinking of the Court in the precedent of **Republic v. Pete Msongo @ Patrick**, Criminal Sessions Case No. 179 of 2022.

I am aware that the accused in his defence had testified that he was at his home resident sleeping between 21:00 hours of 26th July 2021 and morning hours of 27th July 2021, and that he did not attack any one with *panga* on 26th July 2021 at 23:00 hours. However, his evidence cannot shake eye witnesses PW3 and PW4, as much as I believe every witness is credible and reliable (see: **Goodluck Kyando v. Republic** (supra).

In the present case, the prosecution has proved that the accused had attacked the deceased. The accused was required to raise some doubts to the prosecution case by bringing necessary

materials, to which he had failed. I am aware that it is not proper to convict the accused on basis that he is found to be a liar (see: **Mushi Rajab v. Republic** (1967) HC 384) or weaknesses of his defense (see: **Christian Kale & Rwekaza Bernard v. Republic** (1992) TLR 302). However, in the circumstances of the present case and considering materials brought by prosecution, it is vivid that PW3 and PW4 have witnessed the accused attacking the deceased on the head by use of *panga*.

The next question is whether, the accused had attacked the deceased with *malice aforethought*. The law enacted in section 200 of the Penal Code provides for circumstances which establish malice aforethought in murder cases. The section has already received a standard interpretation of the Court in the celebrated precedent of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994. However, the Court in the precedent has placed an important clause that each case must be decided on its own peculiar facts.

In the present case, there is evidence of fight and the deceased had showed up at the Pub with a *panga* at his waist. According to the Court, where there is evidence of a fight it is not safe to infer malice aforethought, unless there are very exceptional circumstances. There is a bunch of precedents of our superior court on the subject (see: **Stanley Anthony Mrema v. Republic, Criminal Appeal No. 180 of 2005; Jacob Asegelile Kakune v. Republic,**

Criminal Appeal No. 178 of 2017; **Aloyce Kitosi v. Republic**, Criminal Appeal No. 284 of 2009; **Stanley Anthony Mrema v. Republic**, Criminal Appeal No. 180 of 2005; and **Moses Mungasiani Laizer @ Chichi v. Republic** [1994] TLR 222).

This court has been following the move without any reservations (see: **Republic v. Pete Msongo @ Patrick**, Criminal Sessions Case No. 179 of 2022; **Republic v. Chacha Mwita Mohere**, Criminal Session Case No. 141 of 2022; and **Republic v. Samwel Saulo @ Ikula**, Criminal Session Case No. 58 of 2016. According to the Court, where death occurs as a result of a fight, this court may convict accused for a lesser offence of manslaughter, not murder (see: **Jacob Asegile Kakune v. Republic** (supra); **Aloyce Kitosi v. Republic** (supra); **Stanley Anthony Mrema v. Republic** (supra); and **Moses Mungasiani Laizer @ Chichi v. Republic** (supra).

In the circumstances of the present case, I am satisfied that the prosecution had failed to prove malice aforethought as per enactment of section 200 of the Penal Code and standard practice placed in the precedent of **Enock Kipela v. Republic** (supra). There are no very special circumstances in the present case to hold the accused responsible for murder. I am therefore holding that the accused had killed the deceased without *malice aforethought*. In the result, I convict the accused, **Mr. Nyataigo Mwita @ Makende** with

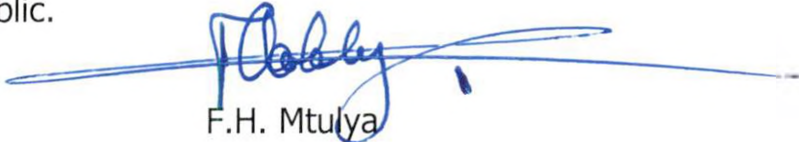
a lesser offence of manslaughter contrary to section 195 and 198 of the **Penal Code**.

It is so ordered.




F.H. Mtulya
Judge
11.10.2023

This Judgment was delivered in open court in the presence of the accused, **Mr. Nyataigo Mwita @ Makende** and his learned Defence Attorney, **Mr. Evance Njau** and in the presence of **Ms. Agma Haule** and **Ms. Happiness Machage**, learned State Attorneys, for the Republic.


F.H. Mtulya
Judge
11.10.2023

ANTECEDENTS

Haule: My Lord, we do not have previous criminal record of the accused. However, we pray for serious sentence against the accused. My Lord, the official penalty of manslaughter is up to life imprisonment. My Lord, we say so because:

1. The weapon was sharp;
2. The accused attacked several parts of the body;
3. The event has occurred at the villagers and a pleasure area;

4. The deceased's family had lost a person, and
5. To raise a lesson to the Serengeti District communities.

My Lord, as per **Sentencing Guidelines of 2023**, this kind of killing falls at high level manslaughter which attract a sentence of more than ten (10) years. My Lord, the sentence should send a signal to all those persons who take laws into their own hands. My Lord, you must show that these kinds of issues are discouraged by the legal community. My Lord, he did not regret and refused confession of the offence. He kept this court busy for unnecessary reasons. My Lord, this accused person has taken the life of the community in Serengeti, which is not his role. The role of taking life of human persons is reserved to God, not accused persons. My Lord, we pray for stiff sentence to this accused person My Lord, that is all for the Republic.

F.H. Mtulya

Judge

11.10.2023

MITIGATIONS

Njau: My Lord, this court has found the accused with a lesser offence of manslaughter. We pray for a lenient sentence. We have reasons, My Lord:

1. The accused is the first offender;
2. He is a young person of thirty-five (35) years;

3. He is a parent to several children and a wife;
4. The event had occurred in a pub where friends were swallowing alcohol;
5. The weapon belonged to the deceased. He contributed to his death; and
6. Bleeding was caused by knife and not *panga*.

My Lord, there is **Sentencing Guideline** which shows that an offence of manslaughter of this nature falls into the third category of manslaughter as there was provocation caused by age issues. My Lord, we pray for lenient sentence and if possible conditional discharge to this accused. My Lord, that is all from the defence side.

F.H. Mtulya

Judge

11.10.2023

SENTENCING ORDER

Mr. Nyataigo Mwita @ Makende (the accused) was arraigned to this court for allegation of murder of **Mr. Petro Juma @ Kisiri** (the deceased) contrary to sections 196 and 197 of the **Penal Code [Cap. 16 R.E. 2019]** (the Penal Code). After registration of all relevant materials, this court has found the accused guilty of a lesser offence of manslaughter contrary to sections 195 and 198 of the Penal Code.

In assisting this court to arrive at an appropriate sentence against the accused, **Ms. Agma Haule** and **Ms. Happiness Machage**, learned State Attorneys, for the Republic and **Mr. Evance Njau**, learned Defence Attorney for the accused, were called to register antecedents and mitigations against and for the accused, respectively.

According to Ms. Haule, there is no previous record of the accused, but he may receive grave sentence as: first, the official sentence of manslaughter is up to life imprisonment; second, the accused used sharp object *panga*; third, he attacked several parts of the body; fourth, this court to send a lesson to Serengeti District communities; fifth, the accused has declined to show regret of killing the deceased; and finally, the **Tanzania Sentencing Guidelines** set the killing of this species at high level of manslaughter which attract a sentence of more than ten (10) years imprisonment.

Whereas Mr. Njau on the other hand thinks that the accused had caused death in the circumstance of fight and that he may receive a lenient sentence, because: first, the accused is the first offender; second, he is a young person of thirty-five (35) years; third, he is a parent to several children and a wife; fourth, the event had occurred in a pub where friends were swallowing

alcohol; fifth, the weapon belonged to the deceased. He contributed to his death; sixth, bleeding was caused by knife and not *panga*; and finally, the killing falls in the lower level of manslaughter.

I think, in my opinion, the law regulating consequence for persons found guilty of manslaughter is enacted under section 198 of the Penal Code, which provides up to life imprisonment. However, the standard practice as is displayed by the Court of Appeal in the precedent of **Ramadhani Omary v. Republic**, Criminal Appeal No. 83 of 2018, where twelve (12) years were considered reasonable.

On 25th September 2023, this court had resolved a case of fight and sentenced the accused to serve nine (9) years in prison (see: **Republic v. Pete Msongo @ Patrick**, Criminal Sessions Case No. 179 of 2022. However, it was decided so because the deceased had followed the accused at his residence.

In June this year, this court had resolved knife attack to the women to attract ten (10) years imprisonment (see: **Republic v. Ryoba Mwita Mseti**, Criminal Sessions Case No. 149 of 2022. The facts of the case had displayed that the accused was in state of unconscious due to alcohol and was found in his home residence sleeping unaware what had transpired. During hearing of the case in this court, the accused had admitted the offence and pleaded for

manslaughter. To those who regret their events and enter plea of manslaughter, this court has been very lenient.

Last week, **Mr. Masunga Daba** was brought in this court by the Republic for murder in **Criminal Sessions Case No. 2 of 2023**, and readily admitted killing of the deceased without malice aforethought. This court had found him guilty of manslaughter and sentenced him to one (1) imprisonment.

In the instant case, three (3) persons were against one person, the deceased. The accused had two (2) other persons, **Mr. Petro Juma** and **Mr. Esami Maitaro**, attacking the deceased, each with his own specific role to play and that they used knife and *panga* to cause multiple wounds in different parts of the deceased's body. The wound-cuts had left the deceased's colon and ileum to flow out of the stomach. This is a peculiar case of its own species bordering murder and manslaughter.

In order to have better and fair resolution of sentences against accused persons who are found guilty, the **Tanzania Judiciary** has produced the **Tanzania Sentencing Guidelines, 2023** to assist judges and magistrates in passing appropriate, consistence, proportionate, fair and just sentences. The offence of manslaughter is cited at page 37 with three (3) categories which invite different levels of penalties, from high, medium and low. The use of dangerous weapons of any species falls under high level species of

manslaughter and attracts a sentence of ten (10) years to life imprisonment.

However, after considering the nature and all circumstances surrounding this case, the indicated antecedents and mitigating factors, and noting the accused did not cooperate since his arrest and has declined regret to the incident, I am moved to sentence him to fifteen years (15) years imprisonment from the date of this Order, **11th October 2023**.

It is so ordered.




F.H. Mtulya

Judge

11.10.2023

This Sentencing Order was pronounced in the presence of the accused, **Mr. Nyataigo Mwita @ Makende** and his learned Defence Attorney, **Mr. Evance Njau**, and in the presence of **Ms. Agma Haule** and **Ms. Happiness Machage**, learned State Attorney for the Republic.


F.H. Mtulya

Judge

11.10.2023