

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB REGISTRY OF MOSHI
AT MOSHI**

CRIMINAL SESSIONS CASE NO. 09 OF 2023

REPUBLIC

VERSUS

- 1. AUDIFACE PIUS TARIMO**
- 2. TARSILA PIUS MKWE @ NG'OE**

JUDGMENT

29th May & 4th June, 2024

A.P.KILIMI, J.:

Primarily, both accused persons namely AUDIFACE PIUS TARIMO and TARSILA PIUS MKWE@NG'OE hereinafter first and second accused respectively were charged for the offence of Murder contrary to section 196 of the Penal Code Cap 16 R.E. 2022 'Penal code'. That both jointly on the 24th day of October, 2022 at Kirongo Chini Village within Rombo District in Kilimanjaro Region, did murder one **FELICHESM PIUS NGOWI**. After the information was read the first accused denied to commit the offence. But, the second accused person prayed to plea a lesser offence of manslaughter, the same was not objected by the prosecution and filed a new information to such respect, the second accused pleaded guilty to the charge and its facts

thereto I found her guilty and convicted for the offence of manslaughter contrary to section 195 and 198 of the Penal Code. Having considered circumstances of her participation in the commission of the crime, her mitigation and the period she stayed in prison I made an order discharging her absolutely.

Now, before I proceed with the merit of the case against the remaining second accused, I find apposite to state the brief background of his case. The deceased, his mother 'second accused' and first accused lived on the same compound. On the day of incident stated above around 09:00 hrs both while at home a fight arose between the deceased and the first accused person. The first accused person was accusing the deceased of stealing his ten litres bucket.

On the course of the said fight the second accused person who is the mother to the first accused and the deceased intervened to stop a fight and requiring the deceased to give the said bucket. Later, the brother of the deceased one Priscus Pius Mkwe Ngo'e also managed to intervene and calmed the fight down, the deceased gave them the said bucket and the first accused person went to his room. However, after the said fight the deceased

started complaining he was hurt, his condition worsened, unfortunately died the following day.

The police officers were informed of the incident, they were able to arrive at the crime scene, drew the sketch map and took the deceased body to Karume Hospital where autopsy was conducted on the deceased 's body. After examination the Post mortem Report revealed the cause of death was severe head injury.

In his defense the first accused person acknowledged that the deceased was his young brother, and said on the day and time stated he asked his mother (first accused) the whereabouts of his small bucket, deceased who was in his room came furious and invaded him, he escaped him by stepping backward. Then the deceased returned to his house and came out with a machete. Priscus Pius Mkwe Ngo'e also his young brother took a big stick and hit the said machete, it dropped down and he took it. Later the deceased surrendered the said bucket to her mother, then accused person took it for taking bath and went to the church.

It was on the next day on his way back from his farm he met villagers who told him that the deceased had died in abnormal circumstances and

police officers have arrested his mother and Priscus Pius, He decided to follow them at police station and the officers who arrested them. He further said he did nothing to the deceased and added that he left the deceased being normal after the said fracas until when he heard about his demise.

As said above the first accused person denied the charge, to substantiate the charge, the prosecution paraded 3 witnesses. Briefly Jakob Erick Utoh '**PW1**' is a Clinical Officer Karume Health Centre did an autopsy of the deceased body, in this court he tendered Postmortem Examination Report of Felichizim Pius Ngowi which was admitted as exhibit P2.

WP 3175 D/Sgt Selestina '**PW2**' is a police officer who wrote the statement of witness named as Priscus Pius Mkwe Ng'oe @ Mwanaa, this witness was not found by the prosecution, thus before the trial they filed a notice under Section 34(B) (1) (2) (a) (e) of Evidence Act Cap. 6 R.E.2022 'Evidence Act'. Therefore, this witness tendered the said statement which was not objected and admitted as exhibit P3.

The last witness was F.3527 D/Sgt Msafiri '**PW3**' he was the investigator of this case; he went to the scene of crime and drew a sketch map. Further according to him the evidence of Priscus Pius who was at the

scene of crime, stated how the incident occurred, but the accused person rejected to participate in beating the deceased.

Having considered the evidence tendered, now the issue in this case for determination is whether the evidence tendered did demonstrated beyond reasonable doubt that the accused persons actually caused the death or participated in the causation of the death of the deceased. However, this being a murder case, by virtue of provision of section 196 of the Penal Code which provides that;

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

The above wording of the provision needs for the offence of murder to be proved must, first; there must be unnatural death of a person, second; causation of death be by unlawful act or omission and third is the existence of malice aforethought.

In respect to the death, as stated above there is no dispute that one Felichesm Pius Ngowi died unnatural death, this is substantiated by the evidence of PW1 who did an autopsy of the deceased body after being introduced to him by close relatives named Priscus Ngowi and Barnabas

Ngowi. Further PW1 said after autopsy he saw blood on deceased mouth and nose and his head was swollen on the left side. He then concluded the cause of death was severe head injury, he wrote that in exhibit P2. Having considered the above, I have no hesitation that the Felichesm Pius Ngowi really died unnatural death.

The next point for prosecution to prove is whether the accused person caused the death of the deceased either by unlawful act or omission. According to the evidence above, the evidence touching the accused person is the evidence of witness who cannot be found one Priscus Pius Mkwe Ng'oe @ Mwanaa, his statement was tendered in this court and admitted as P2.

Under common law this kind of evidence is treated as hearsay, generally whether oral or written is inadmissible in criminal proceedings, but may be admissible in certain carefully safeguarded and limited exceptions. In the celebrated case of **Subramanian vs Public Prosecutor** [1956] 1 WLR 965 the Privy Council gained wide acceptance and observed this rule in these terms:

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

In this land, it is a mandatory requirement of the law that, for a statement of that nature to be admitted in court in lieu of oral direct evidence under section 34B (1) of the Evidence Act, all conditions stipulated in subsection (2) (a) to (f) must cumulatively be complied with. (See **Andrea Augustino @ Msigara & Another vs Republic** [2020] TZCA 1948 (TANZLII); **Mhina Hamisi v. Republic**, Criminal Appeal No. 83 of 2005 and **Fred Stephano v. Republic**, Criminal Appeal No. 65 of 2007; **Twaha Ali & 5 Others v. Republic**, Criminal Appeal No. 78 of 2004, (both

unreported), To mention few. In **Twaha Ali & 5 Others v. Republic** (supra) The court sitting at Dar es Salaam when was dealing with section 34B (2) of the Evidence Act, stated that: -

" We believe that it is now a common knowledge that all conditions in this subsection are cumulative and must be satisfied by prosecution before the statement is admitted in evidence"

From the above law, the next point to consider is whether the said statement passed the said test, it is apparent the notice was served to the advocate for accused one day before, it was attached with a proof of service by an endorsed summons from the Hamlet chairman of Uzunguni, also affidavit of the court process server was attached.

Furthermore, in respect to the statement itself it has as declaration by the maker to the effect that those statements are true to the best of his knowledge and belief and further that he made it knowing that he might be prosecuted for perjury if the statement was false. Also, in my perusal of exhibit P2 I has revealed that the same was read to its author by the recorder (PW2) before the author could append his signature as per requirement of section 34B(2)(f) of the Evidence Act which provides that:

2) A written or electronic statement may only be admissible under this section- (f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.

(See also the cases of **Syridion Michael vs Republic** [2024] TZCA 365 (TANZLII) and **Joseph Shabani Mohamed Bay vs. R**, Criminal Appeal No. 399 of 2015 (unreported).

In the circumstance, I am satisfied all requirements of the law for the statement of witness who cannot be found to be admissible were met as provided by the law above.

Having found above P2 passed the test of admissibility, I have scanned the entire statement, in my settled opinion I find the witness was coherent, and this is because in that statement, the witness stated that is a family member being the youngest son of the second accused, thus the first accused and deceased are his elder brother, he stays on the same compound. He said being there at home it rose a fight between the first

accused and the deceased, he saw how the first accused person used fists and knees to beat the deceased. At the same time, he mentioned one Grace Audiface who is the wife of the first accused person who intervened the fight but by beating the deceased on his head using a big stick, not only that he saw his mother (first accused person) beating on deceased's back using a stick. He further said the cause of fight was small bucket which was taken by the deceased, however the fight ended after deceased surrendered the said bucket.

After holding that P2 was properly admitted in evidence, and as said the manner of his statements above and relation he has to the assailants, it is my considered view that it is competent evidence capable of grounding a conviction without necessarily being corroborated. I wish to support my reasoning above by the case of **Omari Mohamed China & Three Others vs Republic** [2006] TZCA 32 (TANZLII) where the Court stated that:

"...it is our considered view that it [witness statement] is competent evidence capable of grounding a conviction without necessarily being corroborated.

Be that as it may and without prejudice of the above, the statement of P2 is corroborated by the caution statement (P1) of second accused person

which was admitted without objection before she was convicted in her own plea of guilt. This is evidence of the mother of the deceased and the first accused person.

In his defence the first accused person Audiface Pius Tarimo 'DW1', as briefly stated above, acknowledged that the deceased was his young brother, he also concedes there was fracas between him and the deceased when he requested for his small bucket, he said it was the deceased who invaded him with a machete and it was his young brother Priscus Pius Mkwe Ngo'e who rescued him by striking out the said machete.

I have entirely considered the evidence of both of accused person, his mother and that of Priscus Pius Mkwe Ngo'e 'P2', I am settled there were a fight upon both accused persons including the deceased participated except Priscus Pius Mkwe Ngo'e. There is no dispute the fight arose on 23/10/2022 at 09:00 hrs, but the deceased died next day at noon. According to the evidence of the first accused person no any other evidence proving the fight rather than the fight proved by the prosecution. Therefore, since during the said fight wherein the deceased was hit on head and no any of the family member bothered to send him to Hospital, then having regard the Medical practitioner (PW1) who said the cause of death was due to head injury, thus,

the fact the first accused did participate in that fight, I am considered view his act and omission after the said fight has caught the first accused person into the web of causation of the death of the deceased. Therefore, in the circumstances his defence of not causing death is hereby rejected forthwith, henceforce, the accused person is responsible to the causation of that death.

The next issue is whether the first accused person cause the said death to the deceased with malice aforethought. "Malice aforethought" is provided for by the Black's Law Dictionary. The Dictionary defines the term as:

"A predetermination to commit an act without legal justification or excuse ... An intent, at the time of killing, willfully to take the life of a human being, or an intent to act in callous and wanton disregard of the consequences to human life ..."

I have considered the evidence as stated above, it is undisputed the cause of death of the deceased was triggered due to a fight existed between the deceased and his blood relatives. According to the circumstances evidenced above, I am of settled view the first accused person cannot be

said to have formed an intention to kill the deceased, taking regard the said fight involved others including his mother and one Grace Audiface.

In conclusion thereof I am settled the prosecution did not prove any premeditation to kill against the first accused person or any other person involved in this fight, therefore I consequently find the first accused person not guilty for the offence of murder contrary to section 196 and 197 of the Penal Code as Charged, subsequently I proceed to acquit him for this offence charged forthwith.

Nevertheless, I have considered the evidence tendered by the prosecution. Despite the facts that deceased's death was preceded by a fight which involved more than two people including the first accused person, in my view I have considered other pertinent factors such as; one, apparently evidence shows only two started to fight, I mean first accused and deceased and he used his fists and leg to beat the deceased, but a few minutes through intervention the fatal blow was made by one Grace Audiface on deceased head which according to the PW1 a medical Practitioner death was caused by head injury, second he was unarmed, and third no steps taken by him after the said fight against the deceased, either to take him for treatment

or to report the incident at Police Station who I think could have rescued the deceased. Thus, from above although no malice aforethought to kill proved, first accused participation to the death cannot be disassociated.

For foregoing reasons stated, I am settled the circumstances above triggered by fight push me to hold that the first accused person causation of death amounted to manslaughter. Consequently, I hereby find the first accused person guilty of the offence of Manslaughter contrary to section 195 and 198 of the Penal Code and I proceed to convict him forthwith.

Order accordingly.

DATED at **MOSHI** this day of 4th June 2024.



X

JUDGE
Signed by: A. P. KILIMI

SENTENCE

I have considered the aggravating factors established by the prosecution and mitigation from the defense, according to the **Tanzania Sentencing Guidelines, 2023** which prescribes the procedures and factors to be considered when passing a sentence. Since the nature of the offence was motivated by the fight wherein the first accused person used unreasonable force in defending his property, I am satisfied the punishment appropriate is Low level manslaughter which its punishment range from absolute discharge as starting point and four years as maximum sentence. Thus, in view of the above stated mitigating factors, I find the first accused person deserves a maximum sentence under this level. Therefore, the accused person is I hereby sentenced to serve four (4) years imprisonment. Subject to reduction of the period he spent in custody.

Order accordingly.

Sgd; **A. P. KILIMI**
JUDGE
4/06/2024

Court: - Sentence delivered today on 4th day of June 2024 in the presence of Ms. Rose Sulle, State Attorney for Republic, in the presence of Elisante Kimaro Advocate for first Accused Person and accused person present.

Sgd; **A. P. KILIMI**
JUDGE
4/06/2024

Court; Right of Appeal explained

Sgd; **A. P. KILIMI**
JUDGE
4/06/2024