

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB – REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 164 OF 2022

(Originating from PI No. 06 of 2020 of the District Court of Mkuranga at Mkuranga)

THE REPUBLIC

VERSUS

MOHAMED SALUM MACHELA

JUDGMENT

POMO, J

In the instant case, MOHAMED SALUM MCHALA is facing the information of manslaughter Contrary to Section 195 and 198 of the Penal Code [Cap. 16 R.E.2019] the particulars of which being that on 14th day of May, 2020 unlawfully did kill one SALMA D/O DOTTO. He pleaded not guilty to the information as such trial of the case commenced.

In proving the information, the republic paraded eight witnesses and tendered two exhibits, the report on postmortem examination (Exhibit PE.1) and sketch map of the scene of crime (Exhibit PE.2). These witnesses are Atasia Lameck Mlimakafi (PW1); Ismail Kibumi Mboweto (PW2); H2228 CPL Japhet (PW3); PF20950 Assistant Inspector Raphael Kabisi (PW4); G5275

D/CPL Allimund (PW5); Hawa Mohamed Mbonde (PW6); Hamad Shabani Bofu (PW7) and Asia Mnyamani Bofu (PW8).

In defending, the accused person testified as DW1 and called one witness Mwanaidi Said Kitita (DW2).

Briefly, this is what can be corrected from the adduced evidence. PW6 and the accused person are tenants in a house at Isimbalike hamlet in Kimanzichana village in Mkuranga district. rooms they rented are separated by a house corridor. The accused lived in that rented room with his wife one Salma Dotto Bofu (now deceased). On 14th May, 2020, PW6 phoned PW2 the chairman of Isimbalike hamlet in Kimanzichana informing him that the accused person was inside his room with his wife and had locked it as he was beating his wife who then was screaming for help. That, the way the deceased was screaming indicated was being heavily assaulted. Following that, PW2 reported the incident to Kimanzichana police station. PW3 the police office with his fellow polices together with PW2 immediately went to the scene. There, they met the door still closed and therefore knocked. The accused opened it and they introduced themselves to him who they were. Upon entering the room, found the accused's wife Salma Dotto Bofu lying down holding her head crying complaining for severe headache. They took the accused and his wife to Kimanzichana police station. There at the police,

the accused was detained into the lockup while his wife was given PF3 form and attended Irene Mission Hospital for medical treatment.

G5275 D/CPL Allimund (PW5) is a police officer who investigated the case by drawing the sketch plan (Exhibit PE.2) of the scene of crime on 5/08/2020. He drew exhibit PE.2 in presence of PW1 the hamlet chairman. This was hardly three months from 14/05/2020 when the incident took place. At the scene, he also recorded the statements of the witnesses and then compiled the case file and arraigned the accused before Mkuranga district court for the offence of causing grievous bodily harm to his wife.

On 21/10/2020 PW5 was informed by Zamaladi Amiri Bofu that the victim, Salma Dotto Bofu has died at Mkamba village in Mkuranga district. Following that, the charge of causing grievous bodily harm against him was withdrawn thereby substituting for it with the instant information of manslaughter.

PF20950 Assistant Inspector Raphael Kabisi (PW4) is police officer who together with Dr. Atasia Lameck Mlimakifi (PW1) on 21/10/2020 went to Mkamba village where the deceased died. There, the body of the deceased was examined by PW1 and filled Report on Postmortem Examination (exhibit PE.1). His findings were that, the cause of death was an attack to cerebra part of the head artery and thus died due to blood contusion.

Hamad Shabani Bofu (PW7) is the father of the deceased. He testified that, on 14/05/2020 having been informed by **PW1** the hamlet chairman that her daughter, the deceased, had been severely beaten by the accused, did visit her at Kilimahewa hospital where she was being treated and found her condition was unbecoming. He asked the doctor who told him that the problem was, the deceased had been beaten in the head and the chest. She continued being treated and later was discharged. That about three weeks later, the deceased's children went to PW7 and informed him that their mother (the deceased) was not feeling well. PW7 together with other relatives took her to the hospital. At first was Zakiem Hospital where she received first aid and thereafter referred to Temeke Hospital and then to Muhimbili National Hospital. That, they were told her problem is that of being beaten in her head and the chest. PW7 testified that her daughter is no longer alive, she passed away. She died having been discharged and was at home the time she died.

When cross-examined by the defence counsel, PW7 said that the deceased was taking HIV medicine at Muhimbili National Hospital.

The last prosecution witness was Asia Mnyamani Bofu (PW8). She testified that the deceased is her aunt. She testified that in July 2020 was phone by her son one Shabani Bofu that Salma Dotto was hurt and had taken

her to Zakiem Hospital. PW8 went to Zakiem but upon arriving met the Salma was already referred to Temeke. At Temeke she saw Salma, she was really sick. She was breathing through a machine. They continued taking care of her there at Temeke and later was referred to Muhimbili National Hospital. She was complaining of headache.

That, at Muhimbili National Hospital she got some relief but was unable to understand anything, showing a sign of memory loss. Later on was discharged. PW8 didn't ask any doctor at Muhimbili on what Salma was suffering from. Discharged, was taken to PW8's home who then stayed with her till her demise on 21st October, 2020. That during her stay with the deceased upon her discharge from Muhimbili National Hospital, PW8 was directed by the doctor that she should comfort her. PW8 testified that she did her best. That, one day, PW8 phoned the accused to come at her home to see her wife, Salma Dotto Bofu. He came and Salma Dotto recognized him. When the accused went away, Salma told PW8 on what befell her. That, she was beaten by the accused because of love affairs' misunderstandings based on jealousy. That, the accused continued coming to see her wife but upon her demise, had never seen him till on the date PW8 came in court to testify. This marked the prosecution case

In his defence, the accused person testified as DW1. He denied beating his wife Salma Dotto (the deceased). That, together with his wife were taken

to Kimanzichana police station and is where he was told the offence leading to his arrest that had beaten his wife. He denied the offence. he testified that, among those who wanted to bail him out was the deceased but had lacked qualification in bailing him. Arrest, when night time reached night, he was taken out of the lock up and beaten by the police due to denying to have beaten his wife, when asked on such. That, on 16/05/2020 the accused was bailed out by his brother and returned back to live with his wife (the deceased). That, he was charged with the offence of assault at Mkuranga District Court. Since the hearing date of the case was set far, the accused went to Kivinja village to conduct his daily routine as a traditional healer. There, having stayed for three days received a phone call from his father-in-law one Hamad Bofu (PW7) who told him that his wife had fallen into the toilet. That, the accused returned and met her condition was worse. They took her to Zakiem Hospital where she received first aid and medical examination revealed was suffering from HIV and had fallen down because of neglecting in taking the HIV capsules. The next day, she was referred to Temeke Hospital because her condition was deteriorating and on 5/08/2020 got transferred to Muhimbili National Hospital as her condition was not stabilizing. There, she was treated and stabilized thereafter was discharged. That, at Muhimbili National Hospital he was told by the doctors that his wife was suffering from HIV the disease which the accused is also suffering from.

Having been discharged, the accused took his wife back to their home and continued their normal life. Later, his wife went to Asia Mnyamani Bofu (PW8) at Mkamba village and the accused is the one who took her there having his wife having asked to go. The accused insisted his wife not to stop from taking the medicine. The accused person returned back and continued with his daily routine as a traditional healer. He went to Kilwa for his duties awaiting the date of attending in court at Mkuranga district Court.

That, on 20/10/2020 the accused phoned his wife to know her condition and was told was improving. On the same date during midnight, he received a phone call that his wife has passed away. His wife's brother one Nurudini Shabani Bofu and her aunti one ASIA MNYAMANI BOFU(PW8) are the one who phoned him. As it was night time, the next day, 21/10/2020 he travelled back home and informed his relatives and friends that his wife has passed away. He went Mkamba village where his wife died and they arranged burial services. On the afternoon they buried her. After burial he returned home and when the date of attending in court reached, he went to the court. It was on 14/11/2020. He was discharged by the court but at the entrance gate was arrested and taken to another honourable magistrate. There, was charged with murder case thereafter taken to Mkuranga police station and retained there. Evening time was taken out of the lock up for interrogation where he was asked if he killed his wife. The accused denied the charge and such denial

made the police beat him severely to the extent of breaking his last left finger and then thrown him back into the lock up. He was helped by his fellow remands into that lockup to uplift him. He stayed into the police remand for a month before being taken to Keko remand prison. That, it is until 13/7/2022 when the information of murder against him was substituted to the current manslaughter and upon bail application he was released on bail. The accused maintains that he not responsible for the offence.

Lastly Mwanaidi Said Kitika (DW2) testified for the defence to the effect that the deceased was her daughter in law married to her son the accused herein. Basically, DW2 corroborated the evidence of the accused (DW1) on how the deceased was taken to Zakiem Hospital followed by Temeke Hospital and later to Muhimbili Hospital due to her stoppage in taking HIV tablets as she was suffering from HIV. That, such stoppage led her to fell down in the toilet. That, in all those hospitals they passed through, her revealed problem was HIV decease. That, she improved upon using the dosage for HIV and later were discharged. she attended burial service of her daughter in law at Mkamba village. That marked the end of defence evidence.

Following closure of the case for both side, final submissions were filed. It is the prosecutions final submissions that the information of manslaughter against the accused person stand proved on the basis of unchallenged evidence of PW2; PW3; PW6 and PW8 that the accused person on 14th May,

2020 inflicted injury to the deceased which caused her to suffer cerebrovascular accident the piece of evidence being supported by PW1 and the Report on Postmortem Examination (exhibit PE1). In support, the cases of **Nyerere Nyague versus Republic**, Criminal Appeal No. 66 of 2007 CAT at Arusha; **Cyprian A. Kibogoyo versus Republic**, Criminal Appeal No. 88 of 1992 CAT and **Paul Yusuf Nchia versus National Executive Secretary, Chama cha Mapinduzi and Another**, Civil Appeal No. 85 of 2005 CAT (Both unreported). In these cases, the court of appeal held that failure to cross-examine a witness on a certain matter implies to have accepted that matter and will be estopped from asking the court to disbelieve what the witness said.

The prosecution also cited to this court section 205 of the Penal Code, [Cap.16 R.E. 2022] which provides that a person would be responsible for the death of the deceased if that death occurred within one year and one day from the date of the unlawful act. Thus, since the death of the deceased occurred few months from the date of unlawful act which implicates the accused person, he is therefore responsible for the said death.

On the other hand, it is the defence final submissions that the prosecution has not proved their case against the accused beyond a reasonable doubt. That, the evidence adduced by the prosecution is purely circumstantial there being no any witness who saw the accused committing

the allegedly the offence against the deceased asserting that there is no any tendered exhibit connecting him to the offence. Nothing proves that it is the accused who killed the deceased. That, the allegations that on 14th May, 2020 the accused person assaulted the deceased are unproved one. That, since the prosecution alleges the deceased after the assault was taken to Irene Mission Hospital; Mbagala Zakhem Hospital, Temeke Hospital and Muhimbili National Hospital then medical chits from those hospital are material exhibits which ought to be tendered to prove that the deceased was diagnosed with the traumatic brain injury.

That, the deceased might have had injured by something else due to lapse of time reckoned from 14/05/2020 allegedly she was assaulted to 21st October, 2020 on which she died asserting that the material witnesses were not called by the prosecution. These are the medical doctors who attended the deceased after the 14th May, 2020 incident of assault submitting that such failure to call them is fatal and this court is referred to the case **Mashimba Dotto @ Lukubanija versus Republic**, Criminal Appeal No. 317 of 2013 CAT at Mwanza (unreported) wherein the court, at page 13, referred the case of **Azizi Abdallah versus Republic** [1991] TLR holding that: -

"The general and well-known rule is that the prosecutor is under prima facie duty to call material witnesses who from their connection with the transaction in question are able to testify to

material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw and inference adverse to the prosecution.

That, PF3 which was an essential document to show the deceased was treated subsequent to the assault incident was not tendered thus leaving doubts on the prosecution case. The defence, cited the case of **R vs Cameron** [2003] TLR 84 which laid down a number of principles as the basis of grounding conviction on circumstantial evidence thus: -

- (a) The evidence must be incapable of more than one interpretation*
- (b) The facts from which inference of guilty is drawn must be proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred*
- (c) In murder cases, evidence should be cogent and compelling as to convince jury, judge or the court that upon no rational hypothesis other than murder can the facts be accounted*

Also, the case of **William Ntumbi versus DPP**, Criminal Appeal No. 320 of 2019 CAT at Mbeya (unreported) is cited which was to the effect that

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evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed.

I have gone through the evidence by both sides as well the final submissions. The issue for determination is whether the prosecution has proved the information of manslaughter levied against the accused persons.

The charging section for manslaughter is section 195 and 198 of the Penal Code, [Cap. 16 R.E.2022] which provides as follows: -

"S.195(1) - Any person who, by unlawful act or omission causes the death of another person is guilty of manslaughter

(2) - Any unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether the omission is or is not accompanied by an intention to cause death or bodily harm."

From the instant information of manslaughter, the accusation against the accused is that on 14th May, 2020 he assaulted his wife, Salma Dotto Bofu, while at inside their room at Kimanzichana village in Mkuranga district in coastal region. In the evidence adduced, when the accused opened the room, witnesses entered in and found Salma Dotto Bofu holding her head complaining for headache. These witnesses went to the accused's home because Hawa Mohamed Mbonde (PW6), a tenant like the accused in that

house, had heard Salma Dotto Bofu screaming, reported the incident to the hamlet chairman one Ismail Kibumi Mboweto (PW2) who then reported it to Kimanzichana police station. H2228 CPL Japhet (PW4) and PW2 entered the accused's room. When the accused opened the door, found no one else in that room except the accused and his wife, Salma Dotto Bofu. Therefore, although there is no one who witnessed the accused assaulting his wife, circumstantial evidence obtaining at the scene points at no one else but the accused as the person who carried out such unlawful act of assaulting Salma Dotto Bofu.

It is also undisputed fact that Salma Dotto Bofu is no longer alive as evidenced by the Report on Postmortem Examination (exhibit PE.1) tendered by Dr. Atasia Lameck Mlimakifi (PW1). She died on 21 October, 2020 which is five months and seven days from the date she was assaulted by her husband, the accused herein. The question to ask is? Is the death of Salma Dotto Bofu occurred on 21st day of October, 2020 a result of the assault committed on her on 14/05/2020 by the accused?

In resolving this, I will be guided by the evidence adduced. The hamlet chairman (PW2) and H2228 CPL Japhet (PW4) gave evidence that on 14th May, 2020 when the accused was arrested and detained into the lockup at Kimanzichana police station, PF3 was issued to Salma Dotto Bofu and went to Irene Kilimahewa Mission Hospital for medical treatment. Out of the PF3,

this court is denied the right of knowing what was the diagnosis of the victim of assault, the deceased. This is because PF3 was not tendered in court.

Again, there is no dispute from both sides that the deceased after sometimes from the date of assault incident, she attended medical treatment at Zakhem Mbagala hospital, Temeke Hospital and lastly Muhimbili National Hospital. No any medical chits from any of these hospitals which is tendered in court. Tendering of the same would have enlightened the court on what exactly the deceased was suffering from so as to find out if there is any link with the assault meted on her on 14/05/2020 by the accused. The only document tendered is the Report on Postmortem Examination of the body of the deceased (Exhibit PE.1). This report shows the deceased died of **cerebrovascular accident (CVA) due to the traumatic brain injury she suffered three months ago by then**. This medical examination was carried out on 21st October, 2020 meaning the deceased sustained the said cerebrovascular accident July, 2020. On the other hand, the evidence on record is that, the accused assaulted the deceased on 14/05/2020. This means, two months later from the date on which she was assaulted by the accused, the deceased sustained that cerebrovascular leading to her death.

This being the cause, linkage between assault against her as committed on 14/5/2020 by the accused herein was broken in July when she sustained

that injury recorded by the doctor (PW6) as exhibited by report on postmortem examination (exhibit PE1).

The cumulative effect of failure to tender in court medical chits as well the Police Form No. 3 (PF3) which could have shown the nature of the bodily harm the deceased sustained on the fateful date of 14/5/2020 upon being assaulted by the accused, coupled with the tendered exhibit PE1 which shows that she died out of a July, 2020 incident which is a new incident and the same being not said was caused against her by the accused herein, in my considered view, therefore, I find nothing as proof linking the 14/05/2020 assault incident committed by the accused against the deceased to her death on 21st October,2020.

Following the above exposition, I find the prosecution have failed to prove the offence of manslaughter against the accused. Thus, I find him not guilty of the offence. Consequently, I hereby acquit him and order for his immediate release unless is otherwise held for other lawful cause.

It is so ordered

Right of Appeal fully explained

DATED at **MBEYA** this 31st day of May, 2024.


MUSA K. POMO

JUDGE

31/05/2024

COURT: Judgment delivered at Mbeya sub-registry of the High Court via video conference in presence of Mr. Clement Masua, learned state attorney for the republic, the accused person represented by Mr. Ramadhani Makange, Advocate holding brief for Ms. Hilda Mushi, learned defence counsel and also B/C Zubeda, all appearing before Dar es Salaam sub - registry of the High Court of Tanzania. Right of appeal fully explained




MUSA K. POMO
JUDGE
31/05/2024