

**IN THE HIGH COURT OF TANZANIA**  
**MUSOMA SUB-REGISTRY**  
**AT TARIME**  
**CRIMINAL SESSIONS CASE NO. 27 OF 2023**  
**REPUBLIC**  
**VERSUS**  
**ORACHA S/O DISMAS AUMA**  
**JUDGMENT**

*11<sup>th</sup> & 18<sup>th</sup> March, 2024*

**M. L. KOMBA, J.:**

The accused herein is alleged to kill Tatu Christian Oracha in the night of 29/11/2022 (the two are husband and wife). According to prosecution the two were at their home and Tatu Christian Oracha was found severely injured inside her bedroom while surrounded with blood. Prosecution held her husband responsible for death and charged him with the capital offence, murder, contrary to section 196 of Penal Code, Cap 16. Accused denied the charge levelled against him hence full trial.

What happened to Tatu Christian Oracha can be summarized by four (4) prosecution witnesses; Carolina Dismas (PW1), Peter Adera Odira (PW2), Doctor Nicolaus Benedicto Nsiko (PW3), F.2025 DC Sgt Khalid (PW4) and one exhibit.

Carolina Dismas appeared as PW1 and testified that on 29/11/2022 she was at her home with children and emerge **ORACHA S/O DISMAS AUMA** telling her that Tatu Christina is calling her. He escorted Carolina to his home in order to see his calling wife. Upon arrival, this witness found Tatu sitting on her bed, holding his head and bleeding from the head. The whole body of Tatu had blood.

When this witness asked Tatu what happened, the latter replied she was beaten by her husband. When accused was asked on reasons for his action he replied to this witness it was Tatu who started the fight by beating accused. This witness called his husband who is Dismas Auma who was at the centre for further assistance. PW1 testify further that Dismas Auma requested the victim to go to hospital but she refused. After one hour that is 21:00 hrs victim was weak and was taken to Kowak hospital by her husband, (accused) and the witness husband, Dismas Auma. Around 22:00hrs they received information that Tatu has died.

While cross examined this witness testified that Tatu and herself are married in the same family that is Dismas Auma and Oracha Dismas are brothers. Tatu and her husband was in good relationship although Tatu becomes rough when she drunk alcohol. Confirming her testimony, she

informed this court that one day when she was drunk she injured her husband on head and that the society know Tatu like and enjoy drinking. She further testified that when he was advised to marry another woman, accused refused and bid to tolerate her wife on her habits. This witness was not sure if on the fateful date Tatu was drunk as she (Tatu) did not pass at witness's home but she confidently testified that it was Oracha who spread the news that Tatu was injured and took her to hospital.

This witness go on testified that when she meet Tatu on that day she did not asked what was wrong although she know Oracha was not a man of revenge. Deceased had four children who previous advised their mother to shift from Katoro where they were used to live and moved to Butuli due to her bad behaviour as she had offensive language and like fighting. After she was injured, she clarified that Tatu refused to go to hospital until when she was unconscious is when her husband managed to take her to hospital.

About the environment of the room where Tatu was, this witness said she saw one club on the floor and it was normal for their homes to have such a weapon as they use it to control cows (machungani) and Oracha had cows in his homestead.

Peter Adera Odira testified as PW2 a Kasino hamlet leader who under oath informed this court that on 29/11/2022 at night he saw Shukuru Oracha Auma (accused's son) and Martin Osomba who is the brother of Tatu a wife of Dismas Oracha. It was Martin who informed this witness that Oracha Auma has beaten Tatu. To confirm the information he decided to ask Shukuru what was wrong as he know well Shukuru who replied "father has beaten mother and she is full of blood." Following that confirmation, he decided to go to the scene and found many people at the sitting. Upon greetings, Tatu heard his voice and called in the room where she was.

Witness further testified that in the room he found blood in the floor and two clubs on the floor, one was broken. While in the room Tatu told him that Oracha has beaten her like thief and that he is killed her by his hand. When she was asked where blood from Tatu came from, she show this witness wound on the head and one broken hand. From the circumstances at the scene, he wrote introduction letter to police and handled to Abiso Auma for assistance at the police post. He said he did not saw Oracha Dismas in his home at that time. He informed police who emerge at the scene on time and handled to them two clubs and leave with it.

When he was informed of the death, witness informed police and agreed to meet at Kowak Hospital where the deceased was getting treatment. Upon arriving to the hospital, they found the Oracha Dismas under custody of hospital watchman. He managed to see the dead body of Tatu while he was with police and doctor and then they left. He further testified that on 30/11/2022 he went to the house of Oracha Dismas with police investigator who observed the scene, draw sketch map and allowed the place to be cleaned.

During cross examination PW2 testified that the deceased did not inform him the source of their fight, he was not the first person to talk to deceased as he knew Carolina talked to Tatu before her death. About club and blood at the floor he testified that it is normal to find clubs in their house and without hesitation he informed this court that it was Dismas Auma who took Tatu to hospital.

He denied to know the social habit of the deceased specifically on drunkenness because they shifted from Geita to Makongoro village. After the incident Oracha Dismas did not run away and elaborated that he doesn't remember the name of the police he gave clubs but the documents for signing was sent to him by investigator.

Doctor Nicolaus Benedicto Nsiko testifies as PW3 and informed this court that 06/12/2022 he received a police officers named Khalid and Leonard who requested the dead body of Tatu Dismas Oracha which was in Utegi mortuary to be examined. By physical appearance, witness said it was a female who had wound at the head, right hand and right leg. At the head the wound was 4cm wide and 6 cm deep, the right leg was broken at the lower limb and fore arm of the right hand was injured it was swallowed like 6 cm width. According to this witness wounds were caused by a blunt object. And as per his observation he informed this court that cause of the death is severe traumatic brain injury. This witness filed a post-mortem report (Exh P1).

During cross examination he testified that he did not know where the death occurred but he examined the body while at Utegi Health Centre after being introduced to him by Leonard and one police called Khalid. He did not take x-ray but he use tape measure to measure the size of wounds. He insisted on the cause of death to be brain damage resulted from beaten by blunt object on the head although there are other causes of brain damage.

There after prosecution paraded F.2025 DC Sgt Khalid (PW4) who was informed to go to Makongoro village where the crime occurred. By assistance of PW2 he managed to arrive at the house of Oracha Dismas Auma which was in Makongoro Kasino. This witness was joined by Assistant Inspector Emmanuel whom together they entered in the room where deceased use to sleep with her husband. He testified that they find a room had blood on the floor and find two magongo (logs) which were used to beat the deceased and seized them. They went to Kowak hospital where the victim was treated and found she was already died. Sgt Khalid further testified that in collaboration with relatives, they agreed to store the dead body to Utegi mortuary and Oracha Dismas was taken to Kinesi police post. He draw sketch map of the scene of crime which was admitted as Exh P2.

During cross examination he testified that clubs were given to Insp Emmanuel whom they were together at the scene and the certificate of seizure was signed on the same day and acknowledged he did not tender them as exhibits. By the time they collect magongo/ marungu the accused was in hospital. This witness was present when postmortem was conducted although he did not know size of the wound which was at the head. About

the use of Utegi mortuary he testified that it was the duty of relative to keep the body of their loved one while his duty was to maintain peace.

Upon this court rule that there is premafacie case which was established by prosecution, accused promised to defend his case under Oath. He testified as the only defence witness DW1. On the fateful day he was at the centre drinking alcohol (a local brew mixed with K-Vant) after he was satisfied he went back home. His wife Tatu opened the door and she went in bedroom and bend on door of the room, when accused entered, his wife pushed him telling him to go back where he was drinking and he was attacked by club. Following the attack, this witness said they started to fight and accused pushed his wife and fall over the broken chair which was inside their room and his wife hit the head. She cried for pains while this witness was at the sitting room. His wife called him to go to the bedroom with a lamp it was at that time he noticed his wife was injured and she was bitter. She drunk *moshi* as he was smelling it.

He informed this court he went to the house of his brother Dismas Auma for assistance to take his wife to hospital as she was bleeding and refused to go to hospital. With assistance of his brother, they managed to took her to Kowak Hospital for treatment and died while under medication.

It was accused testimony that his wife used to drink alcohol and when she drink she becomes cruel. She had two cruelty incidences where she was arrested and taken to police. One day his wife cut him on his head and shoulder with Machete remains with marks. Accused further testified that when his wife died, he nursed, guard and himself store the body of her wife into mortuary within Kowak Hospital before he was taken into custody for safety.

While cross examined by State Attorney accused informed this court that when his wife cut him on head they settle the matter as the family although police knew of the incidence because doctors needed PF3 before they attended him. But he forgiven his wife. He further testified that on 29/11/2022 Tatu had only one wound at the head and insisted she was notorious when she drink. Proving notorious habit of his wife, he testified that in one of the cases, she was ordered by the Primary Court to pay fines.

State Attorney requested and both parties agreed to make final submission.

It was Mary Samson who begins to make submission that accused is charged of murder and it is the prosecution who is burdened to prove their case beyond reasonable doubt. Confidently she submitted that there is no doubt that Tatu Dismas Oracha is dead and the death is not normal. The only question to be determined by this court is whether accused person is responsible for the death and whether he did that intentionally.

She said none of the prosecution witnesses testified in court to witness what went on in the room of Oracha Auma on the fateful day. All witnesses had ear say information including Caroline Dismas (PW1) who informed this court that she was informed by deceased that Oracha beat her. The same was testified by (PW2) he heard from deceased that Oracha beaten his wife. Both did not testify on the source of the fight. Further PW1 disclosed in court that deceased was a person of her kind (notorious) and the family knew that.

PW1 further testified that it was the deceased who started the fight with the accused as testified by accused. Accused was in defence and pushed his wife. It is the habit of the deceased which caused her death. Counsel submitted that the assertion that deceased was beaten by club was not proved as PW2 said they gave clubs to PW4 and then PW4 accept to

receive and store clubs seized but clubs were not tendered for this court to assess its size. By failure of the Republic to tender the said exhibits apart from contradictions on signing of the certificate of seizure, counsel prayed this court not to believe prosecution story of club to be used but to believe what was testified by accused that he pushed his wife and fall over the broken chair.

Counsel further has a concern on how the body of the deceased was handled. It was her submission that after injury, Tatu was treated at Kowak hospital and she died while at Kowak hospital but PW3 informed this court that he works at Utegi dispensary and he conducted post mortem to deceased while at Utegi dispensary without explaining how the body arrived at Utegi Dispensary. PW4 confirmed that death occurred while at Kowak and the body was transported to Utegi for storage without proof on how the body was transported from one hospital to another dispensary as the body was under control as there was criminal case. She prayed this court not to consider the postmortem report because of lack of chain of custody of the body. Generally, counsel prayed this court to find her client had no intention to kill as there was a fight between accused and his wife

as the prosecution failed to prove malice aforethought to the offence of murder.

On the hand Prosecution presented by Ms. Monica Matwe submitted that in fulfilling that duty to prove the case they had four (4) witnesses and two exhibits and the defence had one (1) witness. In their final submission prosecution raise four issues; **One** whether Tatu was killed unlawful, **Two;** whether the accused murdered Tatu, **Three;** whether malice aforethought was proved and **Four;** whether the case against accused was proved beyond reasonable doubt.

On the 1<sup>st</sup> issue the prosecution had three witnesses, PW1 and PW2 went to the house of deceased and found wife of accused injured on head and surrounded by blood and both testified that deceased was taken to Kowak hospital where she met her death and postmortem report shows cause of death was traumatic brain injured. Due to the observation of PW3 the death was unnatural.

On the 2<sup>nd</sup> issue Ms. Matwe submitted that prosecution has 2 witnesses. PW1 and PW2 who went at the crime scene and communicated with deceased person and mentioned her husband who is the accused. On the

3<sup>rd</sup> issue, she submitted that malice aforethought can be proved in various circumstances as provided in the case of **Charles Bode vs Republic**, Criminal Appeal No. 46 of 2016 that among the factors to be considered are weapon used to injure victim as stated with PW1 and PW2 and collaborated by PW4 who found club at the scene, part of the body has to be considered as deceased was attacked to her head and cause of death is reported to be severe brain damage. On that account she said Republic has succeeded to prove malice.

On the last issue (4<sup>th</sup>) she said Republic has two kind of evidence which are dying declaration and circumstantial evidence. Prosecution paraded PW1 and PW2 who communicated with deceased before her death and mentioned accused person as the one who attacked her. That was collaborated by the evidence of PW3 and PW4. A doctor PW3 examined a deceased body and found injuries was caused by blunt object. Further State Attorney submitted that PW4 found two clubs and one of them was broken.

For dying declaration to be relied the court has to prove its accurate and its truthfulness as was in **Mwiburi Muriro @ Hamis Michael Mg'ururi and Two Others vs Republic**, Criminal Session No. 14/2022 at page 14. She

prayed this court to regard oral dying declaration as accurate and true. Another circumstantial evidence as presented is where PW1 testified that it was accused who went to her home and requested to take Tatu to hospital, PW1 found deceased was bleeding and injured. It was her submission that not every killing must have an eye witness as was in **Mashaka Juma Tatura vs Republic**, Criminal Appeal No. 140/2022 CAT Shinyanga at page 15. Accused and deceased were alone in the room and therefore she invites this court to confirm circumstantial evidence.

Together with evidence, prosecution admitted they failed to tender two clubs seized at the scene believing it was not necessary to tender weapons used or else many murder cases could not be prosecuted as was in **Alexander Peter Mvungi @ Alex Kandamiza vs Republic**, Criminal Appeal No. 395/2019 Cat Moshi. She prayed this court to find failure to tender the two seized clubs lacks merit and proceed to convict accused with available evidence.

She further prayed this court to find contradictions on number of clubs used in the crime to be minor discrepancies due to lapse of time as the matter occurred in 2022 and now is 2024 as sometimes discrepancies are expected and considered normal errors in observation, normal errors due

to memory loss, lapse of time and shock. Finally, she informed this court that the Republic has managed to prove their case beyond reasonable doubt and for conviction accused to the offence of murder as charged.

As presented by both counsel in their submission that accused is charged of murder contrary to section 196 and 197 of the Penal Code. The charge is serious because it involves a death sentence penalty to the convict unless the same is not proved on the standard required by the law. Therefore, at this early stage, I wish to point out that in order to win conviction, the prosecution must prove their case beyond reasonable doubt as required of it under section 110 of the Evidence Act, CAP 6 R.E. 2022, short of that conviction will fail as it is not the duty of accused to defend, rather, evidence led by the prosecution must incriminates him to the extent that there is no other premise than the fact that the accused person committed the offence with which he stands charged. (See **Anthony Kinanila and Another vs The Republic**, Criminal Appeal No. 83 of 2021 (unreported)).

In the case at hand, the accused is charged of murder and section 196 reads;

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

During final submission both counsel were of the position that Tatu Oracha Dismas (Tatu) was dead and her death was unnatural. I shall not repeat the fact on those findings as this court also has the similar position.

That being settled, it is the duty of the prosecution to prove the case against the accused persons at two stages; first that it is the accused person who killed the deceased Tatu Oracha Dismas and secondly, that he did commit the killings with malice aforethought as stipulated under section 200 of the Penal Code. There is no doubt that PW1 and PW2 talked to Tatu while at her room and mentioned her husband to be responsible for her injury. The same position was submitted by both counsel during final submission. Defence counsel was of the position that both prosecution witnesses did not testified on source of the fight among the two although PW1 and PW2 explain they were informed by deceased that it was accused who attacked deceased and PW1 further testified on the habit of the deceased of notorious/cruelty/ nastiness.

Basing on PW1 and PW2 testimony prosecution maintained that it was accused who killed his wife and he did that purposely due to the weapon used to commit the said offence which is club and the position, the blow

was directed on the head. Basing on decision in **Charles Bode vs Republic (supra)** the accused had ill intention.

In law there is a principle that each case has to be decided basing on its own facts. See **Nestory Simchimba vs Republic**, Criminal Appeal No. 454 of 2017, **Mr. Henry Leonard Maeda and Another vs Mr. John Anael Mongi and Another**, Civil Application No. 31 of 2013, **Republic vs Hussen s/o Malulu @ Elias & 3 Others**, HC at Shinyanga (unreported)

There is no doubt that the accused and his wife are the only people who were at the scene. After the injury of the wife, it was accused who spread the new of injury and looking for assistance, that was testified by PW1. One question as reasonable man can ask is, if accused intends to kill why did he look for assistance after the injury of his wife? In determining presence of malice in the side of accused Court of Appeal in the case of **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994 (unreported) discussed what entails malice aforethought as was quoted in **Charles Bode vs Republic (supra)** saying that: - "Usually, an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following:- (1) the **type and size of the weapon** if any used in the

attack; (2) the **amount of force** applied in the assault; (3) the part or **parts of the body** the blows were directed at or inflicted on; (4) The **number of blows**, although one blow may, depending upon the facts of the particular case be sufficient for this purpose; (5) The **kind of injuries** inflicted. (6) The attacker's utterances if any; made before, during or after the killing and **the conduct of the attacker** before and after the killing. (7) The **conduct of the attacker** before and after the killing.

Prosecution pointed weapon used and part of the body where blow was directed. I agree with party of the body injured which was head. Reading PW1 testimony careful, she informed this court that deceased mentioned her husband that is the one beat her but she did not testify if any weapon was used. It was the testimony of PW1 and PW2 that there was club(s) in the room but both explained that it was normal for a house to have a club as is used to keep cows and the accused had cows. Basing on the case of **Charles Bode vs Republic (supra)** as cited by State Attorney, I find type and size of weapon used is important to determine malice in collaboration with the force used. It was uncertain to prosecution on whether in room they found clubs or logs (rungu au gongo) as the PW4 testified on the use of both names. Type and size of weapon found in the

room remain to be uncertain as prosecution did find importance of assist this court in assessment of the weapon by tendering them. See **Aziz Abdallah vs Republic**, [1991] TLR 71, **Boniface Kundakiva Tarimo vs Republic**, Criminal Appeal No. 350 of 2008, **Emmanuel Kabelele vs Republic**, Criminal Appeal No. 536 of 2017.


Further the kind of injury has to be considered in establishment of malice. There is no doubt that deceased had a wound on his head and as per Exh P1 the wound was caused by a blunt object and source of death was severely traumatic brain injury. The body was examined while at Utegi Health Center while death occurred in Kowak Hospital. None of prosecution witnesses explain how the body was handled from death to the time of examination and preparation of the Exh P1. I am of the firm finding that the body of deceased was poorly handled bearing in mind that the cause of death was wound, and the wound was examined seven days after occurrence of the death (29/11/2022-06/12/2022) as per Exh P1. There is no good reason registered by prosecution on delay to examine the dead body which was the cause of this case. See **Laurent s/o Rajabu vs. The Republic** Criminal Appeal No. 270 of 2012.

Further to that, this court consider words of attacker (accused) after the crime and his conduct. PW1 testified that she was informed by accused at the early stage that it was deceased who started the fight and it was accused who spread the news that Tatu was injured. Apart from Doctor, all prosecution witnesses testified that accused assisted his wife and took her to hospital and he was with her till her death. His conduct after the fight was positive as he assisted to inform relative and make sure deceased was taken to hospital.

The duty of the defence in criminal case is to create doubts over prosecution case. See **Abas Matatala vs Republic**, Criminal Appeal No. 331 of 2008 CAT. It was the defence by accused that he was fighting with her wife and it was the wife who started the fight. In the cause of fighting, his wife fall down and hit her head at the broken chair and injure her head. For the second time, prosecution denied this court a look of the room where the alleged fight took place as Exh P2 explain nothing about contents of the room. Accused just like other witnesses he deserve credence unless there are reasons for not according it. See **Allan Duller vs Republic**, Criminal Appeal No.367 of 2019 (unreported).

To this end I find the prosecution has failed to prove malice to the offence levelled against the accused, that is malice in murder. So far as prosecution proved and accused did not deny to fight with his wife and in cause of the fight his wife falls on the broken chair and hit her head. The fact that accused assisted his wife for medical attention and she died while under medication, this court is satisfied that accused cause the death of deceased without intention and I find the accused person guilt of a lesser offence of manslaughter. That being so I hereby convict **ORACHA S/O DISMAS AUMA** with the offence of manslaughter contrary to section 195 of the Penal Code.



  
**M. L. Komba**  
**Judge**  
**18<sup>th</sup> March 2024**

### **SENTENCE**

Having heard aggravating and mitigation factors and considering the age of the accused and the fact that there was a fight among them, I hereby sentence the accused to two years imprisonment for the offence convicted. In considering he has spent 1 year and four months in custody, the period

There is no doubt that deceased had a wound on her head. This accused shaken the prosecution evidence by his testimony that deceased hit her head on chair. In the absence of proof of the use of wooden log/club to beat the deceased, prosecution has failed to clear doubt on the cause of wound which cause death of the deceased.

Further, the body of deceased was not kept in a manner to maintain the size of the wound which, was the only cause of death, for postmortem report to be filled and convince any court of law that deceased death was due to the wound, the body of the deceased was the important exhibit but the handling was poor hence creates doubts on the size of wound while Tatu was under treatment and the wound found during postmortem. See **Paulo Maduka and 3 others vs. Republic**, Criminal Appeal No. 110 of 2007 and **Republic vs Jacobo S/O Olambo Muna @ Jack** (Criminal Sessions No. 190 of 2023) [2023] TZHC 21999 (20 October 2023). In our legal regime doubts has always decided in favour of accused. See **Mabula Makoye and Another vs Republic**, Criminal Appeal No. 227 of 2017 and **Akwino Malata vs Republic**, Criminal Appeal No. 438 of 2019.

spent in custody is reduced and accused Oracha Dismas Auma has to serve eight (8) months in prison.



  
**M. L. Komba**  
**Judge**  
**18<sup>th</sup> March 2024**

Right of appeal is fully explained.

  
**M. L. Komba**  
**Judge**  
**18<sup>th</sup> March 2024**