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IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 46 OF 1997

R E P U B L I C

VERSUS

RICHARD BENJAMIN MNGULWI

J U D G M E N T

KIMARO, J.

This is a case in which Richard Benjamin Mngulwi is charged with murder c/s 196 of the Penal Code. The person who is alleged to have been killed, one Conrad Kilonzo Mngulwi is the accused's natural brother. The offence is alleged to have been committed on 25th day of May, 1997 at Mabibo area, in Kinondoni District.

The accused denied the commission of the offence. He was defended by Learned Advocates Major Nnko, Ms Kasonda and Mr. Michael Ngalo. The prosecution on the other hand was first led by Learned State Attorney Mr. Mtinangi. Later on, Learned State Attorney Mr. Mndemu took over.

The case is not complicated. However, it is unique. Unique in the sense that it was committed in the presence of persons, yet no witness was bold enough to tell the court who inflicted the injuries which led to the death of the deceased. Reasons for such an attitude are not far to find. The accused is a spouse and a father to the witnesses who were present when the offence is alleged to have taken place.

The facts and the evidence establish the following position.

The accused and the deceased are relatives. As stated before they are natural brothers. The accused was a married man. He was married to one Neema Mngulwi. Neema Mngulwi testified in this trial as PW2. Unfortunately, she died before the trial was concluded. The accused was living in his own house with his wife, children, the deceased and a house girl. They were living at Mabibo Makuburi area. One of his children, (Nasia Richard) testified as PW3. The house girl, (Angela Kayoka) testified as PW4.

In the afternoon of 25/05/97, the fateful day when the incident took place, the accused's family had various visitors. The visitors were the accused's natural brothers, their spouses for those who had them, and their children. They had assembled in the accused house for what was described as a normal family gathering. The visitors turned up but not in response to any invitation. It was a normal visit which in our customary tradition does not require any service of a prior notice to the accused and his family.

The accused left in the morning of that day to his building site. On his way, he met one of his brothers and his family. That was Mr. Silvester Kinyolo Mngulwi. Silvester informed the accused that he was heading forwards his (accused's) residence. The accused and his brother agreed that the two should remain and visit the building site together because Silvester is an engineer. Silvester's family was directed to go to the residence of the accused with the deceased who was then with Silvester.

At the accused's family premises, other brothers and their families came in. They ate and drank. The accused's wife who was at home after attending the morning mass on that day, which was a Sunday, remained at home and welcomed some of the visitors. She stayed there with the visitors until later in the afternoon when she left and went to work. At the time the wife of the accused left, her husband who is the accused had not returned home.

The accused returned home at about 2.00p.m. He was with his brother Silvester. He found his other brothers and their families there. It was only his children and the deceased who were present. His wife had also not returned. The absence of his wife at home while they had visitors, disappointed the accused. The disappointment is reflected in the confrontation which took place immediately the accused's wife returned home.

She returned home at about 6.00 p.m. Even before the wife had greeted the visitors, she was required to explain which tradition allowed her to have visitors and then leave them behind on their own. The intervention by some of his brothers quelled the confrontation. His wife was then able to greet the visitors and joined them. The visitors continued drinking until when the time for leaving came and they left.

After the visitors left only members of the family remained. This time the accused raised the same question again. That is why did the wife leave, leaving the visitors alone. The wife whom I have already said that she testified as PW2, said that the accused raised the same question again while she was eating. It is important to have it mentioned here that despite of the fact that the wife of the accused was informed of the

privilege she retained under Section 130 of the Evidence Act, 1967 not to testify against a spouse in Criminal Proceedings, she opted to testify. Her testimony was that much as the accused seemed not to be angry or disappointed, she left the house and went outside through the kitchen door. The witness denied existence of any quarrel. According to her, she disappeared in the dark but hid herself at a position where she could see what was taking place. That the accused followed her as well as the deceased. As the accused failed to see her, he returned into the house. The same with the deceased. Later on, she heard her children shouting. She went into the house. She found the deceased had dropped on the floor and was snoring. His intestine was outside. She could not see the wound because a large portion of the intestine was outside.

The accused's wife was a trained nurse. She attended the deceased by removing him from the place where he had fallen and put him in a place where she could administer first aid to him and she did so. Later on, the deceased was taken to hospital. PW2 said she did not see anybody who escaped from the house. She said although Nansi (PW3) and the house girl, Angela (PW4) were present when the deceased fell down; no one was able to explain what had actually taken place.

The deceased died before he could be treated by a doctor. Exhibit P1 which is the post mortem examination report was admitted in court without any objection from the defence. It shows that the cause of death was haemorrhagic shock. The report shows that the deceased had an infraumbilical sharp wound size 4cm by 1.5cm. A loop of intestine size 6cm with omentum protruding out. The doctor who conducted post mortem, also observed two perforation of the large intestine. He also scooped 500 mls of mixed blood clots and fresh blood.

The child of the accused Nansia Richard (PW3) admitted that the accused questioned her mother where she was and her mother remained silent and went outside. The accused and the deceased followed her. Later the deceased and the accused returned inside the house. It was after the said event that the deceased dropped on the floor after being injured. However, she was not able to tell the court who injured him.

Likewise, the housegirl, Angela gave a narration of the confrontation which took place between the accused and his wife on why her absence while there were visitors at home. The witness said the wife did not reply. Instead she went outside, in the darkness. The accused and the deceased followed her. Later the deceased returned into the house. The same with the accused. Later, she heard as if a bag had fallen down and when she went to watch, it was the deceased who had fallen on the floor at the corridor. She explained how the wife of the accused returned into the house and then administered first aid on the deceased before he was taken to hospital.

One Victor Msilangi was PW5. He was a neighbour of the accused. He testified of having volunteered in taking the deceased to hospital when he was asked for assistance. According to this witness, the deceased was seriously injured and he could not walk. It was the accused's wife who took an active role in assisting the deceased. She is the one who administered first aid as well as looking for transportation to take him to hospital as well as escorting him to hospital. That the accused remained at home.

The other prosecution witness, Inspector Issack Msangi PW1 told the court that the accused has been prosecuted because the offence was committed in the presence of family members and when there was a quarrel between the accused and his wife and he was injured when the quarrel was taking place.

The last piece of evidence for the prosecution is a statement of one Aloyce Mushi Kasmili which was admitted in evidence under section 34B of the Evidence Act, 1967 because it was very difficult to secure physical presence of the witness.

In his statement, Mr. Mushi admitted passing at the accused house after the incident occurred. He said he was on his way home. He stopped after hearing people crying and seeing a lot of people around. It was then he decided to go inside to render assistance. He also assisted in taking the deceased to hospital. Mr. Mushi admitted being at the accused house on that day and also being with him when he went to his building site. Equally admitted by him, is the fact of his sleeping at the deceased room. However, he said he left long before the incident occurred. He also explained about the relationship which was established between himself and the accused.

The evidence which the prosecution is relying upon is:

- i) *The deceased was injured in the accused house.*
- ii) *In the presence of family members.*
- iii) *During a quarrel between the accused and his wife
and*

iv) *The passive role played by the accused after the deceased had been injured*

The view of the prosecution is that such evidence is sufficient to prove that the accused is the one who committed the offence.

In his defence, the accused gave his brief history, qualifications and the activities he engaged on, on that day before the incident occurred. He explained that he was angered by his wife's absence while there were visitors at home. He interpreted that absence to amount to ignoring his family. He admitted the confrontations he had with his wife. First in the presence of the visitors and second after they had left. According to the accused, the second time he confronted his wife, there was no reply. By then he had made a conclusion that she had gone to Kakobe's church. Earlier on, the wife told the court that after going to work, she also attended fellowship where bible lessons are given. According to the accused, he told his wife to go back to where she had gone. Such a decision was taken because a month before, the same incident had occurred and the accused wanted to separate with his wife. However, the accused's wife apologized. According to the accused, he did not expect his wife to repeat the same thing. As she repeated the same thing, he told her to leave. The wife left. The accused followed her. The purpose was to ensure that his wife left his house. They used the kitchen door.

The accused further defence was that it was after ensuring that his wife left the house that he returned into the house and then locked the kitchen door. He then warned everyone not to open the door. Thereafter, he went into his bedroom and rested on his bed. He did not like to talk to anybody. He then heard cries outside his room, on the corridor. He found

Nansi, his smallest child and the housegirl. His wife was bending. He asked who was on the ground but there was no reply. His wife was giving instructions throughout that she should be given a towel, hot water, motor vehicle etc. It was at that time that the accused realized that the person on the ground was not in a good condition. He then went and look for a motor vehicle. He did not succeed. The explanation given was that Mabibo area was not a developed area. One had to go to Mandela Express Way and it was during the El nino rains. The accused said although he managed to phone his friend – Mr Mkono and he agreed to go and offer assistance he did not know his premises. The accused said since he failed to get transport, he returned home and waited there until the police went there at midnight and arrested him.

The accused denied having inflicted the injuries which led to the death of the deceased. He prayed that the case be dismissed and he be acquitted.

In their final submissions, the defence lawyers gave a summary of matters which are not disputed, the general principals of the criminal law and the trial. They covered the presumption of the innocence of the accused, the onus and standard of proof, the ingredients of the offence of murder and how a decision is reached at. The defence lawyers have also given the ingredients of the offence of murder and the analysis of the evidence given. Eventually, they reached a conclusion that the prosecution has not proved the case against the accused beyond all reasonable doubt.

Let me look at the issues in this case. The fact of death of Conrad Kilonzo Mngulwi is not in dispute. There is also no dispute that he died a

violent death. He suffered an infraumblica sharp wound size 4 cm by 1.5 cm.

The main issue in this trial is who committed the offence? Who inflicted the wound which led to the death of the deceased.

The defence side pointed out correctly that there is no direct evidence to show who inflicted the injury which eventually led to the death of the deceased. Much as the evidence is clear that the deceased suffered the injury in the presence of persons, no one told the court who inflicted the injuries. As said before the reasons for not having such evidence is obvious. The accused who is the deceased brother was a husband of PW2 and also a father of PW3. PW4 was a house girl who was supposed to follow instructions given to her.

The defence submitted, again correctly, that the prosecution case is wholly dependant on circumstantial evidence. However, they have expressed the view that the circumstances in this case do not lead to irrestistable conclusion that it is the accused and not any body else who inflicted the injuries to the deceased. The defence has mentioned PW2 – the accused wife and Mr. Aloyce Mushi Kasmiri as possible suspects who could have inflicted the injuries on the deceased. The cases of **Simon Musoke v R 1958 EA 715** and **Ally Bakari and Pili Bakari v R 1992 TLR 10** were cited in support of their argument.

The prosecution on the other hand conceded that the case depends on circumstantial evidence.

Reference was made to the evidence of PW2, PW3 and PW4. That the accused while quarrelling with his wife followed her. There was no one else outside apart from the accused, his wife and the deceased.

By the principal of elimination, Mr. Mdam said PW2 could not have inflicted the injuries on the deceased because she was running away from the accused. Mr. Mdemu referred to the case of **Mswahili Mulugala v R (1977)** TLR 25 which gives the circumstances under which a court can convict on circumstantial evidence.

The defence side emphasized that the deceased fell inside and not outside the house. They also touched on the aspect of failure by the prosecution in tendering any weapon in court to substantiate the sharp wound which the deceased suffered and also the presence of Mushi in the house.

Indeed, I do agree with Mr. Mdemu on the principal of elimination. PW2's evidence shows that there was a real confrontation much as she pretended that there none. She also touched on the aspect of the children trying to intervene so as to assist her. She had to run outside the house bare footed and asked the house girl to throw her sandals when she was sure that the accused would not see her. In her own testimony, she hid herself in the darkness where she was not seen. This evidence eliminates the likelihood of her inflicting the injuries on the deceased.

The second one is Mushi. PW2 said as she was outside, he did not see anybody else other than the accused and the deceased coming out of the house. The accused himself said he did not recall when Mr. Mushi left. PW3 testified of not seeing Mushi on that day. PW4 confirmed that Mushi was not in the house when the deceased sustained the injuries.

Having eliminated the two, the only suspect who remains is the accused. The issue is whether there is circumstantial evidence to link him with the infliction of the injury which ended in the accused's death.

In the case of **Mswahili Mulugala V R 1977 LRT 25** it was held that for a conviction to be based on circumstantial evidence, the circumstances must be fully proved. All facts must be consistent with the hypothesis of the guilty of the accused person. Circumstances should exclude every reasonable hypothesis except the one sought to be proved. Circumstances must be conclusive in nature. Circumstantial evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence.

In this case the circumstances show that the deceased suffered injuries at the time when the accused and his wife had a quarrel. His wife said she went outside. The accused said he was the one who ordered her to go outside because he was angered by her absence at home while there were visitors. In his own defence he had made a conclusion that his wife had ignored his family. Going by the stereotypical concepts on roles of men and women, this was an unacceptable behaviour in our traditions. He had also drawn conclusions that his wife had gone to the Kakobe's church. This was a repeated behaviour. He had warned her not to repeat such a behaviour. To ensure that the wife left the house he followed her. It was also his own defence that he warned everybody against opening the door for her. Admittedly it is not clear at what point in time the deceased suffered the injuries – Whether it was when they were still outside or inside. What is clear is that he suffered injuries when the quarrel was still all.

The accused said he is not the one who inflicted the injuries. However, an accusing figure only goes to him and not anyone else. The deceased had tried to come in to assist the wife of the accused. The anger which the accused had, reverted into the deceased as he had made attempts to assist his wife. As the accused stood at the witness box giving his defence, the anger could still be read in his defence. He was bitter, stressing that the absence of his wife at home while they had visitors was an abdication of her responsibilities. The fact that he raised the same issue again after it had been raised earlier and the situation quelled by his brother shows how angry he had been.

Another factor to be considered is that PW2 testified despite the privilege she enjoyed under the law not to testify. From the evidence given by her she was all out to assist the accused. It could have been that she was regretting for being the source of the death of the deceased. She testified of not having a quarrel with the accused, that the accused was not angry. As a matter of fact the accused himself admitted being angered and that he had a quarrel with PW2.

Even the child of the accused and the house girl hid the truth for an obvious reason. PW3 in particular is highly interested in the outcome of the case. It is his father who is the accused.

The last factor to be considered is the passive role played by the accused after the deceased had suffered the injuries. The evidence tendered by the prosecution particularly PW5 is that he remained at home while his wife is the one who took an active role. She administered first

and on the deceased, looked for transport through her children and took the deceased to hospital.

Going by the same analogy on our traditions, if the accused did not inflict the injuries on the deceased why did he play a passive role. He said he went to look for transport but did not get any. The accused is not telling the truth. If his children were able to look for transport at the neighbourhood and got one the explanation given by the accused that he went to Mandela Express Way to look for transport cannot be true. The truth is that he did not bother to look for transport.

The circumstances as they are, lead to an inference that it is only the accused and not anybody else who inflicted the injuries. The cases cited by the defence, are distinguishable from this case. The facts are different.

The point raised by the defence that no weapon was tendered in court does not have any substance. Failure to tender the weapon is not a conclusion that the accused could not have injured the deceased. After all there is no dispute that the deceased died because of the injury which he sustained.

Given the analysis of the evidence given above, I disagree with all gentlemen assessors who said that there is no evidence to show that the accused is the one who killed the deceased. There is sufficient circumstantial evidence to that effect.

The last question to be considered is whether the accused inflicted the injuries with malice aforethought.

Under the circumstances under which the injuries were inflicted it is hard to say that the accused formed malice aforethought when he inflicted the injuries on the deceased. As pointed out by the defence the accused and the deceased were in goods terms. The accused was the one who brought the deceased to Dar-Es-Salaam. They had no quarrel. The injuries were inflicted out of anger. There was no intention to cause death.

I join the assessors in finding out that the accused is not guilty of murder as charged. The charge of murder is dismissed and he is acquitted.

However, I disagree with the gentlemen assessors that the accused is not guilty at all. The circumstances under which the deceased died leads to an inference that the accused is guilty of manslaughter c/s 195 of the Penal Code. I found him guilty of manslaughter c/s 195 and convict him of manslaughter accordingly.




N.P.KIMARO,

JUDGE

2/05/2003