IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL SESSION NO. 28 OF 2018

(Originating from Resident Magistrates' Court of Arusha at Arusha PI No. 51/2015)

REPUBLIC .....COMPLAINANT

VERSUS

ELIGIUS S/O EDWARD LYATUU.....ACCUSED PERSON

JUDGMENT

24/03/2021 & 23/04/2021

M. R. GWAE, J

In this criminal case, the accused person, **Eligius Edward Lyatuu** stands charged with an offence termed "Murder" contrary to section 196 of the Penal Code, Cap 16 Revised Edition, 2002 (Code). The accused person when arraigned to the charge of murder, he pleaded not guilty nevertheless he continuously pleading guilty to the lesser offence of Manslaughter contrary to section 195 of the Code.

The parties in this information, throughout the trial, were dully represented by Ms. Adelaide Kasala, the Senior State Attorney assisted by Ms. Akisa Mhando and Ms. Janeth Masonu both State Attorneys whereas the accused person was

duly represented by Mr. Joshua Mambo, the learned Advocate secured by the court.

The particulars of the offence alleged that, on the 30th day of August, 2015 at Makao Mapya area, within the City and Region of Arusha the accused person did murder one **Alfred S/O Oswald Kimario** @ Mandela (hereinafter to be referred to as "the deceased person").

As the accused person plainly denied to have murdered the deceased, the prosecution then assumed its noble duty of proving her charge against him. It subsequently summoned a total of seven (7) witnesses notably; E. 9992 D/CPL. Wito, an investigator of the case (PW1), Vick Charles Shoo (PW2), Lidya Joseph (PW3), Mathei Fidelis (PW4), Pantaleo Joseph Kileo (PW5), SSP Faustine (PW 6) and PF.1874 INSP. Mollel (7).

The prosecution side was similarly able to tender exhibits in support of their charge which are; those produced and received as exhibits during trial, these are; a bag containing a hummer, knife, deceased's torn trouser, short, a coat and sandals (PE1), Guest Registration Card (PE2) and Identification Parade Register PF186 (PE3) and the ones produced and admitted during preliminary hearing notably; extra judicial statement (PE1), government chemistry report-DNA test (PE2-read during trial), Post mortem Report (PE3), sketch map (PE4), certificate

of seizure at Usa-river (PE5-read during trial) and certificate of seizure in respect of search at the accused's house (PE6)

The brief evidence adduced by the prosecution side is to the effect that, between 27/8/2015 to 28/8/2015, there were money stealing accusations given by the deceased against the accused. The money allegedly stolen from a shop dealing with bags retail and whole sale. The shop is said to be the property of one Maximilin, a resident of Dares salaam and the deceased was a shop keeper. Following the accusations leveled against the deceased, it was agreed that the dispute be amicably settled. The PW4, Reverend was requested by the accused to summon the deceased. PW4 positively responded to the request by picking the deceased on the 30th August 2015 at about 13: 00 hrs. Thereafter the accused, deceased and PW4 went to AM Hotel where the accused person secured his accommodation at Room No. 204 (Hotel).

However before arriving at AM Hotel, they sat at a grocery nearby the Hotel. They attempted to mutually discuss on the theft allegations but the same went in vain due to what was said, the place was noisy as a result the accused proposed that they should got to the Hotel. All three persons went to the Hotel at Room No. 204. Before the conversation or discussion started, the accused person requested PW4 to leave from the room so that the accused and deceased could thoroughly discuss on the theft allegation issue.

According to the evidence of PW4, the deceased did not turn back home as expected, consequently he asked the accused as to whereabouts of the deceased following the fact that his phone was not reachable. The deceased did not give satisfactory answer to PW4 as a result PW4 informed the said Maximin and PW5 of the missing of the deceased meanwhile he notified his neighbours and he then he reported to the Police Authority.

There is also evidence as to the fact that it was the accused who booked or was a quest of Room No. 204 on the 30th August 2015, this is amply testified by PW2, the Hotel's attendant and the same piece of evidence is corroborated by PE2, Hotel Registration Register where the accused is alleged to have introduced by name of Reginald Mjemas, a teacher stationed at Karatu District as well as an identification parade (PE3) supervised by PW7 where the accused was duly identified by PW4 to be the Hotel quest on 30th August 2015.

Similarly, there is evidence by the prosecution, PW3 in particular that on the 31st August 2015 in the morning, there was discovery of unusual black bag like a goat in the bath room No. 204. Having noted so, PW3 immediately notified PW2 of her discovery, dead body and PW3 then furnished the information to police.

PW1 and PW6 received the information on the fateful incident that had occurred at AM Hotel within Arusha City. Immediately after such information police officers, PW1 and PW6 inclusive went to the scene of the crime. Upon arriving at

the hotel under the lead of the hotel owner, they directly went to room number 204 where they found a dead body at the bathroom with some of its parts amputated to wit; the head, breasts, palms of both hands, and the genital organ (male). The police and other civilians also found a bag containing nylon bags, flour soap and a bar soap. After a short time, PW4, a relative of both the accused and deceased was called to the scene of the crime as the said PW4 had earlier reported to the police station on the whereabouts of the deceased.

That, on the 1st September 2015 PW4 and PW5 were called by OC-CID in his office and while there, they saw the accused person walking nearby the Police Reginal Head Quarter. They immediately informed the police officers who abruptly arrested the accused person and upon interrogation the accused admitted to have killed the deceased and to have chopped parts of the deceased person's body which he further stated to have hidden them at Seminary River where he took the lead to their discovery. A certificate of seizure was thereafter filled up by PW6 and the same was received as PES during PGH.

After the close of prosecution case, the accused was given an opportunity to enter his defence. In exercising his fundamental right, the accused person stood in the witness box as **DW1, he** gave his sworn defence under the lead of his counsel, Mr. Joshua Mambo. The accused person essentially did not deny to have unlawfully killed the deceased person who was his relative as was the case

whenever was requested to plead to the charge of murder by this court. According to his evidence, on the material date, both were drunk (the accused person and the deceased) and also there were misunderstandings between themselves as the deceased person was accusing him of money theft (Tshs. 20,000,000/=) from the shop where the deceased person was a shopkeeper.

The accused person went on contending that, following the existence of fracas between them, the deceased who was armed with a hammer intended to grievously hit him (accused) with it but opportunely it hit the bed and it was at that time when the accused person got seriously annoyed. In revenge, he hit the deceased with a bottle of Konyagi on his head. There afterwards he did not know what transpired as he was possessed with what he believed to be supernatural powers.

Despite the accused person's admission to have killed the deceased, he vigorously denied to have bought a hammer or to have been in possession of a knife (PE2) or to have planned to murder the deceased. Moreover, the accused seriously disputed to have lied as to his name during his registration at the Hotel on the 30th August 2015 by stating that PE2, is a falsity since it is a copy. He thus refuted the signature appearing in the exhibit PE2. This briefly marked the end of the trial of this peculiar criminal case.

Considering the evidence adduced by both sides, I have observed that there are some facts which are undisputed by both parties in this unique criminal matter, these are; that, prior to the material date, the deceased accused the accused person with theft allegations, that on the 30th August 2015 the accused was with the deceased at A.M Hotel Room No. 204 within the Arusha City, that, on the 30.08.2015 the accused person killed one Alfred s/o Oswald Kimario @ Mandela (deceased). It is further undisputed, that the accused person was arrested on the 1st September 2015 at Arusha Central Police station and that the accused and deceased met on 30th August 2015 with a view of settling their misunderstandings.

Having observed and identified the undisputed facts as explained herein, there are also contentious issues which, were also made known by the court's assessors during summing up, that are to be determined by the court in this judgment, these are as follows;

1. Whether the conducts of the accused before and after the killing of the deceased establishes his malice afore thought.
2. Whether the accused's defence of intoxication pursuant to section 14 (1) (b) of the Penal Code and personal defence as per section 18 (1) (b) of the Code has shakened the prosecution evidence to the offence of murder.
3. Whether the prosecution proved the accused's guilty to the offence of murder or manslaughter to the required standard.

As to the **1st issue above**, the previous and subsequent conducts of the accused which are not in dispute are as follows; the accused's request to meet the deceased with a view of reconciling on the accusations lodged against him by the deceased, that, the accused remained with deceased in the room no. 204 at AM Hotel after he requested PW4 to depart from therein and that the accused chopped parts of the deceased person's dead body and he was the one who led police to their discovery at Seminary River. The prosecution evidence incriminatory to the accused as far as his conducts is concerned is to the effect that, it was the accused person who left the deceased in the hotel and went out to buy a hammer and knife in order to execute his unlawful acts of murdering the deceased. This piece of evidence to my considered view, remains hearsay or speculation since no witness from the prosecution side who saw him except it would be the deceased person who was with the accused.

More so, the cautioned statement of the accused which was listed during preliminary hearing as an exhibit was not tendered nor was extra judicial statement read over during its reception (See **Ntobagi Kelya and Another v. Republic,** Criminal Appeal No. 234 of 2015 (unreported-CAT) equally the Postmortem Report (PE3). Both PE2 and PE3 were inadvertently not caused to be read over by the court during preliminary hearing and the same error was not corrected during trial by the prosecution.

And above all the PE2 admitted during trial to establish that the accused cheated to be called by names of Reginald Mjema with a view of hiding his identity which, in law, amounts to an implied malice aforethought (Predetermination). However, there was no notice to produce additional document that was issued by the prosecution side. Hence the alleged acts of buying hammer and knife before the commission of the murderous offence remain hearsay evidence and circumstantial one. The legal position of this kind of evidence was judicially stressed in the case of **John Shini v. Republic,** Criminal Appeal No. 573 of 2016 (unreported-CAT) and I wish to quote part of the holdings for easy of reference;

> "In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (see **Simon Musoke v. Republic**, [1958] EA 715)".

See also the decision of the Court of Appeal of Tanzania in the case of **Emmanuel Kondrad Yosipati v. the Republic**, Criminal Appeal No. 296 of 2017 (unreported).

In our instant case, the accused person's conducts aforementioned do not sufficiently lead this court to justly and fairly make an irresistible inference as to the accused 's intent to kill unless corroborated with other credible evidence adduced by the prosecution which is his subsequent inhumane acts of cruel

chopping the deceased's parts of his dead body that is breasts, palms of both hands, genital organ and head.

Considering the provisions of section 200 of the Penal Code, Cap 16 Revised Edition, 2020 which was correctly interpreted by the Court of Appeal in **Enock Kipela v. Republic,** Criminal Appeal No. 150 of 1994 (unreported-CAT) that:

> "Usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, Including the following:
>
> i) the type and size of the weapon, if any used in attack;
> ii) the amount of force applied in assault;
> iii) the part or parts of the body the blow was directed at or inflicted on;
> iv) the number of blows although one blow may, depending upon the facts of the particular case, be sufficient for this purpose;
> v) the kind of injuries inflicted;
> vi) the attacker's utterances, if any, made before, during or after the killing; and
> vii) the conduct of the attacker before, or after the killing."

Presently, the accused's subsequent conducts are blamable particularly his acts of chopping the deceased's body by amputating some of the essential parts named above and thereafter his act of putting the same into plastic bags and threw

the same into Seminary River. These acts seriously establish an equitable inference as to his guilty mind unless sufficient explanation is given or proved to the contrary which is the determination in the 2nd issue.

Coming to the **2nd issue**, whether the accused's defence of intoxication pursuant to section 14 (1) (b) of the Penal Code and personal defence as per section 18 (1) (b) of the Code (supra) has shaken the prosecution evidence. The prosecution side during trial endeavored to establish the accused formed an intent to kill the deceased by making preparations such as buying knife ad hammer and his subsequent conducts which are condemned as determined in the 1st issues. However, the accused attempted to raise a defence of intoxication by stating that both deceased and him were drunk and that it was the deceased who wanted to grievously harm him by a hammer which was in the deceased's possession. The accused's defence in this aspect is partly quoted herein under;

> "There occurred misunderstandings between the deceased and I, the deceased picked a hammer which was in his possession and attempted to assault me with it. Fortunately, he did not hit me except the room bed. In revenge and with anger, I hit the deceased on his head by a bottle of Konyagi. Having done so, I became confused or insane and from there onwards I did not know what transpired".

Taking into consideration that an accused person will not almost impossible be willing to declare his intention to commit an offence but it is through his conducts that his acts may be justly and fairly inferred to his intention or otherwise. Examining the prosecution evidence and that of the accused person's defence as quoted above, I am legally persuaded that the accused's defence raises serious doubts as to his alleged intent to the killing of the deceased person except that he was probably intoxicated, provoked and or exercised his right of personal defence taking his consistent plea of lesser offence of manslaughter c/s 195 of the Code and considering the scanty evidence adduced by the prosecution evidence as to the accused person's malice aforethought.

I have further considered the medical report made by medical doctor at Isanga Institution pursuant section 220 of the Criminal Procedure Act, Cap 20, Revised Edition, 2020 which exhibits that the accused was sane or sound when killing the deceased but, in my view, evidence or report of a medical expert does not bind the court to decide different from such evidence of report. This position has been consistently emphasized by courts for example in **David Kamugisha Mulibo v. Bukop Ltd - Bukoba** (1994) TLR 217

> "The opinion of the labour officer that the appellant was not a member of the respondent's management team was no more than a mere opinion which the court was not bound to follow"

In our instant case, the doctor who filled the report stated that, 'his forensic file with police documents was received at the same time and the information recorded was as follows;

> ...Forensic history.....during interrogation with police officers, Mr. Eligius Edward Lyatuu said that he had misunderstanding with the victim. The accused said that he was very angry as he was suspected to steal the money which was not true. He got very angry and fought with the deceased..... He admitted to buy hammer and a knife, the one he intended to kill the victim (sic). He also said that he was drunk as he used to drink alcohol,konyagi.
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> During the interview at Isanga...Mr. Eligius ...was talking normally and relevantly, he was able to express himself and what happened... he said that he was interested in being a pastor since he was a child. Sometime he was lying about what happened during the incidence. For example, he said that he was not the one who hired the room which is contrary to what he said when he was interrogated by the police officers.... He also lied that before the incidence, they (together with victim) were drinking alcohol together (which is not true) ....."

Examining the medical report dated 30th June 2020 on the accused's state of mind, I am therefore not convinced if the doctor who examined the accused formed his own expertise due to what he had personally examined the accused. For that reason, I am therefore not bound to follow the report.

That observed, in the absence of the cogent evidence from the prosecution side as to the accused's intention to kill the deceased person, I am of the firm view, that the accused defence of being under intoxication and personal defence envisaged by the provisions of law do shaken the prosecution evidence as to the accused's guilt to the offence of murder which he stands charged with.

In the **3rd issue,** whether the prosecution proved the accused's guilt to the offence of murder or manslaughter to the required standard. It is trite law that guilt of an accused person must be proved beyond reasonable doubt and the party who owes that duty is no other than the prosecution. The accused has only an obligation to raise a doubt to the prosecution evidence and therefore he or she cannot be convicted on the basis of weakness of his defence. My holding is judicially guided by the principle enunciated in **Republic v. Kerstin Cameron** (2003) TLR 84, Court of Appeal of Tanzania held inter alia;

> "When an accused is charged with an offence his or her guilt is not established or proved if the explanation, he or she offers is one which is reasonable and might possibly be true even if the court is not convinced that it is in fact true"

(See also **Jonas Nkize** (1992) TLR 213 and **Charo Said Kimilu and another vs. Republic,** Criminal Appeal No. 111 of 2015 (unreported-CAT).

Carefully analyzing the evidence adduced by the parties and which is on record that combined effect of all proved facts and disproved facts, consequently,

I apprehend doubts as to the accused person's guilt on the offence of murder as opposed to the offence of manslaughter since there is ample evidence that the it was the accused who unlawfully killed the deceased and he has patently and consistently admitted to have unlawfully killed the deceased person, his friend.

The court's assessors whom I sat with namely; Tabu Simile, Julius Saruni and Joyce Edward and strongly and unanimously opined that the accused person is liable for the offence of murder which he stands charged with however, I have absolutely departed from their opinion for the reasons that, the prosecution evidence with effect that, the accused had ill motive and therefore existence of necessary element of murder that is an intent on the part of the accused before the commission is credibly unfounded and that, the defence that the accused might have killed the deceased due to being under influence of alcohol and anger as supported by PW1 who testified that they found a bottle of Konyagi in the Room No. 204, a piece of evidence which corroborates that of the accused. All that raise doubts to the prosecution evidence pertaining the offence of murder.

That said and done, the accused is found guilty of the lesser of offence and he is acquitted of the offence of murder c/s 196 of the Code. Consequently, I hereby convict the accused, Eligius Edward Lyatuu of the offence of Manslaughter contrary to section 195 of the Penal Code Cap 16 Revised Edition, 2002.

Ordered accordingly.

M. R. GWAE
JUDGE
23/04/2021

Court: Right of appeal to the Court of Appeal of Tanzania fully explained

M. R. GWAE
JUDGE
23/04/2021