

TANZANIA / JUDGMENT

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- 32 -. HC IN THE HIGH COURT OF TANZANIA AT SINGIDA ORIGINAL JURISDICTION (DODOMA REGISTRY) CRIMINAL SESSIONS CASE. NO, 39 OF 1977 REP UBLI C VERSUS NALIGYA s/o DAUDI Charge: M U R D E R c/s 196 of the Penal Code. J U D G M E N T CHIPETA J. The accused in this case, Naligyn s/o Daudi stands charged with the offence of murder c/s 196 of the Penal Code, The Republic has all good things on or about 27th day of July, 1975, in Singida Region, the accused murdered one Makuan s/o Kiula. The accused denied the charge. To prove the charge, the prosecution adduced the following evidence; on the morning of 27th July, 1975 the deceased left his village to go and look for foodstuffs in some other area from where he intended to return that very day. That same morning, the wife of the deceased, one Nkawe d/o Nkana (P.W.1), her mother, and her sister-in-law, one Minazi d/o Mpinga (P.W.3) left for Mininjira village to go and attend a funeral. On their way back from Mininga the three women stopped at Ulukuta village where they drank local liquor worth =/50 or shs. 1/=. According to P.W.1, while the three women were at Ulukuta village, the accused called P.W.1 and asked her if her husband was at home. When P.W.1 told him that her husband had gone to look for foodstuffs, the accused asked her when he would return, to which she replied that he would come back on the same day. Later the three women left for their village. On arrival at their village, they stopped at the house of one Samwel Pyuza (P.W. 2) where there was local liquor. At midnight the three women were either given or they bought for themselves some local liquor. P.W.1 left for her house shortly afterwards as she wanted to go home early because her husband was away. On arrival at her house, which is about a quarter of mile away from P.W.2's house, she started making preparations to cook food. While she was thus busy, the accused appeared. It was then at about midnight. On arrival there the accused who according to P.W.1 and as admitted by the accused, was an old paramour of P.W.1, asked if P.W.1's husband had come back, and P.W.1 told him that he had not yet come back. Thereupon, the accused persuaded P.W.1 to have sexual intercourse with him. The two ... then entered P.W.1's bedroom and had sexual intercourse. (4 33
- through When they were with the sexual act the two made to out of the bedroom. It would appear that as the women were trying to go out the accused (if not P.W.1 as well) was still fastening his clothes. As fate would have it, the deceased knocked on the outside door and asked P.W.1 as to who was inside the house with her. It was the accused who answered and said, "I am here". When the deceased asked what the accused was doing there, the accused said that he

wes looking for fire to light his tobacco0 By then, so it would appear, the deceased was in the sitting-room and the accused and P.O.W. 1 were in the door-way between the sitting-room and the bed-room in which they had just had sexual intercourse0 When the deceased asked the accused why the accused should say that he was looking for fire when he was fastening his clothes, he calmly said: "Today we have met", and then added that he was going to kill the deceased0 Thereupon the accused grabbed the legs of the deceased and fell'd him to the floor within the sitting-room. He then took a knoberry which was hanging on the wall within the sitting room and struck the deceased with it twice on his head and chin0 When P.O.W. 1 tried to intervene and plead with the accused not to assault the deceased, the accused threatened to kill her as well The deceased apparently died on the spot. P.W. 1 then raised an alarm twice0 Meanwhile, the accused held the deceased's legs and dragged the deceased's prostrate body out of the house0 As no one was answering her alarm, P.W. 1 rushed to the house of P.W. 2 and reported that her husband was dead. Many people, including a town-cell leader, one Flatayo Ndalu (P.W. 4) went to the scene where they found the body of the deceased sprawled on the ground outside the house. The deceased had several serious injuries. The accused, however, was not at the scene. That same evening, P.W. 1 told the people present that it was the accused who had killed the deceased, and that accused had attacked the deceased after the latter had found her dead the accused having sexual intercourse P.W. 4 then sent a report to Police, and police arrived at the scene the following morning and examined the scene. A police inspector (P.W. 6) found smears of blood inside the sitting-room and near there was lying a knoberry which had been broken into two0 He found no other weapon of any description in the house. P.W. 6 also noted signs showing that the dead body of the deceased had been dragged from the sitting-room to where he found it lying outside the house The broken knoberry was produced in court and was identified by P.W. 1 as belonging to the deceased, and to be the one the accused used in assaulting the deceased. 00/ 3 On learning that it was the accused who killed the deceased P.W. 6 went to Npande village where he arrested the accused. The dead body of the deceased was taken to hospital where an autopsy was carried out0 The autopsy report produced before the Court under section 275 of the Criminal Procedure Code reveals that the deceased sustained extensive head injuries which included a large lacerated wound of an indefinite size on the left frontal area involving fracture of the left frontal bone, fracture of both left upper and lower jaws, fracture of the right parietal bone with laceration of meninges and brain substance, and fracture of the right temporal bone at the base of the skull. In the opinion of the doctor who conducted the autopsy the cause of death of the deceased was violence causing brain injury0 The accused was taken before a doctor who examined him. The examination revealed that the accused was aged 30 years, was mentally and physically normal, and had no marks of violence on his person. In his defence on oath, the accused said that on the day in question he saw P.W. 1 at Ulukuta village, but he did not talk to her. At about 6.00 p.m. he went to P.W. 1's house for the express purpose of having sexual intercourse with P.W. 1 who was his long time paramour. Laying out the contradictions in his evidence, this is the gist of what the accused said happened on the night at P.W. 1's house: he persuaded P.W. 1 to have sexual intercourse with him, and the two then went into P.W. 1's bedroom where the two had sexual intercourse.

When they were through, they made to go out of the bed-room, 'ust then the deceased ant .:red th sitting-room and asked as to who was with P O W O 1 in the room. The accus d answered and said he ;as in th re. Asked what he ws doing, the accused said thit ho was hying sexual intercourse with the deceased's wife. Thereupon the deceasd seized h accused by the collar of his shirt, pushed the door shut and pickd up a knobkerry, ap;arently ifntending to strike the accused with it. The aecused, however seized the knobkerry and snatched it away from the deceased. The deceased, still holding th; accus.d by th collar of his shirt, then picked up a piece of 1Lirw0oc1 from the fire-place in the siti:ing-room, But b.:foC1. , th deceased could strike the accuaed with the piece of wood, the accused hit the deceased once on the left side of the head with the knobkerry, and the deceased fell down on his back uncounscicus. The accused went on to say tht after that he pulled the decasod outside the house so th t the deceas d could hove some fresh air to resuscitate him. While all this eas happening, P,W,l had gone out and was raising an elcrra, and so cclld not see wh t WaS hapening inside the house. After pulling the dece sd outside, th accused noticed that the deceas :d WaS dead, md so he became afraid and scan away. The a cused a dod that he had no means of g :tting out of the house b fore he hit th deceased because docr was Closed and the house had no windows. He admitted having threatened to kill the deceased, but added that he said so after the deceased himself hid threatened to kill him. In his final submission, Mr. Mwailungi, leariad defence couns.l, invited the court to accept the accusedts story as the truth of whet happened and so hold that P.W.l never saw what happened between the. accused and the d .:ceased, from which fact the court should hold that the Cccu;eJt acid in self-defence and so is not guilty of any off :flCC, In the alternative, l.arncd counsel for the defence submitted that if

- 35 - the court should hold that th defence of s.elf-dcfnce is not available to the accu ed, th.in it should hold that the accused killed the dac asecl in the course of a fight and so find him guilty of the lesser offence of manslaughter and not murder0 The 1 arned state attorney, on his part, invited the court to accept P O W O 1 as a truthful witness; that h.;r account of what happened is the whole truth; and so should reject the accus-"dls version of the story as a bundle of lies 0 In his submission, P0t1 was straightforward and consistent in her story, and hr demeanour was beynd reproach0 He has therefore urged the court to find as a fact th it it was the accused who throatend to kill the deceased and did in fact kill the deceased; that at no time can the accused he said to h ve been in imminent danger of a serious attack from th5 deceased, th t the injuries were very extensiee, and th:t the a.:cused pulled th5 deceas ;d outside th house probably in -a biCt to dispose of the body0 If these facts are found establishd, the 1 arned state attorney submitted the irresistib1 inference is that the accused acted with malice aforethought and so is guilty of nurder 0 In the alternative, lamed state attorney submitt.:d that if the court accepts the story (f the accused as th: truth, never-theess the defence of self-defence is not available to him becuse: (a) the force he used was not raasonU15.. hut excessive, and (b) he cannot h said to have b an under mc :1 apprehension about his lie0 After my summing up to the two gentlemen ass.ssors,, both gentlemen assessors accepted P O W O 1's OVIDeflC as a true account of wh..t hajpned0 They

therefore found as a fact that the accused held the deceased's legs, felled him to the ground and killed him, and that at no time did he attempt to run away even when he had the opportunity to do so after felling the deceased. Each of them accordingly found the accused guilty of murder. On the evidence, it is beyond dispute that a person by the name of Makuza Iiula is dead; that he died a violent death; and that it is the accused who killed him. The question left for consideration, therefore, is whether the killing in the circumstances amounted to murder, manslaughter, or no offence at all. As I told the gentlemen assessors, it is established law that in criminal cases the prosecution has to prove its case beyond reasonable doubt, and that an accused person does not assume the burden of proving his innocence. All that an accused person has to do to be entitled to an acquittal is to give an explanation that raises reasonable doubt in the mind of the court.

- On the basis of this principle, an accused person ought to be convicted on the strength of the prosecution's case and not on the weakness of his defence. Indeed, the mere fact that an accused person has told lies does not deprive the trial court from ascertaining from the whole evidence whether the offence with which he was charged has been proved beyond reasonable doubt. (Longinus Komba v Republic, (1973) LRT 39) In the instant case, the prosecution's case is based almost entirely on the evidence of PW1. The first question I have to consider, therefore, is whether PW1 is a witness of truth. I have heard and observed this witness as she gave evidence, and I have taken into consideration the admitted fact that she
- PW1 is a woman of weak moral fibre. But her moral turpitude notwithstanding, this witness impressed me as an honest witness. Her story was straightforward, and she graphically described the nasty events of that day even when the facts were not in her favour. She calmly answered every question with a demeanour I could not fault. I therefore fully agree with the two gentlemen assessors that PW1 is a witness of truth. The next question I have to consider is whether she correctly described what happened that fateful evening. Again I have no doubt at all in my mind that her account of the incident is actually or substantially what happened that evening. I am fortified in view of the fact that shortly after the incident she gave the same story to the ten-cylinder loader (PW4), and her evidence that she saw the accused hit the deceased at least twice, and that one of those blows landed on the deceased's chin, is supported by the post-mortem examination report. According to this report, the deceased had fracture of the left frontal bone, right parietal bone, of the skull, and fracture of both the left lower and upper jaws. These findings clearly support the evidence of PW1 and ridicule the accused's story that he hit the deceased only once. Indeed, PW1's evidence further finds support in the evidence of the
- a. accused himself who at on-stage admitted having threatened to kill the deceased, having held the deceased's legs and felled him to the floor, and having pulled the dead body out of the house. All these matters were deposed to by PW1. The story of the accused that the deceased picked up a piece of firewood from the fire-place is contradicted by the evidence of PW6 (which I accept) that apart from the broken knobkerry, there was no weapon of any

description in that house. On a full consideration of the evidence as a whole, therefore, I am in no doubt at all that the story of the accused was a ridiculous afterthought which I completely reject. I am satisfied that the accused was the person who threatened to kill the deceased; that he then grabbed the deceased by the legs and felled him to the ground, and thereafter picked up the knobkerry from the wall and savagely pounded the deceased's head with it, and then dragged the deceased's dead body out of the house. I am also satisfied that the accused was at no time armed, and that he never caused any damage to the person of the accused. Further, I am satisfied and find as a fact that the accused threatened to attack P.W.1 if she intervened. The question now is whether on those facts the defence of self-defence is available to the accused. To start with, it should be pointed out that where a defence of self-defence is raised, the onus remains throughout on the prosecution to prove that the accused is guilty of murder. The onus is never on the accused to establish that defence. In other words, where a plea of self-defence is raised, it is for the prosecution to negative it. I will now proceed to discuss the principles of law regarding the defence of self-defence. As I told the gentlemen assessors, it is beyond dispute that a man who is attacked is entitled to defend himself; but in doing so he must only do that which is reasonably necessary in the circumstances, and what is reasonably necessary will depend on the seriousness of the attack or the crisis with which he is faced. Before a plea of self-defence can succeed, therefore, it must be shown that the defence was necessary, that he did all he could to avoid it, and that it was necessary to retreat from such serious bodily harm as would give a reasonable

- 37- apprehension that his life was in immediate danger, and that the force used was reasonable in the circumstances, (See Archbold, 38th Edition, para 2499). But if the moment of danger is over, or if there has been no danger at all and no danger requiring immediate reaction then the use of force as a defence cannot be justified, and may amount to mere aggression. In such a case the plea of self-defence will fail. Of course, as was stated by the Privy Council in *Palmer v. R.* 55 Cr. App. R. 223, at page 242: "If there has been an attack so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his defensive action". This dictum was quoted with approval by the East African Court of Appeal in *Mhambi Mtunqi v. R.*, digested in 9 E.A.L.J. page 270. However, where the force used was any way beyond that which was reasonable in the light of the circumstances as they reasonably appeared to the accused, then the plea of self-defence must still fail. In the instant case, the accused was not at all under attack, and there was no reasonable apprehension of immediate danger to his life or person for the deceased was unarmed, and apart from asking questions, there was no immediate cause for apprehension at any stage. Besides, the accused would appear to have taken no avoiding action. He could have gone out of the house at the time P.W.1 did so. He did not do that. He could have gone out after felling the deceased before he hit him. Again he did not do so. In those circumstances I am fully satisfied that the prosecution has completely negated the plea of self-defence. The question that now presents itself is this: what are the consequences when a plea of self-defence to a charge of murder fails, either because there was no attack and no immediate danger to justify the use of force, or where the use of force was clearly

beyond that which was reasonable in the light of the circumstances as they reasonably appear to the accused? In other words, should a man whose plea of self-defence to a charge of murder fail necessarily be found guilty of murder? In my view, in such a case the accused may be found guilty of murder or manslaughter depending upon the peculiar facts on which the plea of self defence is unsuccessfully raised. I am fortified in this view by the persuasive English decision in the case of *R. v. McNos* (1971) 3 All E.R. 295, in which the Court of Appeal followed the decision of the Privy Council in *Palmer's case* (supra). In the *McNes* case, the Court stated, at page 301., "If self-defence fails for the reason stated, it affords the accused no protection at all. But it is important to stress that the facts on which the plea of self-defence is unsuccessfully sought to be based may nevertheless serve the accused in good stead. They may, for example, go to show that he may have acted under provocation or that, although acting unlawfully, he may have lacked the intent to kill or cause serious bodily harm, and in that may render the proper verdict one of manslaughter." The final question for decision, however, is whether the prosecution in this case has proved malice aforethought beyond reasonable doubt, or whether the facts in which the

- 38 - plea of self-defence has failed the accused may be said to have lacked the intent to kill or cause grievous harm and so render the proper finding to be manslaughter. Undoubtedly, the accused acted in a most impious manner. He insistently stood his ground when he should have run away or asked to be paroled, and then went on to viciously attack the man whom he had so seriously offended. But that said, one must consider the sequence of events. The accused could not go to the deceased's house armed, and at the time they were exchanged words, he was still not armed. At the time he first attacked the deceased, he did so with his bare hands. He caught the deceased's legs and fell him to the ground like one would in a wrestling contest. From P.W. 01's evidence, one gets the impression that the deceased took it hard and down. But there is all the possibility that the deceased put up some resistance, albeit ineffectively, and then upon the accused snatched the knife from the wall and used it to inflict the fatal injuries to the head of the deceased. In those circumstances I am not persuaded that the inevitable inference should be that the accused acted with malice aforethought so as to make the killing a murder. In my view, it is safe to hold that the prosecution has not proved malice aforethought beyond all reasonable doubt. On these grounds, and with great respect to the gentlemen assessors, I must, albeit with reluctance, differ with their opinions. I hold that the killing in this case amounted not to murder, but to manslaughter. I accordingly find the accused not guilty of the offence of murder with which he was charged, but I find him guilty of the lesser offence of manslaughter under section 195 of the Penal Code and I duly convict him forthwith of that offence. B. D. CHIPETA JUDGE Mr Mchora: State Attorney for the Republic Mr. Iezi: Holding brief for Mr Mwailung for purposes of the judgment. Mr Mbezi: As the accused has been convicted of manslaughter, I pray for a 5 minute adjournment so that his counsel can appear. Court: Application granted. B. D. CHIPETA 11/10/77 JUDGE Later: As before Mr. Mwailung for the accused. Record: (Mr Mchora) My Lord, the accused has no record. But I submit the court should consider the fact that the deceased contributed to his own death. The accused had been warned by P.Z.1 that the deceased would

return home 0 It was the accused who threatened the deceased with death 0 The barbaric attack 1 and is credible in view of the fact that the accused's brutal tendencies 0 His denial of the number of blows he inflicted shows that he is far from being repentant. It is only by a speck of fortune that the case has ended as it has done 0 This is one of the very bad cases of manslaughter. For the benefit of the accused, the Republic prays for a different sentence. Mr O Mwailunqa: My Lord we pray for leniency on the following grounds: accused has been in custody for the last two years; he is married to two wives, He has a total of five children. He also has three dependents. He is the head of the family. Furthermore, the fact that the accused could not remember how many blows he inflicted on the deceased is just a fact of memory and not lack of repentance 0 Besides, in this part of Tanzania, people keep weapons in their houses. The accused must have thought that there would have been weapons in the house. I pray for a lenient sentence The accused is aged 32 years He, therefore, falls within the group of labour supply. I therefore pray for leniency. Accused: I have nothing else to say in defence: That the accused is a first offender and that he has been in remand custody for the last two years are reasons weighing in favour of leniency. However, the fact that the accused killed a person whom he himself had wronged, that the only sin that the accused committed was that he murdered a woman whom the accused loved and the fact that the attack on the deceased was, very brutal, certainly outweigh anything that can be said in favour of the accused. Indeed, but for the structures of the law, the accused might have faced very grave consequences for this case deliberately bordered on murder. In the circumstances, I find no reason to treat the accused with leniency and accordingly, I do not think any reasonable tribunal would do so For these reasons I sentence the accused to life imprisonment. B. D. CHIPETA 11/10/77 JUDGE Right of Appeal explained. B.D. CHIPETA 11/10/77 JUDGE Gentlemen Assessors thanked and discharged. B.D. CHIPETA 11/10/77 JUDGE

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