

TANZANIA / JUDGMENT

19770701 TZHC Dodoma

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-p IN THE HIGH COURT OF TANZANIA Hfr c-- AT SINGIDA ORIGINAL JURISDICTION (D0DONA REGISTRY) CRIMINAL SESSIONS CASE NO. 66 OF 1976 THE REPUBLIC VERSUS JUSTINA D/O DEMA Charge: Murder c/s 196 of the Penal Code. J U D G M E N T CHIPETA, J. The accused Justina dlo Dema, stands charged with the offence of manslaughter c/s 1S6 of the Penal Code 0 The prosecution has ileed that on or ::thout 11th July, 1975, in Singida Region the accused unlawfully killed one Hema s/^ Kindanji. The accused has denied the charie. The prosecution's evidence is as follows: the deceased, aged about three years, and his young sister, went to play with the children of the acused at the aqused!s house as they often used to do0 While they were at the accused's house the accused gave them milk, and shortly after that the deceased ran out of the accu;ed's house crying and ran towards his mother's house which is not far from the accused's house0 The mother of the deceased, one Beti d/o Hema (Pwl) saw the deceased crying, and before he reached his mother's house, the deceased fell down and started frothing from the mouth0 The mother and other neighbours ttied to give the deceased first aid by making him drink salted water, but they were unable to do so because the deceased could not open his mouth0 So they took the deceased to Ntuntu dispensary0 On arrival at the dispensary they told a rural medical aid, one Paulo Barnabas (PW5) that they suspected that the deceaed had been poisoned. P O WC 5 noticed that the deceased looked fatigued and was frothing from the mouth 0 According to P.W.5, the deceased was in a serious condition0 He then gave the deceased two injections which were intended to resuscitate the deceased from shock and to enhance the heart puping -. AS there was no transport to take the child to Singida Hospital,. they took him back home0 However, on the way home the child died. When the accused was asked by one Michael Siwi (PW3), who was a ten—cell leader, the accused denied having given any milk to the child0 Howevr, her daughter,. one Emiliana (PW2) said that the accused had given milk to the deceased in a gourd. The villagers then detained the accused. A report was then sent to police. The next day police arrived at the village. On searching the house of th accused, police found a small gourd and some insecticide in powder form in a nylon bag... In another gourd was some milk. All those articles were seized, and according to the police officer, the small gourd had remains or particles of milk in it. I.) -2- The dead body was then taken to Singida Government hospital where one Dr. Msha Mambea (pW4) conducted a post-mortem examination ou.the. body of the-de:decdsed. P O WO 4 noticed that the tongue was black and was roruding out of the mouth. Internally P.W0 4 found that the stomach and the intestines were inflamed. He then removed the stomach and intestines and handed them to police to take to the Government Chemist, Dar es Salaam for

analysis. The doctor did not form a definite opinion as to the cause of death, but from the blackness of the tongue and inflammation of the stomach and intestines, the doctor suspected that the cause of death was poisoning which must have been swallowed. The viscera of the dead body were then sent to the Government Chemist, Dar es Salaam, together with the insecticide, and gourd which were seized from the accused's house. The viscera from the body of the deceased were duly examined by a Government Chemist, one Felicia Luisa Dias (P.W.8) who found an alkaloid (a poison) called tserpentinefl varying from 0.07 to 1.14 milligrams in the liver, kidney, and stomach contents. She also found another type of poison in some of the viscera. This poison is called "organo-nitrogen". According to P.W.8, these poisons do not exist in the human body naturally, and that depending on the dose, the two poisons can be lethal. She was, however, unable to say what the lethal dose of those poisons is as literature does not give it. The gourd, locally known as "kipeyu" by one Mary Josephine Kayani (P.W.9), and it was found to be clean, and contained no poison. P.W.9 also examined the insecticide seized from the accused's house. The insecticide, called Carbaryl Sevin, was found to contain a poison known as "carbaryl" which is a poison in the organonitrogen group, and that depending on the size of the dose it can be lethal. As literature does not give the lethal dose of carbaryl, P.W.9 like P.W. 3, could not say what is the lethal dose of carbaryl. On 16/7/75 the accused made an extra-judicial statement before a justice of the peace, one Agness Sawo (P.W.10). In that statement, the accused said that she gave milk to the deceased and her children in a gourd (kipeyu) which they had used for applying insecticide to their cotton. She poured milk in this gourd without washing it and gave the milk to the deceased. Shortly after that the deceased ran towards his mother's house and fell down on the way. They took the child to the dispensary for treatment, and on the way home the child died. In her defence on oath, the accused said that she prepared food which she gave to the deceased and other children. She then prepared milk, and then washed the utensils. After that she gave the milk to the children who took it together. The children then went out to play. After some time she was told that the deceased was vomiting at his mother's house. Then they took the deceased to hospital for treatment, but he died on the way home, and After my summing up to the lady/assessors and gentlemen the evidence of P.W.1 and the accused's extra-judicial statement, and found the accused guilty as charged. The gentleman assessor also found the accused guilty of manslaughter "through gross negligence". In his opinion, the accused must have seen the insecticide in the gourd as it was during the day, and so in giving the milk to the deceased in that gourd the accused "did it deliberately". As pointed out by the learned counsel for the Defence and the Republic, and As I told the lady and gentleman assessor; there can be no doubt that a child by the name of Hema s/c Kindanji is dead. The questions to be considered are: what was the cause of death of the deceased, and if it was not from natural causes, who caused it, and (3.) if it was caused by any person whether the killing amounted to manslaughter in the circumstance's. It has been submitted by the learned counsel for the defence that since there were two types of poison in the body of the deceased, and only one poison was found in the house of the deceased, the evidence did not support the charge of manslaughter or any other offence. From the evidence of P.W.1, P.W. 3, P.W. 4, P.W.8, and P.W.9 I am left in no doubt at all that the deceased's death was not due to natural causes but due to poisoning. From the evidence of P.W.2, and the deceased's extra-judicial statement, I am left in no doubt that the poison was

introduced into the body of the deceased through the mouth, and I am satisfied that the poison was in the milk which the accused gave to the deceased. Having seen and heard the accused as she gave her defence on oath, and having carefully considered her extra-judicial statement, I am unable to accept her evidence as reasonable. I am satisfied she has told the court a pack of lies. I am satisfied that what she told the justice of the peace in her extra-judicial statement was the whole truth. I therefore find as a fact that the accused, knowing that she had used the gourd for applying the insecticide to cotton plants, proceeded to use it for giving the milk to the deceased without first washing it. The final question I have to answer is whether the accused caused the death of the deceased in circumstances that amounted to manslaughter (i.e., through negligence). In order to prove a charge of manslaughter through negligence, the prosecution must prove: (1) that the accused owed the deceased a duty of care; (2) that the accused was culpably negligent in the discharge of such duty; and (3) that such culpable negligence resulted in the loss of life of the deceased. In the instant case, it is apparent from the accused's defence and her extra-judicial statement, that she was not ignorant of the fact that the insecticide was harmful to life. It has not been alleged that the accused was short of utensils or short of water, and as was observed by the gentleman assessor, the accused did not hide the gourd in the dark but during the day. The utensils were in her house and she must have used them often. In these circumstances her failure to wash the gourd and her decision to use it unwashed for supplying the milk to the deceased amounted, in my view, to such a callous disregard for the life of the deceased as to amount to culpable negligence. The fact that two poisons were found in the body of the deceased while only one of them was found in the accused's house does not detract from the fact, as I have found, that the poisons were introduced into the accused's body through the milk, and that had the accused not been so negligent, none of those poisons would have been introduced into the deceased's body. The fact that police did not find the second poison in the accused's house, therefore, is irrelevant. On these grounds, I am satisfied that the prosecution has proved its case beyond reasonable doubt against the accused. I therefore find her guilty as charged, and I duly convict her forthwith.

B. D. CHIPETA JUDGE Delivered in open court at Dodoma this 1st day of July, 1977.

Bo D. CHIPETA JUDGE 1/7/77: Court as before: Accused present Record: Accused is a first offender. Mr. Lyimo: My lord, I submit that in passing sentence the court must take into consideration the fact that the killing of innocent children must be discouraged, hatred between their parents notwithstanding. Mr. Mezi: My Lord, I agree that innocent children must not be victims of quarrels between parents. However, this case must be judged upon its own merits. In this case, accused admittedly was very careless, but there is no trace of any intention. Although the "kipeyu" was used in daylight, accused might not have seen the remains of the insecticide - even the Government Chemist found no poison on it. It is likely accused thought the kipeyu was not containing anything that could have harmed the child. Accused's own daughter was also alive. Some milk * children exchange foodstuffs, If accused had known it would be harmful accused could not have risked the life of her own daughter. Before she was released on bail family of the deceased and that of accused have already reconciled the matter. The parents of the deceased have already forgiven the accused person. Up to now they are living happily and are in the same village. To them this was unfortunate and it is a closed chapter. Accused had been in custody for fourteen months. She has been on bail for 3 months. For 2 years this crime has been

hanging on her mind and so suffering from remorse. The accused is married with two children. Both her parents died. She is 1st offender. I submit that a custodial sentence for accused would be th appropriate in view of the reconcizliation and the long period this matter has been on her mind as such sentence would not serve any purpose. I therefore pray for leniency0 Mr. Lyimo: We have no evidence to that effect. Mr0 Mbezi: On'reason, My lord which influenced mo to apply for bail was that I was assured of the reconciliation and safety of. the accused Accused: I have nothing else to add.

- Sentence: There are three major mitigating factors in this case0 The first is that the accused is a first offender0 The second is that this charge has been hanging on hr h-ad for almost two years now, 14 months of which period she was in custody0 The third is, as I was informed from the bar, that the families of the deceased and accused have since reconciled0 n those circumstahces, even taking a•serious view of the seriousness of the offence and the *ed to protect innocent children, I do not f:e1 that an immediate custodial sentence wouJ.:i serve n' purpose. -I therefore, sentence the accused to three (3) years imprisonment, the whole of which is suspended for one year during which eriodthe accused must not commit any offence involving violence. B.D0 CHIPETA ..JUDGE 1/7/77 Right of appeal to EOA.C.A. explained0 / I/ B. D. CHIPETA JUDGE Assessors thanked and discharged0 -' ii• - YI DODOMA - Be D. CHIPETA
- JUDGE 1/7/77 Mr. V.K.D. Lyimo Counsel for the Republic. Mr. D.C. Mbezi, Counsel for the Accused0

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