

TANZANIA / JUDGMENT

Criminal Session Case No 43 of 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF MTWARA AT MTWARA CRIMINAL SESSION CASE NO. 43 OF 2023 THE REPUBLIC VERSUS SHABAN SAIDI MAKOTO

JUDGMENT

13h March & 4h April, 2025 MPAZE, J.: This case is one in which the prosecution has exerted considerable effort to persuade this court that the accused, Shabani Saidi Makoto (DW1), committed murder with malice aforethought. The success of these efforts will ultimately be determined in the court's final decision. Despite the prosecution's extensive endeavors, the facts of the case remain relatively straightforward, as the core issues are neither legally nor factually complex. i The accused stands charged with the murder of Siamin Rashidi Mkong'ondo, alleged to have occurred on 5th February, 2023 at Nyanyanga Village, within Liwale District, Lindi Region. To secure a conviction for murder, the prosecution must establish the following elements beyond a reasonable doubt;

1. Whether the death of the deceased occurred.
2. Whether the death was unnatural.
3. Whether the accused caused the death.
4. If so, whether the accused acted with malice aforethought. In support of its case, the prosecution called six witnesses: Bikolimana Mosoud (PW1), Ally Omary Kaenda (PW2), Inspector Apolinary (PW3), Ally Said Mkong'ondo (PW4), H. 8899 PC Steven (PW5), and Vicent Hemede Ngassa (PW6). From the testimony of all these witnesses, it is undisputed that none of them personally witnessed DW1 causing the death of Siamin Rashidi Mkong'ondo. However, through the accused's own defense, he admitted to causing the death, though he denied doing so with malice aforethought. 2 However, despite DW1's defence implicitly acknowledging his role in the incident, the critical question remains whether the prosecution has sufficiently established all essential elements of the offence beyond a reasonable doubt. This is because the burden of proof remains on the prosecution to demonstrate that DW1's actions meet the legal threshold for murder, including the element of malice aforethought. Turning to the first issue the occurrence of death, the testimony of PW1, the medical doctor who conducted the post-mortem examination,

confirmed that Siamin Rashidi Mkong'ondo is indeed deceased. His report established that the deceased succumbed to excessive bleeding caused by severe head injuries. This finding was further corroborated by PW4, a relative of the deceased, who testified that following the necessary medical examinations, the body was released for burial. Additionally, the accused himself does not dispute the fact of the deceased's demise. Given this uncontroverted evidence, it is evident that the first issue is resolved in the affirmative. Regarding the second issue whether the death was unnatural the post-mortem examination report (Exhibit P1) establishes that the cause of death was a head injury. The summary of the report states as follows; 3 'Bloodstains were more pronounced at the occipital region, skull fracture observed, and bloodstains noted on the forehead.' The nature, extent, and location of these injuries, combined with the fact that they were inflicted using a dangerous weapon, unequivocally confirm that the cause of death was unnatural. In his defence, DW1 did not dispute that the deceased succumbed to injuries sustained during their altercation. Given this, the court finds that the death was indeed unnatural. With respect to the third issue, whether DW1 caused the death of the deceased this fact is not in dispute. In his defence, DW1 expressly admitted to inflicting the fatal injuries on the deceased using a machete. He further stated that upon realizing the gravity of his actions, he immediately proceeded to the police station to report the incident. Moreover, the machete used in the attack, which was identified as belonging to DW1, was admitted into evidence as Exhibit P5. To further corroborate this, PW2, a government chemist, conducted a forensic analysis of the blood found on the machete. The results confirmed that it was human blood, and additional genetic analysis established a match 4 between the blood on the machete and the bloodstains on the deceased's shirt. The forensic report was admitted as Exhibit P2. In light of this overwhelming and uncontested evidence, there is no doubt that DW1 directly caused the deceased's death. The final and most crucial issue is whether DW1 caused the deceased's death with malice aforethought. Section 200 of the Penal Code [Cap 16 R.E 2022] defines malice aforethought as the intention to cause death or to do grievous harm to any person, regardless of whether that person is ultimately killed. Courts infer malice aforethought by assessing factors such as the nature of the weapon used, the manner in which it was used, the severity of the injuries inflicted, the conduct of the accused before, during and after the attack and whether the accused had a premeditated intention to kill. See the case of Enock Kipela v. R (Criminal Appeal No. 150 of

- 1994) [1999] TZCA 9 (10June 1999). In this case, none of the prosecution witnesses were eyewitnesses to the precise circumstances leading to the attack. From the evidence provided both from the prosecution's case and DW1's defence it is evident 5 that the only persons present during the incident were DW1 and the deceased. PW4, a relative of the deceased, testified that on 4th February, 2023 in the evening, the deceased stopped by his house and informed him that he had just returned from attempting to collect unpaid rent from his tenant (DW1). However, DW1 had been uncooperative. The deceased mentioned that he intended to return the following day to follow up on the payment and, if DW1 remained unresponsive, he would report the matter to the Village Executive Officer (VEO).

PW4 further stated that on 5th February, 2023 in the morning, while on his way to run errands, he received information that the deceased had been attacked by his tenant. He immediately rushed to the scene and found the deceased lying on the ground, unable to speak. Shortly after, the police arrived, took the body, and transported it to the hospital. Later, he was informed that Siamin had passed away. PW3, a police officer, testified that upon arriving at the crime scene, he observed that DW1's door had been forcibly broken. When asked about it, DW1 admitted that he was responsible. 6 In his defence, DW1 testified that on the day of the incident, the deceased came to demand payment for the proceeds from cashew nut sales, which the deceased had entrusted to DW1 for sale on his behalf. DW1 was unable to make the payment, which led to an altercation. He alleged that the deceased locked him inside the room and left while making threats. According to DW1, he then broke the door, retrieved a machete, and stepped outside, where he found the deceased armed with a bamboo stick. The deceased allegedly began attacking him, prompting DW1 to retaliate using the machete in self-defence. PW6, who was the OC-CID of Liwale at the time and actively participated in the investigation of the case, stated that he participated in interrogating DW1 in relation to the offence. However, during cross-examination, he was unable to recall key details, such as whether DW1 had reported being locked inside the room, whether the deceased owed DW1 money from the sale of the cashew nuts, or whether the deceased had made any threats. Nevertheless, PW6 confirmed that DW1 had stated he received cashew nuts from the deceased for sale, and he also admitted to finding 7 DW1's door forcibly broken, with the crime scene showing signs of a violent struggle. As previously explained, malice aforethought must be established based on several factors. Despite DW1 admitting to causing the death of the deceased, he contends that he did so in self-defence after being attacked by the deceased, who allegedly wielded a bamboo stick. I am mindful of section 18(1) of the Penal Code [Cap 16 R.E 2022], which provides the right to self-defence. The section reads as follows; 18A.-(1) Subject to the provisions of this Code, every person has the right-

- (a) to defend himself or any other person against any unlawful act or assault or violence to the body. Section 18B further specifies the conditions under which the right of self-defence can be exercised; 18B.-(1) In exercising the right of self-defence or in defence of another or in defense of property, a person shall be entitled to use only such reasonable force as may be necessary for that defence.
- (2) A person shall be criminally liable for any offense resulting from excessive force used in self-defence or in defense of another or in defense of property. 8
- (3) Any person who causes the death of another as a result of excessive force used in defense shall be guilty of manslaughter. The case of *Palmer v R* [1971] AC 814 provides useful criteria for assessing whether the accused used reasonable force in self-defence. Lord Morris made the following points;

1. A person who is being attacked should not be expected to "weigh to a nicety the exact measure of his necessary defensive action."
2. If the jury believes that in the heat of the moment, the defendant did what he honestly and instinctively thought was necessary, that would be strong evidence that only reasonable defensive action had been taken.
3. The defence of self-defence will only fail if the prosecution shows beyond a reasonable doubt that what the accused did was not by way of self-defence.⁹ In the Tanzanian context, it has been established that where a confrontation results in a fight, self-defence may be considered as a valid defence. For instance, in *R v. Cheka Antony* [1985] TLR 75, this court held that when death occurs as a result of a fight, unless there are exceptional circumstances, the person who caused the death is guilty of manslaughter and not murder. Additionally, in *Gobeth Cleophance v. R* (Criminal Appeal No. 210 of 2010), the Court of Appeal emphasized; '...First, there is no evidence that there was any physical confrontation/ encounter between the deceased and the appellant, only verbal exchanges. These verbal exchanges must be followed by physical confrontation in order to lead to a fight worthy of consideration to reduce a charge of murder to manslaughter. A fight should trigger some defense known under the law such as provocation, self- defense. A fight per se is not enough. '[Emphasis added] In applying these principles to the present case, DW1 claims he acted in self-defence during an altercation with the deceased over the proceeds of cashew nut sales. According to DW1, the deceased locked him inside the room after a dispute about the payment, and upon leaving, he allegedly made threats. DW1 then broke the door, retrieved a machete, and encountered the deceased outside, armed with a bamboo stick. When the deceased reportedly began attacking him, DW1 retaliated with the machete, leading to the deceased's death. The post-mortem report (Exhibit P1) confirms that the deceased sustained fatal head injuries caused by machete-inflicted wounds, 10 particularly to the back of his head and the face. Although Exhibit P1 does not explicitly describe the size of the injuries, PW1 testified that the length of the wound was approximately 10 cm and the width about 2 cm. While only one wound is explicitly mentioned by PW1 in respect of its length and width, DW1 admitted during cross-examination that he struck the deceased three times with the machete; "I cut him three times with the machete. When he hit me, I immediately struck him back. It is true." The nature and severity of these injuries indicate that excessive force was used. Although DW1 may have initially acted in self-defence, the extent of the injuries inflicted exceeds what was necessary to neutralize the perceived threat. The fact that the machete was used to inflict multiple blows to a vulnerable area of the body (the head) suggests that DW1's response was excessive, rather than a proportionate defensive action. Furthermore, the circumstances surrounding the incident including the broken door and signs of a violent struggle at the scene, as observed by PW3 and confirmed by PW6 and DW1 suggest that a confrontation indeed occurred. However, the level of force used by DW1 went beyond what was reasonably necessary for self-defence. 11 In light of these factors, the court finds that while DW1 did not have malice aforethought in causing the death of the deceased, the force used in the act was disproportionate. As per section 18B(3)

of the Penal Code, excessive force used in self-defence can result in liability for manslaughter. It is clear that the force employed by DW1 was excessive. The prosecution's efforts appear to have sought to convince this court that the injuries inflicted by the accused amounted to murder. However, this conclusion could only have been reached if the prosecution had proven that there was no fight. For malice aforethought to be established, there must be evidence that the accused had a premeditated intent to kill or cause grievous harm. The facts of this case do not suggest any prior enmity between the accused and the deceased, nor does it appear that DW1 had planned to attack the deceased. Instead, the altercation appears to have escalated unexpectedly. Moreover, the fact that the accused reported himself to the police immediately after the incident further supports the argument that he did not act with premeditation but rather in a spontaneous reaction to the situation. 12 Given the totality of the circumstances, the court concludes that while DW1's actions led to the death of the deceased, the prosecution has not sufficiently proven the existence of malice aforethought beyond a reasonable doubt. The accused's reaction, though excessive, was not premeditated and was instead a response to a perceived threat. In light of the foregoing analysis, I find that the prosecution has failed to prove the offence of murder against the accused beyond a reasonable doubt. Accordingly, I hereby acquit Shaban Saidi Makoto of the charge of murder. However, having considered the evidence and circumstances of the case, I find the accused guilty of the lesser offence of manslaughter, as provided under sections 195 and 198 of the Penal Code. I therefore convict the accused accordingly. It is so ordered. Dated at Mtwara this 4th April, 2025. Judge 13 SENTENCING Having carefully considered both the aggravating and mitigating circumstances in this case, I have also taken into account the Tanzania Sentencing Guidelines, 2023, which provide criteria for determining an appropriate sentence. In light of these considerations, I hereby impose the following sentence; While it is acknowledged that the accused is a first offender, the seriousness of the offence, specifically the taking of a life, and the manner in which it was committed, fall under a high level of gravity. The accused's actions directly resulted in the death of the deceased, which is of profound concern, particularly considering the irreversible nature of the loss. As such, I find that the appropriate starting point for sentencing is 10 years. However, taking into account the mitigating factors, such as the accused's age at the time of the offence (20 years old), his surrender to the police, his family responsibilities, and the time he has already spent in custody, these are all significant factors that warrant a reduction in the sentence. Additionally, the accused has shown remorse and a willingness to face the consequences of his actions, which further weigh in his favour. 14 In consideration of all these factors, the court sentences Shaban Said Makoto to a term Of 7years imprisonment. Order

1. Two shirts, one alleged to belong to the deceased and the other to the accused, shall be destroyed as they are unfit for further use due to their condition.

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2. The machete, which was used as a weapon in the murder of Siamini Rashid Mkong'ondo, shall be destroyed. T M.B Mpaze > Judge ; 4/4/2025 15 Court: Judgment delivered today in the presence of Mr. Sebastiani Majaliwa State Attorney for the Republic, Mr. Emmanuel Ngogi Advocate for the accused and the accused person. M.B Mpaze Judge 4/4/2025 16
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