

TANZANIA / JUDGMENT

republic vs vumilia so thomas

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IN THE HIGH COURT OF TANZANIA DISTRICT REGISTRY OF BUKOBA AT BIHARAMULO
ORIGINAL JURISDICTION CRIMINAL SESSION CASE NO 12/2016 REPUBLIC VERSUS VUMILIA S/
O THOMAS

JUDGMENT

01/ 11/2018 & 07/ 11/2018 Kairo, J. The above accused person; one Vumilia s/o Thomas stands charged with murder c/s 196 of the Penal Code, Cap 16 RE 2002. It was alleged that on 2/5/2014 during night hours, the accused murdered one Elian w/o Vumilia. The accused pleaded not guilty to the charge. The prosecution case was conducted by Mr. Grey Uhagile the learned State Attorney while the accused was represented by Mr. Matete the learned Advocate. It is not disputed that Elian w/o Vumilia has passed away and that she has died an unnatural death. This is confirmed by the evidence of Pw1, Pw2, Pw3, Pw4 and Dwl who have so stated during their testimonies. The main issue for court's determination therefore is whether or not the offence charged was proved beyond reasonable doubt. In so doing the court has to determine whether it was the accused person who caused the death of the deceased and further whether the accused had the intention of causing her death. The prosecution has summoned four witnesses and tendered one exhibit (PI) which was a sketch map of the place of incident in order to prove that it was the accused person who murdered the deceased. The first prosecution witness (Pw1) was a boy child of 13 years of age. According to his age, the court had to conduct a voire dire test as per Sec. 127 of the Evidence Act Cap 6 RE 2002 as amended by Section 26 (a) of the Written Laws (Miscellaneous Amendments) Act No. 4/2016 to ascertain if the boy (witness) possesses sufficient intelligence, and knows the meaning of oath to justify reception of his evidence and or duty to speak the truth. The test was accordingly conducted and the court was satisfied that the witness possesses sufficient intelligence, knows the meaning of oath and further he promised to speak the truth. He was thus sworn before receiving his evidence. The witness told the court that on 2/5/2014, the incident date, while at home peeling some potatoes, his father (the accused) came back home and found that his mother Elian w/o Vumilia was not back home yet. He told him that they should go to look for her at Mkuratilo Centre, a neighboring village. It was around 6:00pm but not yet dark. Pw1 went on to tell the court that he noted his father 2 was drunk, and they went. He went on that they met the deceased on her way back home and his father took a coffee

stem stick and started to beat the deceased on her head. He equated the size of the stick with his arm adding that his father beat his mother what he called "fimbo za ukweli". Pw1 was afraid and run away to the neighboring house of Mtarambigwa. He stated that when he ran, his father was continuing beating his mother. He also told the court that it wasn't the first time for his father to beat his mother and when that happens, he warns her not to tell anyone. In cross examination, Pw1 stated that when they went to look for her, they didn't reach at the centre as they met her on the way and that they met her at around 9:00pm and it was dark. Pw1 conceded to have told the police that when his mother was beaten, she run away and his father run after her and that when Pw1 run to Mtarambigwa, she left his parents chasing each other (wanakimbizana). During re-examination, the witness re-affirmed that his father started to beat his mother when they met her on the way and that it was 9:00pm but he had no watch. He also stated that he saw his father inflicting two blows of stick on his mother's head and his mother run away after being beaten and his father chased her. When questioned by assessors he replied that, his father was holding the hand of his mother when cutting the stick. He also stated that he wasn't there when his father killed his mother but he left him continuing beating her when he run away. On further questioning he stated that when he came at home with neighbors, he found his mother has already died. 3 Pw2 was Antony Biguma a Hamlet Chairman. He told the court that on 2/5/2014 around 4:00am while asleep at home with his family, one Niyonge Elias came and informed him that Vumilia Thomas has killed his wife. That he wake up and they together went to the house of the accused. He went on that on reaching there; he found the people of that area have already arrested him. Pw2 further told the court that he entered the house and found the deceased was laid on the mat. He noted that the deceased had an injury on her head and when the accused was asked what happened, he replied that he doesn't believe that his wife has died. The witness went on that he didn't ask him more and he went to report to the incidence to Police. When the witness was asked by the 2nd assessor on the relationship of the couple, Pw2 stated that it was full of drama (frequent quarrels). He also stated that the people around there got the information of the death of Elian around 8:00pm. The third prosecution witness (Pw3) was Josiah Jonathan who was a ten cell leader (Balozi) when the incident occurred. He stated that on 2/5/2014, he was at home and a neighbor Mtarambigwa came and informed him that Vumilia has killed his wife. That he went to his house and together with the neighbors they roped Vumilia to ensure that he doesn't escape. Pw3 went on to tell the court that they found the deceased body at their home and observed that she had an injury on her head, but he doesn't remember how big the wound was. The witness stated that they believed the words of Fanikio when he told them that his father has killed his mother adding that the couple had frequent quarrels. 4 During cross examination, he denied to be present when Vumilia's wife was dying. n rl When asked by the 2 assessor, Pw3 told the court that Fanikio (Pw1) has told them that he left his father continuing beating his mother and he run away. Pw4 and the last prosecution witness was Asst. Insp. of Police; Yusuph Abdallah Kavenuke who investigated this case. He told the court that he remembers on 3/5/2014 morning hours while at his work station Kabanga Police Post, he was informed by his OCS that there was a murder incident at Mlambya Hamlet Mukarehe Village. The witness went to the incidence in the company of the Doctor and met the Hamlet Chairman with whom they went together where the deceased body was. He went on that on reaching there, they found the body was inside the hut

which had one room and was laid on her back on the mat (mkeka). He observed that the body had injuries on the head and face. Pw4 further stated that he further continued with the investigation including writing witnesses statements. The Doctor examined the body and filled the postmortem report which was handed over to him. However when he prayed to tender it as an exhibit, Advocate Matete objected to its admission on ground that some words have been added (doctored), it wasn't signed and there was no qualification of the doctor who filled the report. The basis of his argument was the comparison between the original copy sought to be tendered and the copy availed to the defence. The court sustained the objection. Pw4 further told the court that he also drew the sketch map of the scene area (PI). He went on that when they arrived at Vumilia's house, they found him under the custody of Hamlet leadership and he was told that it was the deceased's husband who was involved in the killing. He then went with Vumilia to Kabanga Police Station for questioning and he wrote his statement into which he admitted to have caused the death of his wife. The accused was then taken to court to answer charges he is facing. When questioned by the 3 Assessor on the type of injuries on the deceased's body and the object used to inflict the same, Pw4 stated that he observed the injuries to have been caused by a blunt object like a stick beating as bruises could also be observed, but not a sharp object. That marked the end of prosecution witnesses. The defense side had only one witness who was the accused himself testified as Dl. They had no document to tender. The witness told the court that he remembers on 2/5/2014 his wife Elian died. He went on that when he returned home on that day he found that Elian was not yet home. He thus told Fanikio; their son that they should go to the neighboring village to look for her. They went and met her on the way. He asked her why she was late. Dwl went on that, he then took a maize stem stick (fimbo ya muhindi) and beat his wife with it on her head. He went on that Elian run away and even Fanikio run away as well, adding that the first to run was his wife Elian and she run towards the direction to their home. He followed her and found her to have fallen down. The witness went on that he carried her and took her home - thinking that she was just unconscious (amezimia). He further stated that he then went to his mother so that she can assist him to take Elian to the hospital, but when his mother came, and observed her, she told Vumilia that Elian has already died. His mother then went to inform the neighbors so that they can preserve the body of the deceased. 6 Dwl went on that, he remained at home with the body when his mother went to break the news. He also conceded to have seen the doctor at the scene but he didn't saw him coming to testify. He further stated that, she noted that the deceased had an injury on her head. When cross examined he stated that what caused his wife's death was his drunkenness which made him to take the maize stem and beat her. She clarified that the injury she sustained was caused by the maize stem stick but he didn't know that maize stem stick can cause injury and that he so knew after the incident occurred. Dw4 admitted that what caused the deceased's death was the injury which was caused by his act of beating her. He concluded that, he was the one who caused the death of the deceased. On further cross examination he told the court that her testimony wouldn't have changed even if the Doctor who examined the body would have come to testify. When re-examined, he stated to have drunk a local brew (mgoligoli) on the incident date and that he heard people saying that Elian (deceased) had an injury on the head but he didn't see it. When sought for clarification by the 3rd Assessor, Dwl stated that Fanikio run away before he beat Elian but he

was there when he was cutting the maize stem stick. He went on that he heard what Fanikio has testified concerning the type of stick but that was not correct. He clarified that it was night and dark that's why Fanikio didn't see the type of tree the accused cut and used to beat the deceased. He added that they were at the maize farm. He further stated that he beat the deceased to warn her not to return late at home. 7 After both sides had closed their cases, the court invited the counsels to make their final submissions. Generally, Advocate Matete for the accused person submitted that the prosecution has failed to prove the charge against the accused beyond reasonable doubt. On the other hand Mr. Grey Uhagile, the learned State Attorney for the Republic submitted that the prosecution has proved the offence charged beyond reasonable doubt against the accused and thus the court should find him guilty of murder. After summing up the case to the Gentlemen Assessors, the first one was of the opinion that the accused person was the one who caused the death of the deceased and the killing was intentional, thus guilty of murder as charged. He amplified that the accused beat the deceased many times by the coffee stem stick as testified by Pwl who properly identified it. However the 2nd and 3rd assessors were of a common view that the accused was the one who caused the death of the deceased but with no malice afore thought. The 2nd assessor opined so because the story leading to the deceased death as testified by Pwl and Dwl are similar and further the accused has admitted when defending himself to have caused the deceased's death. The third assessor when stating the reason of so finding stated that the accused had no preparation towards the killing as he wasn't armed when went to look for the deceased. I will keep on referring to the submissions of the learned counsels together with the opinions of the gentlemen assessors in the course of writing this judgment. As earlier stated, the main issue for determination before the court is whether or not the prosecution has proved the case against the accused beyond reasonable doubt. This is essentially so because the burden of proof in criminal cases generally is always on the prosecution and the standard of proof is beyond reasonable doubt [Refer the case of Jonas Nkizi vrs R [1992] TLR 213 and Mohamedi Said Matula vrs R [1992] TLR 3. The prosecution in the case at hand has based on the evidence Pwl who was an eye witness to the beating incident and on circumstantial evidence as no one has seen the deceased dying. Pwl was a boy of a tender age (13years) thus a voire dire test was conducted. The court was satisfied that he fulfilled the requirement of section 127 of the Evidence Act Cap 6 RE 2002 as amended by Section 26 (a) of the Written Laws (Miscellaneous Amendments) Act No. 4/2016 and thus went on to receive his evidence. The witness in his testimony stated to have seen the accused cutting the coffee stem stick and beat the deceased twice on her head when they met her on the way, insisting that it was 9:00pm. Pwl also stated that the size of the said stick was like his hand. The accused on his part (Dwl) conceded to all the facts stated by Pwl except the type of the stick used to beat the deceased which Dwl stated to be of a maize stem. Generally visual identification is regarded as the weakest kind of evidence and the courts have been warned not to act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight [Refer the case of Waziri Amani vrs R [1980] TLR 250], The interlocutory question is whether the conditions were favorable for proper identification of the type of the stick and the size of the same. Both Pwl and Dwl testified that it was night and dark. The State Attorney in his submission contended that the person to be believed is Pwl arguing that

the accused was drunk on the incident date. Thus Pwl being sober, 9 was in a better position to identify the object used to beat the deceased. I paused to ask whether the accused was so drunk that he was incapable of knowing what was going on at the scene thereby confuse the coffee stem stick with the maize stem stick. Thorough analysis of the facts proves otherwise; It was the accused who came with the idea of going to look for the deceased who was late to come back home. He met her on the way, he then cut a stick and beat her, when she run following the beatings, he run after her and found her to have fallen down. She carried her back home thinking that she was unconscious. The accused then went to his mother to seek for help to take her to hospital. Looking at the above incidents, it is my conviction that even if the accused was drunk on that day, he wasn't drunk to the extent being unable to distinguish the maize stem stick and the coffee stem stick. I thus don't subscribe to the learned State Attorney's argument with due respect. The third assessor when sought for clarification from the accused person with regards to the coffee stem stick as testified by Pwl, stated that it was night and dark that is why Pwl didn't see the type of tree he cut, which explanation I agree with. The accused also added that they were in maize a farm. Besides Pwl stated that the accused was holding the hand of the deceased when he went to cut the stick to beat him and he was afraid, which state could have made Pwl confused. In this circumstance, the court is skeptical to rule out that the identification on the type of stick and its size was watertight as opined by the 1st assessor. Instead, the person who was better placed to know the type of tree used to beat the deceased was the accused himself as rightly argued by Advocate Matete. 10 According to testimony, the deceased was observed to have an injury on her head and face (Pw2, Pw3 and Pw4). It was further testified that the accused person has beaten the deceased twice on her head with a stick (Pwl and Dwl) as such it was not many times as opined by the 1st assessor. The accused person when giving out his defense had conceded that he was the one who caused the death of his wife Elian due to the beatings she inflicted on her head. The State Attorney in his submission has stated that, the eyewitness (Pwl) has seen the accused beating the deceased with a stick on her head which is true. He further submitted that the accused in his defense didn't dispute either and that the injury observed on the deceased body was on the area Pwl and Dwl have testified the deceased to have been beaten. However none of the witness has testified to have seen the deceased dying which means the prosecution also rested the case on circumstantial evidence. Advocate Matete in his submission has argued that there was no evidence to show what happened from the time when the deceased run away after being beaten to the time when the deceased fall down. He clarified that anything might have happened in between and caused her death, thus suggesting that the evidence doesn't lead irresistibly to an inference of guilty to the accused as it was capable of other reasonable explanation. One of the principles on circumstantial evidence is that the evidence must lead irresistibly to an inference of guilty of the accused, incapable of any other reasonable explanation. [Refer the case of Rex vrs Kipkering Arap Kusked & Another (1949) EACA 135 cited with approval in the case of Rajabu Taratibu vrs R: Crm Appl No 237/2014 (unreported)] The wanting question therefore is whether the evidence leading to the death of the deceased is incompatible with the guilt of li the accused and is capable of other reasonable explanation than that of guilty as argued by Advocate Matete. It was testified that the accused and Fanikio met the deceased on her way coming back home and the accused immediately cut the stick and inflicted

two blows on her head. (Dwl and Pwl). Further that the deceased run away to save herself following the beatings and the accused run after her. Pwl run away as well but he left the accused continuing beating the deceased (Pwl). The accused immediately followed (chased) her and he found her to have fallen down, (Dwl) he carried her to their home and the deceased never wake up again. According to above narrated facts, I am not convinced with the argument by Advocate Matete that the time lapsed could have allowed the happening of anything that could be the cause of the deceased death. I am so stating because the accused followed the deceased immediately after she run away to escape the beatings. This can be explained by Pwl testimony when he said "n'Hipokimbia niliwoocho wanakimbizona". My conclusion is also strengthened by the fact that the accused was the last person to have been with the deceased while alive. It is my considered opinion that there was no other co-existing circumstances led by evidence that there could be another person or another incident which could have caused the death of the deceased apart from the accused person who was the person seen beating the deceased by Pwl. Besides Pwl and Dwl testified that the blows were directed on the deceased's head and the injuries on the deceased's body were seen/observed on the head as well by other witnesses (Pw2, Pw3 and Pw4). 12 Further to that the accused person has repetitively admitted when giving his defense that he was the one who beat the deceased twice on her head, the blows which caused her the death. The position of the law with regards to an admission by the accused person is that, admission by an accused person is the best evidence. In that regard therefore I agree with the 2nd and 3rd assessors that it was the accused person who caused the death of the deceased. Having found that the accused was the one who caused the death of the deceased, the court has to go further to determined whether the killing was with malice aforethought. In the case of Enock Kipela vrs R; Criminal Appeal No. 150/1994 CAT Mbeya (unreported) the court has resolved as follows on determining whether a particular killing was with malice afore thought: "Usually on attacker will not declare to cause death or grievous bodily harm, whether or not he had that intention must be ascertained from various factors, including the following: 1.the type and size of the weapon if any used in the attack

2. the amount of force applied in the assault
3. the part or parts of the body the blows were directed at or inflicted on
4. the number of blows, although one may, depend upon the facts of the particular case, be sufficient for this purpose
5. the kind of injuries inflicted
6. The attackers' utterance if any made before, during or after the attack. 13
7. the conduct of the attacker before and after the killing In the case at hand, the accused used a stick which was not a lethal weapon (Pwl and Dwl). The amount of force used is not known. Though Pwl has stated "fimbo za ukweli" but he didn't tell the court its meaning. According to testimonies, the deceased was found with injury on the head but it was not testified how big the injury was. Pw3 told the court that he can't remember how big the injury was. Pw4 on his part only told the court that he observed the deceased to have

injuries on the head and face and when asked by the 3 assessor on the nature of the injuries, he replied that the injuries seemed to have been caused by stick beatings as there were bruises (Pw4), which explanation in my view suggests that they weren't big. There was no dispute that the deceased was beaten on the head (Pw1 and Dwl) twice. However, considering the type of weapon used, number of blows and nature of the injuries, I am still of the firm view that malice cannot be inferred in this circumstances. I will analyze the 6th and 7th factors as per the case of Enock Kipela (supra) collectively. It was testified that before the beating, the accused told his son that they should go to look for the deceased as she was late to come back home (Pw1 and Dwl). That he went with his son Fanikio which action shows that he had no ill intention otherwise he would have gone alone for concealment purpose. The accused didn't go armed. Even the stick which he used to beat the deceased with was obtained at the scene (Pw1, Dwl) which showed that he was not prepared to beat her. 14 When the accused started to beat her, the deceased run and he followed her. After finding that she has fallen down, he carried her home believing that she was just unconscious which again negate malice otherwise why didn't he left her behind when she fall down? Further to that the accused stated that he beat her to warn her not to be late. The accused after reaching home went to his mother for assistance to take her to the hospital. I am aware the State Attorney has argued that failure by the accused to take the deceased direct to the hospital shows malice on his part. However the evidence was to the effect that Dwl at first thought that the deceased was unconscious that is why he took her home expecting that she would recover consciousness later. But also the accused didn't state the type of assistance he went to seek from his mother having in mind that assistance could even be in terms of cash Further to that it was testified that when the accused's mother went to the neighbors to inform them on the death of Elian, the accused stayed behind with the body, he didn't run away. Besides even his reply when asked by Pw2 as to what happened he said he didn't believe that his wife has died the answer which in my view denotes that the happening was startling and chocking to him. Besides, in his defense he stated that he didn't know that the maize stem stick could cause death. Those facts in my view negate the existence of malice. On top of that his admission that he was the one who caused the death of his wife by beating her on the head shows no ill intention on his part. It should be noted that his admission was since the incident occurred as can also be evidenced by the Preliminary hearing proceedings of 30/08/2016. 15 In the foregoing the court has entertained serious doubts with regards to existence of an intention to kill the deceased on the part of the accused. It is the legal stance that where there are doubts, they same are to be resolved in favor of the accused. In the circumstances therefore malice aforethought cannot be said n/H to have been established beyond reasonable doubt as rightly opined by the 2 and 3rd assessors. As to what is the way forward, the case of Augustino Kaganya and 2 Others vrs R

[1994] 16 CAT serves as guidance where in the court has observed as follows:- "In a charge of murder, only where it is doubtful on the evidence that an accused intended to kill or cause grievous harm to the deceased, will the court give the benefit of doubt to the accused and

find him guilty not of murder but on manslaughter". This court having entertained doubt on the existence of an intention to kill on the part of the accused person is constrained to found the accused; Vumilia s/o Thomas guilty of a lesser offence of manslaughter contrary to section 195 of the Penal Code Cap 16 RE 2002 and hereby convict him accordingly. L.G. Kairo Judge 7/11/2018 State Attorney: Hon. Judge there is no previous record regarding the accused. However we pray the accused be sternly punished so as to make him learn a lesson and even make others learn a lesson as well for the people with similar habit. Hon. Judge I so pray that because it has been a custom due to patriarchy wherein the man turn her wife to a property or a child to be chastised now and then as it was testified in this case that the accused had the habit of beating his wife. Thus punishing him sternly will send a message to him and others as well that such habit can cause the killing of innocent women as it happened in this case. That is all. Mitigation by Advocate Matete: Hon. Judge, I pray your court be lenient when punishing the accused for the following reasons:- Hon. Judge, as stated by the prosecution that the accused is the first offender and according to evidence, it shows that the offender was a good father in his family that is why even when he decided to go search for the wife, he went with their son, which shows ensuring safety of all of them. The offender is the father of one child, and even the child's conduct when he came to testify wept when he saw his father. The child now has no parent as the mother has passed away and another parent (father) is under legal custody. Besides the offender's mother is alone at home and is an old woman who depend much on the offender. The offender also is remorseful for what he has done as since the incident occurred, he admitted to have killed her but not intentionally. In fact the prosecution would have saved time and public money if it would have accepted to charge him with a lesser offence of manslaughter. Further to that, the health of the accused is not good as he is having eyes and skin ailments. As the prosecution has stated that the 17 accused is the first offender. It should also be considered that the accused has stayed about four years in remand prison. For all above reason, we pray the court to be lenient and give him lenient sentence so that he can go and attend his child whom after seeing his father wept bitterly. That is all. Accused: Hon. Judge, I pray your court be lenient to me when punishing me. I didn't intend to kill her. SENTENCE I have taken into consideration the mitigating factors advanced by Mr. Matete Advocate for the accused person. I have also taken into account what accused has stated which is the finding of the court anyway. The accused is the first offender as per State Attorney's records. He has admitted the offence since its commission as per preliminary hearing proceedings which show remorsefulness or repentance for the offence he committed. But further to that, the court has also considered the fate and predicament of the child Fanikio. When he came to testify I was watching him and observed that he was weeping from the moment he entered the witness box until he left. Whenever he looked at his father or mention his mother's name, he would weep bitterly. I can't imagine the extent he misses his parents. It is sad that the incident has turned him to an orphan as the mother has passed away, the father is behind bars. Needless to say; a child has a right to be loved and cared by both parents. It is unfortunate that the mother is no more, but at least, the father who is still living should take charge. 18 I have also

considered his future in the sense that during voire dire test, he said that he is not schooling. Again it means his right to education has been infringe as well and there could be no explanation but because he has no parent now to ensure that he goes to school and if not to be held responsible in case of breach. Much as I agree with the State Attorney that the accused has shown patriarchy habits one being of beating wives, the habit which should be accorded zero tolerance, but sincerely I am of the view that to continue holding the father in the circumstance means punishing Fanikio, the innocent child more than the offender himself. Besides, I am aware that the accused has stayed in remand prison for four years which in my view is enough time to teach him a lesson, and also send the message to others who have got similar habits. Having all those into consideration, this court Vumilia s/o Thomas discharge him on condition that he commits no offence for a period of twelve (12) months effective the date of this order under section 38 (1) and (2) of the Penal Code Cap 16 RE 2002, short of it section 38 (3) of Cap 16 (supra) shall apply. Judge 7/11/2018 19 Right of Appeal explained. Court: Lady and Gentlemen Assessors are thanked and discharged. L.G. ^iio Judge 7/11/2018 ff AT BIHARAMULO V- 20

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