

TANZANIA / JUDGMENT

Luaga Boxer Judg

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB
REGISTRY) AT DAR ES SALAAM CRIMINAL SESSION CASE NO 9012 OF 2024 CASE REF
202404052000009012 REPUBLIC VERSUS MTABI DAUDI LUAGA@JOHN BOXER “TRAINER BOXER”

JUDGEMENT

12th & 14th March, 2025 KIREKIANO J: At the port of Dar es Salaam, there is a baggage area, used by passengers traveling from Dar es Salaam to Zanzibar. After sunrise it is rush hour at the ferry, many passengers travel to Zanzibar. Whether it for business or leisure is not the subject of this judgment. What is worth is that, on the 5th day of July 2023, around 08hrs it was already a busy day for PW2 E. 7483 D/Sgt Pashua a police officer who worked at Bandari Police station. He walked around and thought he should have a cup of coffee. When he was walking around, he learnt from civilians around that there was a person was lying near the baggage area, wounded and needed help. 1 He informed his senior officer, the police responded to the rescue. The said person was Peter Godson Sella (the deceased). He was rushed to Muhimbili hospital for medical attention. His life come to an end before he could get any treatment. It is the prosecution case that the death of Peter Godson Sella was not natural but caused by an unlawful act. Upon investigation and arrest, the accused herein found himself at the dock charged with the offence of murder contrary to section 196 and 197 of the Penal Code [Cap 16 R.E. 2022]. The particulars of the information filed was that on 5th day of July, 2023 at Baggage room area within Ilala District in Dar es Salaam Region, the accused did murder the said Peter Godson Sella. The accused pleaded not guilty. In a bid to prove tha information the prosecution side paraded seven witnesses they are; Pw1 SP Gabriel C. Mwakisongo, PW2 E. 7483 D/Sgt Pashua, PW3 G.4882 D/Cpl Rashidi, PW4. F6245 D/Sgt Masoud PW5 Prof Amos Roja Mwakigonja. PW6 Said Hashim Mlungula and PW7 F6368 Dsgnt Yusuph . The prosecution also tendered the statement of the witness Ponsiano Richard who could not be traced. In substance the prosecution case is that; When at the scene PW2 Sgnt Pashua, inquired from the people around and learned from one Isaya 2 that the deceased was Peter and was beaten by one Mtabi Luaga. After reporting to his senior PW1 SP Mwakisongo, he also went to Muhimbili hospital where the deceased was rushed to hospital. The hospital confirmed that Peter had lost his life. He said the police launched an investigation into the cause of death. On his part, he confirmed to have participated in the post-mortem examination, which was conducted on 8.7.2023 at Muhimbili. PW3 Rashid a officer, also witnessed the postmortem examination conducted on 8.7.2023, at Muhimbili National Hospital.

According to him, the deceased was Peter @ Godson Sella, as confirmed by the deceased relative, one Rose. On 6.7.2023, he went to the crime scene and prepared a sketch map, which he tendered as (Exhibit P1). He said he was led by Isaya, who was acquainted with the scene. According to him, the deceased body was found at the baggage area beside the road near the beach. PW1 SP Gabriel C. Mwakisongo confirmed to have received report from PW2 Pashua. According to him, having learnt about the death of the deceased. Investigation was launched; he received the preliminary information that the deceased was assaulted by one Ntabi Daudi Luaga @ BOXER the accused. This was according to one Ponsiano. The next day 3 on 6.7.20223, the accused was arrested by police Jamii (PW6 Hashim). According to PW1 when he asked the accused about killing, he told him that he was provoked by the deceased. He did fight back but since he was a boxer it appears the deceased did not survive his fist. Further investigation was carried by PW4. F6245 D/SGT Masoud According to him, the deceased died from a wound he sustained after being hit by a blunt object at his head. According to evidence he gathered from one Ponciano, the deceased was hit by the accused using a piece of wood. He said the accused led him to the scene to find out the piece of wood which was used to hit the deceased, but none was found. It was also his evidence that the said Ponciano was initially implicated as co-accused but was discharged, as he appeared to be a witness, not accused. He was also convinced by the report on postmortem, which indicated that the cause of death was due to a wound sustained on the head. When cross-examined by Mr. Katundu for the accused, he said the blunt object used to hit the deceased could be a piece of wood or a fist. As such, it was found in his investigation that the accused was arrested by the Police Jamii, who informed the police on the accused's arrest. 4 PW5 Prof Amos Roja Mwakigonja, a pathologist at the Muhimbili National Hospital, examined the deceased body on 8.7.2023. According to him, the deceased skull suffered a fracture on the left side of the head. In his opinion, a heavy blunt object caused the fracture because the skull of a human being is hard to break. He was of the opinion that the cause of death was a traumatic brain Injury caused by the head injury. These findings were tendered in Post mortem Examination report. Exhibit P2. According to the statement of Ponciano Richard (Exhibit P3) admitted under sections 34B (2) (e) - (f) (4) (5) Tanzania Evidence Act Cap 6 RE [2022], he said on 05.07.2023, 21:00hrs around near Azam Marine he met his friend MTABI S/O DAUDI "BOXER" before they could go home, the said Mtabi told him he wanted to teach one person a lesson because, he had angered him, in the process the said Mtabi picked a piece of wood and hit the deceased Peter Godson Sella around his head. In that incident he could not defend himself. PW7 Said Hashim Mlungula: confirmed to have arrested the accused, according to him on 06.07.2023, while in company of Abdi Ibrahim, Omary Mohamed Ally, Chambuso he said he worked as Police Jamii and when working at Dar es Salam Central Business District (CBD) area they got tip that one man namely Boxer was wanted after murder 5 of Peter Godson Sella he then took the accused to police station for further investigation. On his part, the accused's defence DW1 Mtabi Luaga, he said he knew the deceased before as Peter. On 5.7.2023, while at his working place, Posta ya Zamani, the deceased arrived. When he asked the deceased about the money, he owed him the deceased responded by insulting him with vulgar abuse. As such, the said Peter had a flick knife. He armed it and followed him in attempt to stab him, he pleased him but the deceased approached him. He responded by hitting the deceased by fist. The deceased felt down, since there were stones at the area, the deceased hit

his head and did not wake up for a while. He said he felt mercy, picked him and assisted him to sit down. He then told him that they were like brothers, he told the deceased what had happened was not good, the deceased told him he was sorry, and he left for his training sessions. The next day he was he said he arrested by Ulinzi Shirikishi (PW6), who informed him that the person he assaulted was in bad shape, and after some detention he was told that Peter had died. His defence was that he had no bad intention to harm the deceased but it was the deceased who started it so he was defending himself. 6 Given both sides' evidence, I have considered the same. To find conviction against the accused person on the offence charged, all elements of the offence of murder under section 196 of the Penal Code must be proved beyond reasonable doubt. That is first, Peter @ Godson Sella is dead, second, his death was not natural but caused by an unlawful act. Third, it was the accused who did the unlawful act or omission, fourth, the death was caused with malice aforethought, that is to say, the act was intended to cause death or grievous bodily harm. I will start with the first and second aspect of whether Peter @ Godson Sella is actually dead and whether his death was not natural. Proof of death can be proved in many ways depending on the nature of death. Where the body is available, the common practice has been to have the body examined by the medical practitioner with a view to confirming death, but also the cause of death. In the Kenyan decision, which persuaded me, that is *Republic v David Morogo*

[2017] KEHC 5361 (KLR) Citing the court of appeal decision in *Ndungu Vs Republic* [1985] EKLR the Court of Appeal decision, held that; 7 “Where a body is available and the body has been examined, a post-mortem must be produced, the trial court having informed the prosecution that the normal and straight-forward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is examined.” It is noted here that the reasoning above does not mean that was the only way to prove death. However, in this case there is no dispute that the body of Peter Godson Sella was found and examined at Muhimbili National Hospital. The pathologist PW5 Prof Mwakigonja testified to have examined the body, he confirmed death and opined that the cause of death was a traumatic brain Injury caused by the head injury. These findings were tendered in the Post mortem Examination report Exhibit P2. As such, there was an oral account of PW3 Pashua who said he found the deceased with a head injury before. There was no evidence to contradict this fact, instead, the accused stated that he hit the deceased with his fist on the reasons he stated. Based on the evidence of the pathologist PW5 and his finding in Exhibit 2, but also the oral account of PW2, and having considered the accused's story, I thus find as a fact that 8 Peter @ Godson Sella is dead and death was not natural but caused by an unlawful act. The third aspect is whether the accused did the unlawful act or omission. There is evidence from the statement of Ponciano Richard exhibit P3 that it was the accused who did hit the deceased. This fact also featured from PW1 who said when, he asked the accused about this he said it was true that he did beat him by fist. I see no reason to doubt this evidence because in his defense the accused readily confirmed the prosecution version to the extent that he did hit the deceased by fist in self-defense. I also note that the accused said the deceased fell down and hit his head on a sharp stone. I have

given this thought, as far as causation is concerned, I do not consider that this saved his day. My reasoning is persuaded by the decision in the South Africa Court applying “but for the test.” This was in *S v Nsele* (CCD 10/2020) [2022] ZAKZDHC 16 (21 February 2022), the court narrated that the “but-for” test requires the court to mentally eliminate or think away as much of the defendant’s conduct as was unreasonable and to ask hypothetically whether the plaintiff would still have suffered the harm had the defendant acted reasonably. 9 If the harm would “not” have been suffered, factual causation is established; if the harm “would” have occurred anyway, the required cause link is absent. From the foregoing, even believing that the fracture of the head was caused by falling down and hitting his head, yet it does not pose a flicker of doubt that it was the accused whose unlawful act ultimately caused the death of the deceased. The last aspect is whether the accused person caused the said death to the deceased with malice aforethought. Malice aforethought is defined under section 200 of the Penal Code [CAP 16 R.E. 2002] (the Code) thus;

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not; although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not; or by a wish that it may not be caused;
- (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years; 10
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence. As such a helpful reading from Black’s Law Dictionary “Malice aforethought” is termed as: “A predetermination to commit an act without legal justification or excuse ... An intent, at the time of killing, wilfully to take the life of a human being, or an intent to act in callous and wanton disregard of the consequences to human life ...” In *Enock Kibela Versus Republic* Criminal Appeal NO 150 OF

1994. The Court of Appeal stated that for courts to establish malice within the context of the Penal Code, they need to assess the following seven aspects; “(1) the type and the size of the weapon, if any, used in the attack (2), the amount of force applied in the attack, (3) the part or parts the blow or blows were directed or inflicted on,
- (4) the number of blows although, one blow may, depending on the facts of a particular case, be sufficient for this purpose,
 - (5) the kind of injuries inflicted, (6) the attacker's utterances, if any, made before, during or after the killing and, (7) the conduct of the attacker before and after the killing.” 11 I have considered what caused the harm sustained by the deceased. The prosecution evidence,

according to the statement of Ponciano, Exhibit P3, the deceased was attacked by the accused with a piece of wood, he said. As such it stated in the statement that, the accused uttered word intending to teach the deceased a lesson. While I consider this, there is also another version from PW1, the officer, the accused told him that he was provoked, thus was in self defence. This fact also featured in the accused's defence, who said he was defending himself from the deceased attack by a knife. The prosecution did not tender the alleged piece of wood nor did the accused tendered the knife. In *Shedrack Kuhaha vs Republic* (Criminal Appeal No. 139 of 2015) [2015] TZCA 166 (5 June 2015) the court of appeal was faced with a similar situation where the axe alleged to have been used to assault the victim in a case of attempted murder was not tendered. The court of appeal at page 8 held; It is true that the axe and the matrimonial proceedings were not as exhibits. The position of the law is that, even if those articles were not produced in court, that factor affects only the weight and not the admissibility of oral evidence regarding the existence of these articles. Their 12 non-production does not obliterate the fact that under section 61 of the Evidence Act (Cap. 6 - R.E. 2002) all facts except the contents of a document may be proved by oral evidence It follows that whether the accused assaulted the deceased by piece of wood as stated or was in self-defence remain a matter of weight between the prosecution case and his defence and could be proved by oral evidence. I note that every witness deserves to be believed unless reason is shown to discredit one. Now in this case, the only eyewitness is Ponsiano, whose statement was admitted as Exhibit P3. In his statement he said the accused wanted to teach the deceased a lesson and went on to hit the deceased. I have given this consideration; however, it is to be noted that this witness was arrested, charged and discharged and now testified against the accused. It is the very witness who when arrested the accused said that he was not involved. His evidence was treated with caution. On top of this while his statement is considered as valid evidence, under the circumstances his credibility here can not be of assurance. It could be different if the same was subjected to cross examination in *Asia Iddi V Republic* 1989 TLR 174 this court in its wisdom found that; 13 P.W.3 was a witness with his own interests to serve. He could not, therefore, be expected to have said anything other than that which would exculpate him from liability; This is the same position with the evidence in Exhibit P3, the said Ponciano Richard has his interest to serve and it is not surprising why he could not be traced. His statement on needed corroboration and it could come from the person namely Isaya mentioned by PW1 but could not be traced. The other version stated above is that the accused was in self- defence. This featured in PW1 but also in the accused's defence. In this state of affairs. Now in this case *Olfam Mathias @ Mnola v. R* [2012] T.L.R. 304 at 305, where this Court observed that: Where there are two possible views on the evidence, one pointing to the guilty of the accused and another to his innocence, a court of law must adopt the one favourable to the accused Having considered the prosecution evidence, I find that the aspect of malice was not proved to the hilt. Instead, the accused's version of self defence is believed. All said, I find that the prosecution Side has not proved the information of murder to the required standard. The accused person is found not guilty of murder contrary to sections 196 and 197 of 14 the Penal Code Cape 16. Instead, the accused is found guilty of the offence of manslaughter contrary to sections 195 and 198 of

the Penal Code Cap 16 [RE 2019]. The accused person is accordingly convicted. A J KIREKIANO JUDGE 14.3.2025 COURT Judgment delivered in open court in the presence of Mr Tumaini Mafuru, learned state attorney for the republic, and in the presence of the accused and his defence counsel, Mr Jacob Katundu Mwambasi, learned advocate. A J KIREKIANO JUDGE 14.3.2025 15

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