

TANZANIA / JUDGMENT

## kisota JUDGEMENT

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF TANZANIA AT MANYARA CRIMINAL CASE NO. 000003407 OF 2025 OFFICE OF DIRECTOR OF PUBLIC PROSECUTION ..... COMPLAINANT / APPELLANT / APPLICANT VERSUS KISOTA S/O TULITO ..... RESPONDENT / DEFENDANT JUDGMENT KAMUZORA, J 11th & 19th February, 2025

The accused Kisota Tulito was charged for the murder of his own son aged five months. The incident took place on 30th day of March, 2024 at Ndotoi Village within Kiteto District in Manyara Region. Before I go to the merits of the matter, I would like to put the records clear. This case was scheduled for trial on 10/02/2025 in a criminal session starting on that date. During pre-session meeting on 07/02/2025, some procedural errors were discovered in the records forcing the prosecution side to withdraw the information and refile it on the same date. Unfortunately, the process was succumbed by the failure in the electronic filing system which resulted into directives for manual filing on 07/02/2025 followed by committal order on the same date. This was so done for purpose of expediting the trial process because the case was already cause listed for trial on 10/02/2025. The system failure was rescued by case management team at the headquarter and as a result of that failure, the case was able to be registered in the system on 09/02/2025 instead of 07/02/2025 and still, could not open window for assignment. In the same footing, hearing proceeded manually until when the system responded for assignment on 13/02/2025 indicating that hearing was conducted before the assignment. With the above explanation, parties should know that the procedures were followed and the court was not ready to be defeated by system failure from doing justice to the parties. Turning to the merits of the matter, the brief facts of the case show that, the accused Kisota Tulito was married to Naidinga Kayuu and were blessed with one child, Elia Kisota (now the deceased). On the date of incident, the accused together with his wife Naidinga Kayuu (PW 3) and their son Elia Tulito were sleeping in the same room. At the middle of the night, PW3 woke up but did not find her husband and their son on the bed. Worried of what may have befallen them, she informed the relatives and neighbours who commenced their search instantly. In course of search, the accused was found sleeping at his brother's house not far from his home. He was interrogated by elders and confessed to have left with the child at night. He led the relatives and the militia man one MG Morika Page. 1 Hon. DEVOIHA KAMUZORA Matepete (PW 4) to the place he left the child. They found the child covered in blood, his abdomen cut open and was already dead. The accused confessed to have killed the child using a bush knife. They immediately apprehended the accused and PW 4 seized the bush

knife from him. The accused's brother phoned the police at Dondo police post in Kiteto district and police officers including F .3 1 15 D /SG T Jam es (PW 2) w ent at the scene. They were led by the relatives to the scene where they found the dead body o f a m ale child w ho had a cut w ound on the abdom en. A ccording to PW 2, the accused was already arrested and under the custody o f the militia man who also handed to him the bush knife (exhibit PE7) which he had seized from the accused. PW 2 prepared a certificate o f seizure (exhibit PE5) indicating that he seized the bush knife. The body was exam ined by the doctor, one Jerem ia W illiam N yondo (PW 1) in the presence o f the relatives o f the deceased. In his evidence the doctor exam ined the body and observed a penetrated cut wound from the left to the right side o f the abdom en. The report on postm ortem exam ination (exhibit P E I) indicates that the cause o f death was severe haem orrhage due to penetrated low er abdom en cut w ound. The accused was sent to Dongo police post and a bush knife was handed to CPL W illiam and upon transfer o f the accused to Kibaya police station, the exhibit w as handed to CPL Nadhifu as evidenced by the chain o f custody form (exhibit PE6). The evidence also reveals that, the accused was interrogated and according to G .9659 D /CPL Cleopa (PW 5), the accused confessed to the police and before the justice o f peace to have m urthered his son. The accused's cautioned statem ent was adm itted as exhibit PE3 and the ex traju dicial statem ent was adm itted as exhibit PE4. During prelim inary hearing, the accused adm itted to all facts form ing the offence o f m urther save for his age. In his defence, the accused again claim ed that he was aged 17 years. However, his cautioned statem ent w hich was not objected shows that the accused was bom in 2003. The court called for evidence to inquire on the accused's age and despite the accused's insistence that he was 17 at the tim e he was testifying, he was unable to prove so. The medical report subm itted by the prosecution side suggested that the accused was 17 years old at the tim e o f the com m ission o f the offence but by January 2025 when he was exam ined, he has already attained the age o f 18 years. This court m ade a finding that the accused has already attained 18 years old save that, at the tim e he com m itted the offence, he was under 18 years old. W ith the evidence on record, at the tim e o f incident, the accused was aged 17 years old w hile his wife was aged 18 years old. In his defence, the accused adm itted to have killed his son by cutting his abdom en using a bush knife. He explained that, on 30/03/2024 at night after he left with the child, killed him and abandoned his body in the bush near his house. A fter he had killed the child, he w ent to sleep in his brother's house. Upon being interrogated by his relatives, he led them to the place he had abandoned the body, the bush behind his house. He how ever claim ed that a day before the incident he had sm oked bhanghi thus, he was not aw are o f w hat he was doing. He added that he married his wife w hile she was already pregnant for another man and his m other w as the one w ho found the wife for him. He prayed for forgiveness for the offence he has com mitted. From the above captured evidence there is no doubt that Elia Kisoti was brutally m urthered. The evidence from prosecution w itnesses and doctor's report are very clear that the deceased succum bed to death due to penetrated cut wound on his abdom en after he was ruthlessly attacked by his father. The evidence w as also clear that the accused person caused death to the deceased. From the evidence, the only issue is w hether the accused killed the deceased with malice aforethought. In his testim ony, the accused raised a defence o f intoxication during his defence by claim ing that he had smoked bhanghi before the incident and therefore, he did not know what he was doing. G

generally, intoxication cannot stand Page. 2 Hon.. DEVOTHA KAM UZORA as a defence of murder. See, Court of Appeal decisions in *Mwale Mwansanu vs Director of Public Prosecutions* (Criminal Appeal 105 of 2018) [2021] TZCA 52 (2 March 2021) and *John Dickson @ Ngongole vs Republic*, (Criminal Appeal No. 477 of 2021) [2024] TZCA 144 (29 February 2024) and law, section 14 of the Penal Code, [Cap 16 R.E 2022]. However, there are circumstances under which intoxication can be considered as a defence. Section 14 which reads: - 14.-(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

- (2) Intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of, he did not understand what he was doing and-
  - (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
  - (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) of that subsection the accused shall be discharged and, in a case, falling under paragraph (b) of that subsection the provisions of this Code and of the Criminal Procedure Act relating to insanity shall apply.
- (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
- (5) For the purpose of this section “intoxication” shall be deemed to include a state produced by narcotics or drugs.” In interpreting the above provision, the Court of Appeal in *John Dickson @ Ngongole* (supra) held: - “The circumstances where a defence of intoxication will be considered include one, where the accused did not know what he was doing, two, that the state of intoxication was caused without his consent by malicious or negligent act of another person. Three, the accused is, by reason of intoxication insane, and four, that is temporarily or otherwise or it cannot be established that such person had the capacity to form the intention to kill or cause grievous harm.” In the matter at hand, the accused was unable to show that he was intoxicated to the extent of not understanding what he was doing. His conduct during and after the commission of the offence suggest that he knew what he was doing. He waited until his wife had fallen asleep before he decided to sneak out of the house carrying the child. He took the child to the bush to avoid being seen by anyone and killed him. He decided to go and sleep at his brother’s house without telling anyone of what he did. At first when he was interrogated, he denied being responsible but after being interrogated by the elders, he confessed and led them to the place he abandoned the body. All these events suggest nothing but that the accused knew what he was doing. From his evidence nothing shows if he was forced to smoke bhang or if he smoked it unknowingly or out of negligence of another person. Intoxication if at all was there, it was self-induced

having decided to sm oke it out o f his own volition. D espite that, there is no evidence suggesting that the accused had a confused state o f m ind at the time he com m itted the offence. I say so because, at the time he was arrested, he was found sleeping at his brother's house and no w itness disclosed any fact suggesting that the accused was m entally unstable. All his conducts as captured above suggests nothing but a clear fact that he knew w hat he was doing. In that regard, the accused's defence that he was not aw are o f w hat he was doing because o f intoxication arising out o f sm oking bhanghi cannot stand. On the accused's malice, I have considered the evidence in totality. The accused m alice can be tested based on his 3 Hon.. DEVOTHA KAM UZORA conducts prior the com m ission o f the offence, during and after the com m ission o f the offence. In Elias Paul vs Republic, Criminal A ppeal No. 7 o f 2014 (unreported) the Court o f A ppeal observed: - "M alice may also be inferred from the nature o f the weapon used and the part or parts o f the body w here the harm is inflicted. In this case a stone w as used and was hit on the head\chest and abdom en w hich are vulnerable parts o f a human body." In the m atter at hand, the accused took the child at night w hile others were sleeping, he used a bush knife to cut the deceased. By its nature, the bush knife is sharp double edged big knife. The doctor testified that the body was found w ith a penetrated cut w ound from the left to the right side o f the abdom en w ith protruded intestines w hich were also cut. The blow inflicted was too heavy and the body part targeted w hich is abdom en, shows that the accused intended for the death o f the deceased and not otherwise. In his defence and extra judicial statem ent, the accused disclosed that the deceased w as not his son because when he married his w ife, she w as already pregnant for another man. That, his m other w as the one w ho gave him the wife to marry w hile she was already pregnant. This suggests that he never w anted the deceased for he was not his son. His other conducts o f taking the child at night when others were sleeping show s that he formed a motive to eliminate his existence. From the evidence in totality, this court is satisfied that the accused intended to m urder the deceased, hence m alice aforethought w as established. In the upshot, I am satisfied that the prosecution side was able to prove the offence o f m urder against the accused person beyond all reasonable doubts. In the event therefore, I do hereby convict the accused person Kisota Tulito for the offence o f m urder contrary to section 196 o f the Penal Code [Cap 16 R.E. 2022]. D ated at T H E H I G H C O U R T O F T A N Z A N I A A T M A N Y A R A this 19th o f February 2025 . Page. 4 Hon.. DEVOTHA KAM UZORA

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