

TANZANIA / JUDGMENT

republic vs egidion bilekezi

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF BUKOBA AT BUKOBA ORIGINAL JURISDICTION CRIMINAL SESSIONS CASE NO. 20/2014 THE REPUBLIC VERSUS EGIDION BILEKEZI Date of last order: 26/10/2018 Date of judgment: 30/10/2018

JUDGMENT

Mallaba, J. The accused person, Egidion Bilekezi, stands charged of murder c/s 196 of the Penal Code [Cap. 16. RE. 2002]. The Information alleges that, the accused person, on 7th day of May, 2013 at Itoju Village, Muleba District, Kagera Region, did murder one Anchida Egidion. For purposes of proving the charges against the accused person, the prosecution brought seven (7) witnesses. The 7 witnesses testified as summarize hereunder. The first prosecution witness was one Richard Tingebwa. In 2013, he was the Izigo Ward Executive Officer (WEO) staying at Izigo Village and Ward in Muleba District. On 07/05/2013, at around 12:00 noon, he was at his office at Izigo. The chairman of Page 1 of 15 the Kamashwa Hamlet, Itoju Village by the name of Chrizestom, went to his office and informed him that, there were a murder incident at his Hamlet in that, one Gideon Bilekezi, the accused person herein, has killed his wife. He went to the scene of crime, specifically to the house of the accused person. He found the house closed at the front door. He was taken to the back door, which was open. He used the back door to go into the house. At the sitting room, he saw the body of the deceased person lying by her back. The neck had been cut by a sharp object. He called the Officer Commanding Station (OCS) for Muhutwe Police Station to inform him of the incident. The accused person was not at the scene and they unsuccessfully tried to look for him. PW2 was G 792 D/C Isack. He is a police officer at Muleba Police Station. On 11/07/2013 at around 11:00am, he was informed by the OC-CID that, the accused person in this matter has been arrested and taken to Muhutwe Police Station. He went there to pick him for Muleba Police Station. The witness picked the accused person from Muhutwe to Muleba Police Station. In cross-examination, the witness stated that, he recorded the statement of the accused person who admitted having killed the deceased person. PW3 was E 5189 D/Sgt James. He was the investigator of this matter. He was assigned with investigation of the matter on 07/05/2013 by the Muleba District OC-CID. Immediately after being assigned to investigate the matter, he accompanied the OC- CID for Muleba to the scene of crime. On the way,

they passed Page 2 of 15 through the District Hospital where they picked the District Medical Officer. At the scene of crime, at the house of the accused person, there were a woman killed and the body was at the sitting room. The body was naked only with an underwear. The body had an injury caused by a sharp object in the neck. At the left shoulder, there were another cut wound. A piece of flesh had completely been cut and detached from her shoulder. They were informed by one Edson Gideon @ Mulokozi that, the incident was caused by his father Egideon Bilekezi. The accused was not seen, as he was on the run. The witness drew the sketch map which was admitted in court as exhibit P2. He was present when the body of the deceased was examined by the District Medical Officer. Because the defence did not have any objection to its tendering, the postmortem examination report was admitted as exhibit P3. However, in terms of S. 240 (3) of the Criminal Procedure Act [Cap. 20 RE. 2002], the defence side sought for the opportunity to cross examine the doctor who performed the postmortem examination. After the postmortem examination, the OC-CID gave the body of the deceased to relatives for burial. They continued to look for the accused person who surrendered himself to the Itoju Village authorities. The fourth prosecution witness (PW4) was Edison Egidius. On 07/05/2013, he was on his way to Izigo centre for circumcision when he saw his father running towards home. He presumed that there is something making his father run towards home. He run after him. However, the witness was over-run by his father. On arrival at home, he found his father already there. His father had a stick and her mother was there too. He found them in the bedroom. Page 3 of 15 The mother shouted at the witness "Edson, baba yako ananiua", meaning, "Edson, your father is killing me". He was just about 2 meters away. It was at 10:00am. According to the witness, the deceased added that, the reason for the attack by the accused was because the accused found her talking over a phone with one Jeradian Machume, a young sister to his mother. The witness was told by the accused to leave the room or else he would also be killed. As he refused to do so, the accused took a panga from under the bed and pursued him. He run to a fence from where he could still see what was going on through the window, which was open. While there, he saw the accused cutting the deceased at the neck by use of a panga. The deceased tried to run away but fell down on the floor at the sitting room. The deceased was naked, only with her underwear. The deceased was also cut at her hand. When the accused saw the witness peeping through the window, he pursued him and the witness run to a neighbour by the name of Elizabeth Binushu, who testified as PW5. There were nobody at the house and remained there till the said Elizabeth Binushu came. When she came, the witness told her that, his father (the accused) has killed his mother (the deceased). Then the witness went back home where he found the accused with a rope in the neck, apparently intending to commit suicide. On seing the witness, the accused ran away leaving the panga back. Elizabeth Binushu, as already indicated, testified as PW5. She was a neighbour to the home of the accused and deceased persons. She was about 50 metres away. On the morning of the material day, on 07/05/2013, she had taken her child to hospital. She came Page 4 of 15 back at around 11:00am. On arrival, PW4 told her that, his father has killed her mother. PW5 went to the house of the accused. Peeping from the window, she saw the deceased lying down dead. She did not see the accused. She raised alarm and people came. The deceased had a neck cut wound. She testified further that, PW4 went at her home at about 12:00 noon. She also testified that, the body of the deceased was in a black skirt. PW6 was one Silas Bilekezi. He is the young brother of the

accused person. On the material day, he was informed by one Pancreas Kaijage that, his brother, the accused, had killed his wife. He was at Izigo centre. He went to the house of the accused where he found many people. He saw his in-law, the deceased, dead. He testified that, the body of the deceased was in a blouse. The accused was on the run. On 10/07/2013, on coming back home from his daily duties, he found the accused person at his home. He reported him to authorities and was accordingly arrested on the next day. PW7 was Fidelis Nyanda Mabula, the doctor who performed the post-mortem examination on the body of the deceased. He observed in his report that, the body of the deceased had a big cut wound at the left part of the neck and at the back of the head. The one at the back of the head was 5 centimeters wide and 8 centimeters deep. The jaglar vein had been totally cut. The cause of death was severe acute haemorrhage. With the seven witnesses, the prosecution closed its case. This court found that the prosecution established a prima facie case and Page 5 of 15 hence ruled accordingly and invited the accused person to defend himself. The accused was the only witness for the defence and testified on oath. The accused testified that, he is a fisherman. On 07/05/2013 at 8:00am, he left home for Izigo centre to by fishing tools, specifically a fish hook (ndoano). He bought the fish hook and returned home. On his way, he passed through a local pombe club. He drank illegal brew called “gongo”. Thereafter he went home, arriving at 10:00am. On arrival at his home, he found the front door of his house closed and locked. He went round at the back door. He knocked at the door but nobody answered the knock. He pushed open the door which was closed but not locked. On entering in the house, he found his wife, the deceased, on bed with a man he does not know, having sex. The man he found in his house; and his wife, all started to attack him by fists. He saw a panga and picked it. He threw it at the man but, unfortunately, it missed him and hit his wife. The man ran away. After cutting his wife with a panga, the deceased started to raise alarm. The accused decided to run away for worry of being killed. He went to a place named as Lushongo Island where he stayed for two months. Thereafter he decided to come back to see if the person he cut was his wife or the man that was in bed with her his wife. When he came, that is when he was arrested. In cross examination, he admitted the deceased had two cuttings. The fracas was for about 6 minutes. He did not raise any alarm in finding a man having sex with his wife in his house. That was the end of the defence case. Page 6 of 15 After the summary of the evidence for both the prosecution and the defence as above, this court will now turn to consider and evaluate the said evidence, to see if the prosecution has managed to prove the accused person's guilty to the required standards. In criminal cases, the burden of proving the accused person's guilt always lies with the prosecution side. This is as per Section 3

- (2) (a) of the Law of the Evidence Act (Cap. 6 RE. 2002). The principle was also stated by the case of Tyamos Asao V R. (1967) HCD No. 251, among many others, where it was stated: “The burden of proof in a criminal case is on the prosecution . . .” The standard of proof, as was stated in the case of Said Hemed V. R. (1987) TLR 117, is beyond reasonable doubt. In the present case, therefore, the prosecution had the duty to establish the accused person's guilty to the required standard. This court's review of the evidence on record will therefore be on the basis of that burden and standard of proof. As already indicated, the accused person stands charged of offence of murder c/s 196 of the Penal Code. In a charge of murder, the

prosecution is charged with the burden to establish the following four elements as follows:

- a. death of a person;
- b. the death being caused by an unlawful act or omission;
- c. the accused being the one who did the unlawful act or omission; and Page 7 of 15
- d. the killing was done with malice aforethought. In the present matter, in the memorandum of undisputed facts, the first element, regarding death of the deceased person, was not disputed. It was not disputed that the deceased in this matter, Anchida Egidion is indeed dead. She died on 07/05/2013. It is also undisputed that, the death of the deceased Anchida Egidion was unnatural, meaning that the same was caused by an unlawful act or omission. Apart from the fact that these two elements are undisputed, the fact that Anchida Egidion is dead and that she died an unlawful death, surfaced also in the evidences of PW1, Richard Tingebwa, the Izigo Ward Executive Officer; PW2, G 792 D/C Isack, a police at the Muleba police station who visited the scene of crime; PW3, E 5189 D/Sgt James, the investigator of the matter; PW4, Edson Egidius, the son of the accused and deceased persons; PW5, Elizabeth Binushu, the accused and deceased's persons neighbour; PW6, Silas Bilekezi, the accused person's young brother; and PW7, Dr. Fidelis Nyando Mabula, the doctor who performed the postmortem examination of the deceased person. There is also exhibit P3, the postmortem report. It also goes to prove that the deceased is dead and that he died unnatural death. Regarding the third and fourth elements, that is, whether it is the accused person who did the unlawful act or omission; and whether the killing was done with malice aforethought, the evidence in regard to the two is the same. Therefore, the two will be dealt with together. The first thing to note is that, both the prosecution and defence stories agree that, it is the accused person who killed Page 8 of 15 the deceased person. The only difference is on how the death was caused. The prosecution story is that, the accused person did cut the deceased person. This version is according to PW4, Edison Egidius, the person who testified as an eye witness. On the other hand, the accused person's version is that, as he arrived at his home, he found his wife, the deceased, having sex with another man. Then the man and the deceased started to attack him by fists. He saw a panga and took it and threw it at the two. At first, he claimed that, it hit the deceased who fell down and the man run away. Later he claimed that, he did not know who was hit by the panga. In other words, the accused appears to raise the defences of self defence and provocation. He also raised the defence of intoxication. This court is of a considered view that, the starting point is the choice as to which story to go by. This court will start by looking at the evidence of PW4, to see if it was credible and worth of belief. This court had the opportunity and advantage of seing PW4 testifying. It was able to assess his demeanour. It found the witness a credible one. This court also did not see any reason that would make the witness lie or to give a fabricated testimony against the accused person, who was his father. The accused himself, in his testimony, did not see any reason to make PW4 lie. Further, the evidence of PW4 finds support and corroboration from other evidences. The postmortem report (exhibit P3) supports the evidence of PW4 in that, it explains as to why the deceased having two panga

cuts. The evidence of PW4 is also corroborated by the evidence of PW1, PW2, PW3 and PW7, all of whom saw the deceased Page 9 of 15 person with two cut wounds. Further, it was stated in the case of Goodluck Kyando V R (2006) TLR 367 that, every witness deserves credence and his testimony to be believed unless there are reasons to the contrary. In the present matter, there are no reasons why the evidence of PW4 should not be trusted. On the other hand, although this court recognizes that, an accused person does not have any duty to prove his innocence, he has a duty to raise reasonable doubts. In the present matter, this court is convinced that, the accused person has not raised any reasonable doubt to the prosecution story, in his defence. This is because, in the first place, his version of what happened does not explain the two cut wounds that the deceased had. If the deceased was cut by a panga that was just thrown at the deceased, it wouldn't have caused two cut wounds. In the second place, a panga thrown at the deceased would not have caused such a deep cut wound of 8 centimeters. Such a deep cut wound is only consistent with a person applying direct force cutting another person. In the circumstances, the evidence of the accused person has not created any reasonable doubt to the prosecution version of what happened. While believing the evidence of PW4, this court recognizes that, there were some contradictions as regards the exact time events happened and also on the body of the deceased, whether it was naked only with an underwear or whether it had a skirt. Just because there are inconsistencies in evidences, it is not sufficient to impair the credibility of witnesses. It is only when the discrepancies or contradictions in evidence are material and are incompatible with Page 10 of 15 the credibility of his version, that is when a court may be justified in discarding a witness's evidence. In the present matter, the contradictions or discrepancies as to time and how the body of the accused was dressed, are not material. They are minor ones and they ought to be disregarded. In the circumstances, this court will go by the version of the only eye witness to this matter, PW4. According to that evidence, the accused person did first of all administer strokes to the deceased person as was clear from the dying declaration of the deceased to PW4. When PW4 arrived at their home, his mother told her that, he had been killed by the accused and he was dying. Even putting the dying declaration aside, PW4 saw the accused person, while applying a panga, cutting the deceased. This explains as to what happened, such that, the body of the deceased was found at the sitting room. From the evidence of PW4, it is clear that, the death of the deceased was caused by the accused person by specifically cutting the deceased several times at the neck and at the back of the head. In the case of Enock Kipela V. R. Criminal Appeal No. 150 of 1994 (CAT-Mbeya) (Unreported) it was stated by the Court of Appeal that: "... Usually an attacker will not declare his intention 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, (2) the amount of force applied, (3) the part or parts of the body the blow or blows were directed Page 11 of 15 at or inflicted on, (4) the number of blows although one blow may be sufficient for this purpose, (5) the kind of injuries inflicted, (6) the attackers utterances, if any made before, during and after killing, and (7) the conduct of the attacker before and after the killing". In the present matter, the weapon applied was a panga, a potentially dangerous weapon and was so applied to a person, even if we go by the

accused person's story, who had no weapon whatsoever. Looking at how deep one of the cut wounds went, 8 centimeters deep, it shows that, the amount of force applied was very big. The panga being directed at the neck and head, delicate parts of the body, for that matter, all go to show that the accused person intended to cause death and hence he killed the deceased with malice aforethought. Further, the utterances that the accused made prior to applying the panga on the deceased, like warning PW4 that he would also kill him if he did not leave the scene, all show that the accused really intended to kill the deceased. Also, the accused running away immediately after killing the deceased, without providing any assistance is consistent with intentional killing. Although this court has discarded the accused person's story, which story raises the three defence, this court will consider all the three defences. The first is that of self defence. Section 18, 18A, 18B and 18C of the Penal Code all deal with the defence of self defence. As per section 18 of the Penal Code, a person is not criminally responsible for an act done in the exercise of the right of self Page 12 of 15 defence or defence of another or defence of property. In the present matter, although the accused claims to have killed in self defence, but even going by his own story, there were no self defence. The accused person was the one who was pursuing his wife and the man he found with his wife. They were not the ones pursuing the accused. As per section 18A of the Penal Code, self defence applies only where there is an unlawful act or assault or violence to the body. In the present matter, even by the accused's story, there were no any assault or violence to the body of the accused person, to which he would self defence. As stated earlier, it was the accused who was pursuing the deceased and the man he claimed he was having sex with. Generally, because this court has discarded the accused person's story, the defence of self defence does not apply. The other defence raised is that of provocation. Legal provocation has to meet the test of section 202 (1) of the Penal Code. The thing or incident that is the basis of provocation should be something depriving on accused person, the power of self control. In the present matter, even if this court was to go by what the accused person stated in defence, which story has been discarded in the first place, the accused person testified in a manner which shows that, he was in self control of the situation from start to finish. As such, the defence of provocation does not arise in the present matter. Coming to the defence of intoxication, it was stated in Republic V. Michael Chibing'ati (1983) TLR 441 that: Page 13 of 15 "Coming to intoxication, it has to be stated generally that, this does not constitute a defence to any criminal charge. In a murder charge, intoxication would serve as a defence in three circumstances, namely; where the person charged did not at the time of the act or omission complained of, know what he was doing and the state of intoxication was caused without his consent by the malicious or negligent act of another person; where such person is by reason of intoxication insane, temporarily or otherwise or where it cannot be established that such person had the capacity to from the intention to kill or cause grievous harm". Even going by the accused person's story, the principles established in the cited case have not been attained. The accused person took a self induced intoxication. Neither did the accused claim that the intoxication put the accused person in a state of temporary insanity. The accused person was aware of everything. He left the place he claimed to have taken the drink to home. While committing the offence, evidence shows

that he was with full sanity. In the circumstances, the defences of the accused person, all do not apply. In view of what this court has stated above, it is satisfied that, the prosecution has proved the case against the accused person beyond all reasonable doubts. Page 14 of 15 The ladies and gentleman assessor gave their opinion that, the prosecution proved its case to the required standards. This court agrees with the assessors and finds that, the accused person, Egidion Bilekezi committed the offence with which he was charged with. He is thus found guilty of the offence of murder with which he is charged with. The accused person Egidion Bilekezi is accordingly convicted of the offence of murder c/s 196 of the Penal as charged. It is ordered accordingly. iqi a euvvC^' 30/10/2018 Page 15 of 15

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