

IN THE HIGH COURT OF TANZANIA

AT SONGEA

ORIGINAL JURISDICTION

(SONGEA REGISTRY)

CRIMINAL SESSIONS CASE NO. 25 OF 2014

THE REPUBLIC

VERSUS

THEOPHIL HAULE.....ACCUSED

JUDGMENT

Last Order: 31st March, 2016

Date of Judgment: 5th April, 2016

CHIKOYO, J.

On 22/10/2013 at Liula Village within Songea Rural District in Ruvuma Region, THEOPHIL HAULE, herein will be referred as the accused person is alleged to murder one FULKO HAULE, herein will be referred as the

deceased contrary to **section 196 of the Penal Code [Cap. 16 R.E 2002]**. Through the entire hearing of this case, the accused person has been denying committing the alleged offence, whereas the prosecution side, has been insisting that, the accused person is the one who is responsible for the alleged offence.

In order for the prosecution to prove the alleged offence, a total of six prosecution witnesses were called herein who are MICHAEL FULKO HAULE (PW1), MARIETHA TINDWA (PW2), MARIETHA KOMBA (PW3), LISTON TINDWA (PW4), PATIENCE MATHIAS CHALE (PW5) and G37 D/C DENIS (PW6). On the other side, the accused person strongly opposed the said allegations, as a result in his defense upon being sworn, testified against the republic's version.

Before going into the merit of this case, it is more appropriate for now to summarize a brief of facts which have led to this case. On the material date around 19:00 hrs, when PW1 was about to reach his house while coming back from his activities, he heard the scream of a fight, and when he arrived at his house, PW1 met about five people sitting therein, among them included PW2, PW3, the accused person and the deceased. Then PW1 asked PW2 as what had happened, that is when PW1 was informed

by PW2 that, the accused person had blocked PW4, who was a motorcycle rider, but then it would appear that the incident ceased as a result, PW1 decided to go to collect his chairs from one VENANT HAULE (the accused person's father), which took him five (5) minutes while leaving behind the above mentioned people at his house.

When PW1 was returning again to his house, PW2 informed him that, the deceased has been hit by the accused person on his head and fell down unconsciously. Regarding on what had happened therein, according to the testimony of PW2, witnessed the accused person quarreled on the road near to PW1's house with PW4 as stated by PW1 in which ANORD HAULE came up to separate PW4 and the accused person, and when PW2, ANORD HAULE and the accused person went back to PW1's house, the accused person was said to have continued to say abusive language including '*kuma leo halali mtu*', as a result, the deceased who was sitting therein told the accused person that, '*mwanangu kauli hii siyo nzuri*', that is when the accused went to take a bamboo stick from the '*uchanja*' which is used to dry utensils which was around there and proceeded replying to the deceased that, '*niliyokuwa nakutafuta ni wewe*'. Then the accused person used that stick and hit it twice on the deceased's head, as a result the

deceased fell down and became unconscious, however his body was full of blood due to the said injuries but again the accused person continued to say '*leo halali mtu hapa*'. It was also alleged that, all these incidents were witnessed by PW3 (PW1's wife) who was also at the scene of crime. Then PW2 decided to run inside the house, and the accused person disappeared. PW2 and PW3 insisted to have identified the accused person committing the alleged offence since, PW2 and PW3 knew the accused person even before the occurrence of the alleged offence, for example the accused person is the PW2 and PW3's brother - in - law and at the scene of crime, there was light. The deceased later died.

Following the said injuries, according to the testimony of PW5 that, on 23/10/2013 around 15:00Hrs he commenced to examine the body of the deceased, and as per the post mortem report (Exhibit P.1) and the testimony of PW5, the cause of death was due to the damage of the base of skull which can be caused by being beaten with a heavy object, an accident or falling on the head. Again, since the accused person was linked with the alleged offence, then on 23/10/2013 PW6 an investigator witnessed when PW5 conducted the examination of the deceased's body, and later PW6 went at the scene of crime for investigatory purposes, and

later the accused person was arrested and sent to police station linked with the alleged offence.

On the other hand, as stated earlier, basically the accused person in his defense strongly opposed to have committed the alleged offence, since in his testimony he stated that on 19/10/2013 while at Mkongo Gulioni he was called through the phone informing him on the illness of his young brother who was at Liula Village hence he managed to go there. On 20/10/2013 he was asked by the family members to escort the sick to Songea Regional Hospital. He hired the motorcycle and started the journey however on their way at Kitulu area he discovered the sick had passed away. They buried on 21/10/2013 and 22/10/2013 they departed. Then the accused alleged that, he and other people including COLETHA HAULE, ANASTASIA HAULE, COSMAS HAULE, STEPHENIA HAULE, VENANT HAULE, BERNARD HAULE and FULKO HAULE went to the local pub from 13:00 hrs to 20:00 Hrs where the other people departed leaving behind the accused person. However, at 20:30 Hrs when the accused person started departing on his way at the road he met with PW4 who had a motorcycle and the accused person asked for a lift, but it would appear that, PW4 refused and then the accused person and PW4 started to exchange words as a result,

they started to fight to each other and PW2 came there and also started to beat the accused person, as a result the accused person raised an alarm seeking for an help, thus FREDIRICK KOMBA, ALANA TINDWA, BOSCO HAULE, WENDELIN HAULE, ANORD HAULE, COLETHA HAULE and the deceased came there to separate the accused person, PW2 and PW4, then the accused person went away to his home, but around 21:00 Hrs PW1 came to his house and told the accused person that, the said quarrel had led to the deceased to be injured, then the accused person decided to go to the deceased's house, but upon reaching there, he was beaten by them alleging him to cause the alleged injuries to the deceased, and in the next day in the morning the accused was informed that, the deceased had died, and later the accused person was arrested, and was involved in the alleged incident. Basically the accused person in his defense has raised an implied defense of *alibi*, that he was not present at the scene of crime as alleged by the prosecution side, when the second quarrel had occurred, since the court records reveal that, on 12/02/2016, Mr. D. Ndunguru the former learned Advocate for the accused person had this to say during the preliminary hearing of this case;

'Madame Judge, the accused was not at the scene of crime on the material date, he was away with his wife called Devotha Sinkala. The defense will call two witnesses himself and Devotha Sinkala...'

Having said so, the court had this to state;

'COURT: *The notice raised by the defence side that the accused was not at the scene of crime on the material date noted.'*

Basically, the accused person denied to have been involved in the deceased's death since he never went to the PW1's house as alleged by the prosecution side and the accused had no any quarrel with the deceased, thus according to the accused person, he never committed the alleged offence.

After closing the defense case, on 31/03/2016 when this court made a summing up to the assessors, basically in response to that, both Mr. Twaibu and Ms. Theopista (the first and the second assessors) opined that, the prosecution side failed to prove the alleged offence against the accused person, whereas one Ms. Eliza (the third assessor) was of the view that,

the prosecution side had proved the alleged offence beyond the required standard of proof.

During the entire hearing of the case at hand, Mr. Ngilangwa the learned Advocate appeared for the accused person, whereas Mr. Nkoleye and Mr. Balikila the learned State Attorneys appeared for the republic.

After summarizing the brief facts which have led to this case, the issue here is whether the accused person is responsible for murdering the deceased. In answering that issue, as far as the facts leading to this case are concerned, I shall be confined on the legal position stated in the case of **Mapinduzi Luminanga Versus Republic, Criminal Appeal No. 332 of 2010 (CAT-MWZ) (Unreported)** at page 11 the Court of Appeal of Tanzania had this to say, and I quote;

*'We take it to be a settled law that on **murder charge**, the duty has always been on the prosecution to prove beyond reasonable doubts not only the death of a person but **also to link that the death with the accused.**'* [Emphasis is mine]

See also; **Diamon s/o Malekela @ Muunganye Versus Republic, Criminal Appeal No. 205 of 2005** and **Enock Yasin Versus Republic, Criminal Appeal No. 12 of 2012 (Both unreported)**.

Upon my perusal of the entire testimonies available in the court records, in its totality, the prosecution side insisted that, there were quarrels which occurred on the material day and time, at first on the road in which it involved PW4 and the accused person, but when they were separated by ANORD HAULE, on way back in the house of PW1, the accused person is alleged to say various abusive language by saying '*kuma leo halali mtu*', as a result, the deceased who was sitting therein told the accused person that, '*mwanangu kauli hii siyo nzuri*', that is when the accused went to take a bamboo stick from the '*uchanja*' which is used to dry utensils which was around there and proceeded replying to the deceased that, '*niliyokuwa nakutafuta ni wewe*'. Whereas according to the testimony of the accused person, he strongly opposed the fact that, he went back with PW2, and ANORD HAULE to the PW1's house where the above stated quarrel had occurred which led to the death of the deceased, however he only insisted that; soon after being separated by ANORD HAULE, he went away to his home.

At this juncture I had to go through the testimonies of PW2 and PW3 who were alleged to be at the scene of crime witnessing the accused person committing the alleged offence, I find no good reason to fault against their testimonies since all of them witnessed what the accused person said before he hit the deceased on his head, and soon after that incident, PW2 ran inside as a result of panicking since the deceased head was bleeding with blood, and it was PW3 who did not run away since according to her, after the deceased was hit twice on his head, she went to see the deceased who fell down but his body was full of blood. More so, the court records are very clear to the fact that, the accused person started to use abusive language as quoted above upon being separated in the quarrel with PW4 in the road, and more so soon after the said separation PW4 went away to his home. The question as to why soon after the accused person being separated therein decided to use abusive language as quoted above? In my view, this is answered by PW3 in cross examination, where she had this to say;

'Theophil Haule was provoked from the fracas on the road.'

The above reason was also repeated by PW3 when answering the questions from the third assessor where she had this to reply;

'The accused was provoked from the fracas happened on the road.'

After a carefully scrutinizing the testimonies of PW2 and PW3 who witnessed the accused hit the deceased on his head twice using the bamboo stick upon being asked by the deceased as to why he was using abusive language after being separated in the quarrel with PW4, in my view, I find no good reasons to disbelieve the testimonies of PW2 and PW3 since their testimonies do not suggest on whether their testimonies are based on improbable evidence; their testimonies have demonstrated a manifest intention or desire to lie; their testimonies have been materially contradicted by another. All in all, according to their testimonies which I agree, the accused person was present at PW1's house (the scene of crime) and hit the deceased on his head twice using a bamboo stick as I am alive with the legal position stated in the case of **Richard Mgaya @ Sikubali Mgaya Versus Republic, Criminal Appeal No. 335 of 2008 (CAT-IR) (Unreported)** at page 11 the Court of Appeal cited with approval the case of **Goodluck Kyando Versus Republic, Criminal Appeal No. 118 of 2003 (Unreported)** had this to say and I quote;

*'It is trite law that, **every witness is entitled** to credence and **must be believed and his testimony must be accepted unless there are good and cogent reasons for not believing a witness.**' [Emphasis is mine]*

See also; Patrick Sanga Versus Republic, Criminal Appeal No. 213 of 2008 (CAT-IR) (Unreported).

I say so because, in its totality the evidence from the court records reveal that, despite the fact that the incident took place at night but the accused person was well known before the incident by PW1, PW2, PW3 and PW4; before the accused person injured the deceased using a bamboo stick, he was firstly involved in the quarrel on the road near PW1's house with PW4 in which ANORD HAULE and PW2 separated them; as stated in the above, the court records are also very clear to the fact that, after the said first quarrel was resolved through separation, the accused was provoked as a result started to use abusive language as quoted in the above while going into PW1's house until when the deceased was injured by the accused person using a bamboo stick on his head which later led to the deceased's death. More so, having in mind with that, I also find that the raised defence of *alibi* by the accused person has failed to raise any reasonable

doubt and more so, it seems to be untrue, and since there are other sufficient, credible and convincing prosecution evidence against the accused person, considering the fact that, the accused person in his defense did not even call DEVOTHA SINKALA as his witness, obviously at this juncture, the accused person must be convicted as charged because the prosecution side have managed to prove the alleged offence beyond the required standard of proof. I say so because, in the case of **Abdalla Mussa Mollell @ Banjoo Versus DPP, Criminal Appeal No. 31 of 2008 (CAT-AR) (Unreported)** at page 20 the Court of Appeal cited with approval the case of **Ali Amsi Versus Republic, Criminal Appeal No. 117 of 1991 (Unreported)** and had this to say;

*'... It is of course not the law that once the alibi is proved to be false, or is not found to have raised doubt, the task of proving the accused's persons guilt is accomplished. **There must still be credible and convincing prosecution evidence on its own merit, to bring the discussion home the alleged offences.**'* [Emphasis is mine]

In line to the above, I find that, the circumstances of the instant case and as far as Exhibit P.1 and the testimonies of PW5 are concerned reveal that,

the accused person is responsible for the death of the deceased because the act of the accused person of hitting the deceased on his head had led to the deceased's death, and obviously as stated above the evidence from the record reveal that, before the accused hit the deceased, the accused made various utterances like '*kuma leo halali mtu*', and when the deceased told the accused '*mwanangu kauli hii siyo nzuri*', that is when the accused said '*niliyokuwa nakutafuta ni wewe*' then the accused hit the deceased on his head twice. In my view, the stated scenario in the instant case reveal that, the accused had a malice aforethought of murdering the deceased because in the case of **Enock Kipera Versus Republic, Criminal Appeal No. 150 of 1994 (CAT-MBY) (Unreported)** where the appellant in that case used the bamboo stick as the case in hand to hit the deceased person, and the Court of Appeal of Tanzania in determining whether the appellant had a malice or not at page 7 had this to say;

'...usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had the intention must be ascertained first 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 attack,

(3) the part or parts of the body the blow or blows were directed at or inflicted on, (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose, (5) the kind of injuries inflicted, (6) the attacker's utterances, if any, made before, during and after the killing, (7) the conduct of the attacker before and after the killing. '[Emphasis is mine]

The above stated legal position fit squarely as in the instant case since the accused person's attack caused the damage in the deceased's skull which in my view a very delicate part of the body; the accused person uttered abusive language as quoted in the above before he injured the deceased and more so, soon after the incident the accused person ran away. All these factors in my view indicate that the accused person had malice aforethought of murdering the deceased.

Having said so, I find the prosecution side has managed to prove the alleged offence of murder beyond reasonable doubts, and I agree with the opinion from the third assessor and I disagree with the opinions from the 1st and 2nd assessors. In the event, I find the accused person guilty of the

offence of murder contrary to **section 196 of the Penal Code (supra)**, consequently I hereby convict the accused person THEOPHIL HAULE as charged.

It is so ordered.




S.M. CHIKOYO

JUDGE

05/04/2016

Judgment delivered in open court in the presence of Mr. W. Ndunguru the Learned State Attorney for the Republic, Mr. Ngilangwa the Learned Advocate for the Accused person who was also present in person and Mr. Komba Court Clerk, this 5th day of April, 2016.





S.M. CHIKOYO

JUDGE

05/04/2016

COURT: Right of appeal explained.




S.M. CHIKOYO

JUDGE

05/04/2016