

IN THE HIGH COURT OF TANZANIA

AT MOROGORO

CRIMINAL SESSIONS CASE NO.18 OF 2002

THE REPUBLIC

Versus

KILANGO ABDALLAH

JUDGMENT

SHANGWA, J.

In this case, the accused Kilango Abdallah is charged with Murder c/s 196 of the Penal Code. The person against whom he is charged to have murdered is Kitwana Hassan hereinafter to be referred to as the deceased. The area on which he was killed is at Nungu Mikese within the District of Morogoro. The date on which he was killed is on 1st January, 2000 before midnight. The prosecution's case was led by Mr. John Mapinduzi, learned State Attorney for the Republic. The defence case was led by Mr. Kanonyele, Advocate for the accused.

The following is what happened immediately before and sometimes after the deceased's death: On the material day, the accused was riding his bicycle from a Pombe club at Fulwe village to his home village at Kizinga. On the way home, he met with PW1 Hamisi Mageni and one Ali who were proceeding on foot from Mkuyuni Pombe club to their respective homes. By then, it was at about 10.00 p.m.

There arose a fight between him and PW1. Ali joined in the fight and the accused cut him with a pocket knife on his chin. Both PW1 and Ali made alarm. The deceased who had been with them from Mkuyuni Pombe Club and who had shortly before taken a different way to his home heard their alarm and went to see what was happening to them. He found the accused fighting with them. He intervened in the fight and the accused stabbed him on his neck with a pocket knife upon which he shouted by saying that he has been stabbed by him. PW1 and Ali got scared and run away. They left the deceased alone.

A few hours later, a certain lorry driver who was driving from Dar es Salaam to Morogoro saw the deceased's body lying down along the road at the area where the fight took place. He continued on his way. When he reached the Police road barrier at Nungu, he informed PW3 No.E.7214 PC Saimon who was on duty about it. The said Police Constable went to the place where the deceased was seen lying dead and saw a cut wound on his neck. From there, he went to the Police Station at Mikese and reported to his fellow Policemen on what he had seen. Thereafter, he went back to the place of the incident with another Police Constable called Ibrahim. Both of them removed the deceased's body and took it to the mortuary at Morogoro Regional Hospital.

The postmortem examination on the deceased's body was conducted by DW2 Alban Mnyambo Ndekeye who among other injuries saw a deep cut wound on the deceased's

neck exposing carotid vessel. The deceased's body was handed over for burial to PW5 Sudi Sara who saw a similar wound on the deceased's neck.

The events before the deceased's death show that there was a fight between PW1 and the accused in which he intervened and got stabbed by the accused on his neck with a pocket knife. Both the accused and PW1 gave different explanations on how the fight between them arose.

Whereas the accused said that the fight arose when PW1 and Ali started pulling his bicycle one after the other which made it impossible for him to move forward, PW1 said that the fight arose when the accused suddenly kicked him and punched him at his shoulder without any reason.

In my view, the explanation given by the accused on how the fight between him and PW1 arose is more understandable than the explanation given by PW1. The accused does not deny to have seen the deceased during the fight. In fact, when he was under cross-examination he revealed to have said in his statement to the Police that during the fight, the deceased took off the air from the back tyre of his bicycle.

What is being denied by him is the fact that he stabbed the deceased with a knife on his neck at any time during the fight. However, despite his denial of this fact, I find that he did so and that what he did was quite unlawful. I so find on the evidence of PW1 which was supported by the evidence of PW3 who saw the stab wound on the deceased's

neck a few hours after the fight and PW5 who saw it before his burial.

It is indisputable that during the fight PW1, the accused, Ali and the deceased were all drunk. The fight took place when all of them were on their way home from the pombe clubs on new year's eve. All of them were acting under the influence of alcohol. None of them including the accused was in a position to control his behaviour or actions. For instance, PW1 told the Court that on the night of the incident he slept in the bush. Ali who was with him on the night of the incident disappeared in obscurity with his cut wound on his chin.

I am of considered view therefore that when the accused fought with PW1, he did not intend to kill him or do grievous harm to him. Also, I am of considered view that when he stabbed the deceased, he had no intention to kill him or do grievous harm to him. It all happened in the heat of the moment when the accused was drunk and when he was resisting PW1 and one Ali's actions who had become a stumbling block to him when he was on his way back home and when the deceased took off the air from the back tyre of his bicycle.

Learned Counsel for the accused submitted that the cause of the deceased's death is uncertain. He did submit so because on post mortem examination by DW2 Alban Mnyambo Ndekeye, who is a Medical Officer, it was seen that the deceased's body did not only have a deep cut wound on the neck but also it had other injuries such as multiple

comminuted fractures of humerus bones, a fracture of femur bones, a fracture of the skull at the temporal area and torn vessels at the fractured sites.

In actual fact, it is not known as to how the deceased sustained those other injuries. The defence side wanted to raise doubt in the prosecution's case by trying to say that in view of those injuries, it is not improbable that the deceased died in a motor accident and that the cause of his death was not a stab wound inflicted on his neck by the accused.

However, measuring the sites on which the deceased sustained fractures, it is improbable that those fractures were sustained by him in a motor accident. PW3 P.C. Saimon, a Traffic Police Officer who went to the place where the deceased's body was found lying dead a few hours after his death, did not trace any signs of a motor accident having taken place there. So, there is nothing to show that the deceased died in a motor accident. The accused told lies when he said that he saw the deceased being knocked down by a motor vehicle during the night of the incident. I believe he did so in order to save his neck.

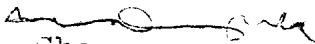
The Medical Officer's opinion was that the deceased's death was due to haemorrhagic shock from multiple injuries. One of these injuries is a deep cut wound which was seen on the deceased's neck exposing carotid vessel. It has well been established by the prosecution that this wound was inflicted on his neck by the accused who stabbed him with a pocket knife.

Under S.203 of the Penal Code, a person is deemed to have caused the death of another person although his act is not the immediate or sole cause of his death to that person. In this case, I find that although the bodily injury inflicted on the deceased's neck by the accused through stabbing might not have been the sole cause of his death, I find that it was the primary cause of his death because he lost a lot of blood through this injury as testified by PW4 C.4123 Dt./Cpl Matiku who drew the sketch map (exhibit P.1) of the area where he was found lying down dead.

As I have already observed, the accused person had no malice aforethought when he caused the death of the deceased through stabbing him with a pocket knife on his neck.

Any person who causes the death of another person by an unlawful act without malice aforethought cannot be held to be guilty of murder c/s 196 of the Penal Code.

I therefore differ with the gentle ladies assessors who unanimously were of opinion that the accused is guilty of murder. For the reasons I have given in my judgment, instead of finding him guilty of murder, I find him guilty of a lesser offence termed Manslaughter c/s 195 of the Penal Code although he was not charged with it and I convict him thereof.

  
A. Shangwa

Judge

23.6.2004

Mr. John Mapinduzi, S.A. for the Republic:- The accused is a first offender.

MITIGATION

Mr. Kanonyele for the Accused:- My Lord, the accused is a first offender. He has a wife and three children who are depending on him. His mother is also depending on him. Apart from that, the accused has responsibility of other nine children who are depending on him. These are his deceased sister's children. The accused has been in remand for a period of four and a half years. I pray the Court to have mercy on him.

SENTENCE

Although the accused is a first offender and has been in remand for a long time together with the fact that he has several dependants, I think he deserves a deterrent sentence which will serve as a lesson to others not to use lethal weapons in the course of a fight. I therefore sentence him to sixteen years imprisonment.

  
A. ISHANGWA

JUDGE

23.6.2004