

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MUSOMA**

**(CORAM: KWARIKO, J.A., GALEBA, J.A. And KIHWELO, J.A.)**

**CRIMINAL APPEAL NO. 297 OF 2020**

**CHAUSIKU NCHAMA MAGOIGA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the Court of Resident Magistrate of Musoma**

**at Tarime)**

**(Ngaile, RM Ext. Jur)**

**dated the 1<sup>st</sup> day of June, 2020**

**in**

**Criminal Sessions Case No. 2 of 2020**

**.....**

**JUDGMENT OF THE COURT**

1<sup>st</sup> & 9<sup>th</sup> November, 2023

**KIHWELO, J.A.:**

Chausiku Nchama @ Magoiga, the appellant herein, along with another person not part of this appeal, were arraigned before the High Court of Tanzania at Musoma in Criminal Sessions Case No. 51 of 2019 for the offence of murder of one Nchama Magoiga Mwita (the deceased) which was predicated on sections 196 and 197 of the Penal Code, Chapter 16 of the Revised Laws (the Code).

However, by an order dated 08.02.2020 and in terms of section 256A (1) of the Criminal Procedure Act, Cap 20 Revised Laws (the CPA) the case was transferred to the Court of Resident Magistrate of Musoma at Tarime (the trial court) where it was registered as Criminal Sessions Case No. 2 of 2020 and determined by Hon. I.E. Ngaile, RM with Extended Jurisdiction (the trial Magistrate) and the result of which the appellant was convicted and condemned to death by hanging. The other co-accused was found not guilty and was acquitted. Believing that justice was not served by the trial court, the appellant appealed to this Court hence this appeal.

According to the prosecution's evidence on record which was found credible by the trial court is that, on 09.11.2017 at Nyakonga Village within Tarime District in Mara Region at night hours, the deceased who was the appellant's husband returned home drunken and found the appellant and her two children having supper. Upon being invited to join them, the deceased did not only impolitely decline the invitation, but also went ahead to disrespectfully insult the appellant by uttering abusive language that the appellant was a mere whore who was casually sleeping around with men without regard to her marital status. The deceased while heading to their bedroom went ahead ill-behaving and abusing the appellant by uttering rude and discourteous words. A little later, the children

including Happiness Peter Simion @ Happiness Nchama Magoiga (PW1) and her younger brother one Alex who were earlier on having supper with the appellant, decided to go to sleep while leaving the appellant in the living room, while the deceased was in their parents' bedroom.

The following morning PW1 and her brother went to hail their parents before leaving to school just to find that the appellant was sleeping alone and when asked the whereabouts of the deceased, the appellant's response was that, the deceased left the previous night in search for further alcohol and that he did not come back. It was at that time that the appellant told PW1 and her younger brother not to go to school and instead indulge in search for the missing deceased. As the trio left their residence in search for the deceased, midway they came across one Rhobi Kirongwe (PW3) who informed the appellant that she had found the deceased lying helpless at the farm trees nearby the appellant's home. As a result, both of them went to the scene, and found the body of the deceased lying lifelessly. Suddenly, the appellant burst into tears and started sobbing and people gathered at the scene of the crime.

A little later, Daniel Ghati Sarima, a Village Chairman (PW4) informed the police who took the body of the deceased to Tarime District Hospital where autopsy of the deceased's body was conducted by Devotha Ernest an Assistant

Medical Officer (PW8) and the results as per the post-mortem examination report (exhibit P1) indicated that the cause of death was acute blood loss leading to cardiac collapse which was a result of two head wounds inflicted by a heavy blunt object. The appellant and another co-accused as hinted above were arraigned by Police Officer No. E. 5153 Corporal Essau (PW5) who also seized a hammer, the murder weapon which was recorded in the certificate of seizure (exhibit PE2), that was also witnessed by Morris Mung'osi Mwita (PW6) a relative of the deceased.

On the other hand, Police Officer No. G. 126 Detective Corporal Bakari (PW7) was entrusted with investigation of the case and drew a sketch map of the scene of the crime (exhibit PE 4) while Mary Marwa Chacha (PW2) testified about the events on the night of the murder and that PW2 who was charged along with the appellant (DW2) was requested by the appellant to assist in rushing to hospital the appellant's sick child, which however, according to the duo it turned out to be not true and instead the appellant requested DW2 to help her in rushing to hospital the deceased who was badly injured and profusely bleeding.

When, eventually, the case for the defence was presented, the appellant while she admittedly testified without mincing words to have killed the deceased, she however, refuted the accusations that she killed him with intent and stoutly

raised the defence of self defence. During her further defence testimony, she expressed the agony she went through the night of the incident owing to the conduct of the deceased who was an infamous abusive husband despite the fact that, the duo was blessed with four issues of marriage. In her testimony, she gave an account of the ordeal she had to endure and in particular the agony of domestic violence especially when the deceased was drunk.

She went further to describe the circumstances on the night of the incident on how the deceased closed the door and started beating her with a stick and how she was struggling to hide under the table while the deceased was pulling her out from under the table.

Furthermore, she graphically described how the deceased grabbed a hammer which was under the bed and hit her twice on her waist until she fell down and that it was out of panic and self defence that suddenly she regained power, stood up and pushed the deceased who staggered a little bit and fell down. It was at that moment that she hit the deceased once and blood began oozing out of his mouth and nose. Terrified and not knowing what to do next, the appellant rushed to the neighborhood and sought PW2 and DW2 who are husband and wife for assistance. Testifying further, the appellant admitted lying to the duo that she was seeking their assistance to rush a kid to hospital while in fact she

was seeking their assistance to rescue her badly injured husband who was at a verge of dying.

When the respective cases from either side were closed, the trial Magistrate summed up the case to the assessors who sat with him in aid. In their lengthy deliberations, two of the assessors returned a verdict of guilty against the appellant, while the other one found the appellant not guilty of murder but a lesser offence of manslaughter. On his part, the learned trial Magistrate concurred with the two assessors who found the appellant guilty, and the appellant was accordingly, found guilty as charged and convicted of murder. She was sentenced, as hinted above, while the other accused was accordingly acquitted.

In this appeal, the appellant seeks to overturn the decision of the trial court. Initially the appellant on 29.09.2020 amassed five (5) grounds of grievance which however, we feel that it will not serve any useful purpose to recite all of them since when invited to address us in support of the appeal, Mr. Baraka Makowe, learned counsel for the appellant premised his submission by abandoning the first, second, fourth and fifth grounds of grievance and remained with the third ground only. Therefore, the deliberation of this appeal will be based on the lone ground of appeal that, the prosecution did not prove that the appellant killed with the requisite malice aforethought.

Arguing in support of this ground of appeal the learned counsel was quite understandably, very brief. He contended that it was erroneous for the trial court's failure to find that the appellant acted in self defence when she killed the deceased. Elaborating further, the learned counsel argued, while referring to page 68 of the record of appeal that, since what happened in the bedroom on the night of the alleged murder could only be told by the appellant which she did, no one else can explain with certainty that the appellant did not act out of panic in defence of her own safety.

The learned counsel therefore, rounded off by imploring us to find that the appellant did not kill her husband with the requisite malice aforethought. He therefore, prayed that, we allow the appeal, quash the conviction for murder, set aside the sentence of death and substitute with manslaughter. Since the appellant has been in custody ever since she was arrested on 10.11.2017, the learned counsel was of the view that she deserves an immediate release.

In response, Ms. Janeth Kisibo, learned State Attorney argued the appeal assisted by Mr. Abel Mwandalama, learned Principal State Attorney, Ms. Monica Hokororo, learned Senior State Attorney and Mr. Yese Temba, learned State Attorney all representing the respondent Republic. Ms. Kisibo without mincing words was quick to support the appeal on the grounds that none of the eight (8)

prosecution witnesses knew and could tell what exactly happened in the bedroom on the night of the murder, except for the appellant herself. Ms. Kisibo was of the considered opinion that, clearly the circumstances surrounding the events on the night of the alleged murder suggests nothing other than the fact that the appellant killed the deceased out of fear and in total self defence and therefore, Ms. Kisibo admitted that the offence committed by the appellant was manslaughter and not murder hence the learned trial Magistrate erred to convict the appellant for the offence of murder.

She therefore rounded off by supporting Mr. Makowe's prayer in wholesome that, we allow the appeal, quash the conviction for murder and set aside the sentence of death and instead substitute with manslaughter which will lead to the appellant's release, since she has already spent ample time in prison.

In rejoinder, Mr. Makowe had nothing to add; he only reiterated his earlier submission and prayer.

Having heard the learned counsel from either side on the lone ground of grievance, it is indeed beyond question that, this appeal stands or falls on the basis of the determination of the issue of whether the appellant killed the deceased with the requisite malice aforethought or not.



It is apparent from the record that, there is considerable merit in Mr. Makowe's submission which was fully supported by Ms. Kisibo in that what happened in the bedroom on the night of the alleged murder can only be told by the appellant as no one else can explain with certainty that the appellant did not act out of panic and in self defence of her own safety. For clarity, we wish to let the record of appeal at page 68 speak for itself:

*"When I went in the room he followed me behind and he closed the door using padlock, he took a stick and beat me four times. He put down the stick and took the hammer under the bed "uvunguni mwa kitanda". The said hammer belonged to him; he used it in the mining activities at Nyamongo. He beat me on my waist "kiuno" on the left side, I fell down, and I was pushing myself in the direction where there was a table. I got hold the legs of the table; he beat me on the right side of my waist "kiuno" using the same hammer. I tried to please him "mume wangu nisamehe nimekukosea nini" and he replied that he will kill me. He stated that "ninachotafuta kwako ni kukuua tu." I continued to hide my head under the table. He was pulling me outside the table using one hand while the other holding a hammer. Thereafter, I pushed him and he fell down. I took the hammer from him and I beat him once without knowing where I beat him, the blood began to flow from his mouth and nose. I took the keys from inside his pocket and opened the padlock*

*of the door. I went to the neighbour one Marwa Chacha Makore  
(2<sup>nd</sup> accused)..”*

Clearly, the above excerpt from the appellant’s evidence indicates that the circumstances surrounding the events of the night of the murder suggests nothing other than the fact that the appellant killed the deceased out of fear of her own safety and in total self defence. There is nothing on record to suggest that the appellant had the requisite malice aforethought to kill the deceased.

In determining that the appellant had the requisite malice aforethought when she killed the deceased, the learned trial Magistrate considered the type and size of weapon used which is a hammer, the amount of force applied, part of the body or blows inflicted and the conduct of the appellant before and after the incident.

However, we find considerable merit in the submission by the learned State Attorney that, none of the eight (8) prosecution witnesses who testified before the trial court was able to demonstrate, leave alone ably demonstrating that they knew or had any clue of what exactly happened in the bedroom on the night of the murder, which leaves the testimony of the appellant unchallenged.

We are not losing sight that, this being a criminal case, the burden lies on the prosecution to establish the guilt of the accused beyond reasonable doubt. The duty of the prosecution to prove a criminal case beyond reasonable doubt is universal and, in our case, it is statutorily provided for under section 3 (2) (a) of the Evidence Act, Chapter 6 of the Revised Laws. Further, in the case of **Woodmington v. DPP** [1935] AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined but case laws have defined it. In the case of **Magendo Paul & Another v. Republic** [1993] T.L.R. 219, the Court held that:

*"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

In the light of the above, we think, with respect, that, both learned counsel were undeniably right when they argued that, it was erroneous for the trial court to convict the appellant with murder instead of manslaughter given the circumstances surrounding the commission of the offence.

As for the way forward, we are inclined to agree with the concurrent submissions by the learned trained minds in that given the prevailing circumstances at the time of the commission of the offence, there is no way conviction for murder could stand. Therefore, we allow this appeal against conviction for murder and sentence of death by hanging which are hereby quashed and set aside respectively. Thus, in terms of section 300 (2) of the CPA we hereby substitute the offence of murder with manslaughter contrary to section 195 of the Code. The reason is not farfetched, the facts on record proved the offence of manslaughter which is minor and cognate to the offence of murder. We note that this is not the first time the court has been compelled to back-pedal from the usual course. We take guidance from the Kenyan case of **Robert Ndecho and Another v. Rex** [1951] 1 E.A.C.A 171 in which the erstwhile Eastern Africa Court of Appeal faced with analogous situation held that:

*"Where an accused person is charged with an offence he may be convicted of a minor offence although not charged with it, if that minor offence is of a cognate character, that is to say of the same genus or species."*

Equally, there is an array of authorities of this Court in this matter, if we can cite one is our recent decision in the case of **Hamisi Chacha Wisare v. Republic**, Criminal Appeal No. 207 of 2019 (unreported).

The net effect flowing from the above, and bearing in mind that the appellant has spent quite some time in custody, as well as the circumstances upon which the offence was committed, we hereby impose a sentence equivalent to the term she has so far served in prison since her conviction, that would result in her immediate release from prison forthwith unless lawfully held for other cause.

**DATED at MUSOMA** this 8<sup>th</sup> day of November, 2023.

M. A. KWARIKO  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

The Judgment delivered this 9<sup>th</sup> day of November, 2023 in the presence of the Appellant in person, and Mr. Tawabu Yahya Issa, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



*[Signature]*  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**