IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: MUSTAFA, J.A.; KISANGA, J.A. and OMAR, J.A.

CRIMINAL APPEAL NO. 80 OF 1985

ASHA MKWIZU HAULI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction/Judgement on the High Court of Tanzania at Dar es Salaam) (Hon. Bahati, J.) dated 2nd day of October, 1985)

in

Criminal Sessions Case No. 3 of 1984

JUDGEMENT OF THE COURT

KISANGA, J.A.:

The appellant Asha Mkwizu Hauli was convicted of murder and sentenced to death by the High Court; she is now appealing against both conviction and sentence. Before us in this appeal the appellant was represented by Mr. M.N. Marando, advocate, while the respondent Republic was represented by Mr. Uronu assisted by Mr. Werema, both state attorneys. Both Mr. Marando and Mr. Uronu had also appeared for the respective parties at the trial in the High Court.

The case for the prosecution was based primarily on a cautioned statement (Exh. P.5) which the appellant had made to the police, an extra-judicial statement (Exh. P.6) which she made to a justice of the peace and the evidence of Musa James (P.W. 2), her house servant, to whom she disclosed certain information after the incident had happened. The prosecution story as can be gathered principally from the three sources is as follows:- The appellant is the wife of one Dr. Johnson Gabriel Hauli, psychiatric specialist with the Muhimbili Medical Centre. The appellant herself is a qualified nurse and midwife, and at the time of the incident she was employed by the Ubungo Farm Implements Ltd. The couple married

in 1969 and the union has been blessed with three children. For the first three years of the marriage the couple got on reasonably well with each other, but thereafter things changed. There developed misunderstandings arising at first from Dr. Hauli's conduct of going with too many women and ignoring the appellant. At one point Dr. Hauli brought in a child he is said to have born with a woman called Clementina Nanguka and asked her to look after it but the appellant refused. The misunderstandings between the couple were further complicated by the appellant's mother-in-law who disliked her and positively assisted to drive her away so that Dr. Hauli could get re-married to some other woman. Indeed at some point it was decided at a family meeting that the appellant was totally unacceptable and should be returned to her parents. All these developments were a constant headache to the appellant.

Things came to a head in about 1983 when the appellant learnt that Dr. Hauli had befriended the deceased, Mwanahamisi @ Happiness Senzota, with the intention of getting married to her. The appellant clearly noticed Dr. Hauli's divided love and attention between herself and the deceased. For instance, when he made purchases he would buy in two lots, say, two pairs of khangas one for the appellant and the other for the deceased. Such conduct on the part of Dr. Hauli added greatly onto the appellant's already troubled mind. The appellant approached several of her neighbours for advice and assistance but all in vain.

The events immediately leading to the death of the deceased started some four or five days prior to the incident when in the evening at about 7 o'clock the appellant spotted Dr. Hauli's motor vehicle parked outside the house in which the deceased had her living accommodation. The appellant went there and found Dr. Hauli seated in the deceased's room. Whereupon she asked the doctor to accompany her home but he refused stating that he was going to spend the night at the deceased's place. This was followed by some disturbance which caused Emilian Kiluvia (P.W. 5), a relative of

the deceased living in the same building, to take the appellant into his room in an attempt to settle the matter. Meanwhile Dr. Hauli slipped away and drove off. Then the appellant went home only to find Dr. Hauli's motor vehicle there but not the doctor himself. At 10.30 p.m. the appellant left for work as she was on a night shift. Dr. Hauli had not returned yet. She telephoned a number of times from her work place to check if the doctor had returned but as late as 2 a.m. nobody was picking up the phone at home. The appellant became worried about the safety of the children at home, and so at about 2.30 a.m. she drove to the house only to find that the doctor had not yet returned. From there she drove to the home of the deceased where she was informed that Dr. Hauli and the deceased did not return there after they had left the place earlier that night. She returned to work and on the following morning she went home only to find again that the doctor was not there. Again she went to the home of the deceased, but the doctor or the deceased was not there either. She then returned home where only after a short while a policeman, in the company of the deceased, arrived and asked the appellant to accompany them to the police station which she did. At the police station the police informed her that Dr. Hauli had brought the deceased there that morning to lodge a complaint against her of creating disturbance at the home of the deceased and threatening to stab the deceased with a knife. The appellant, of course, denied the accusation and stated that she had gone to the home of the deceased only to trace her husband. She and the deceased were asked to report back at the police station after one day. They did so but for some reason they were asked to go away and come back on the following day. This was 22.11.83, the fateful day.

On that day both the appellant and the deceased reported to the police station, as directed, where the officer in charge, Harun Masumar (P.W. 1), attempted a reconciliation but put it off pending the return of Dr. Hauli who had left the country some two days back on an overseas trip. Meantime the appellant and the deceased left the police station, the deceased going

away first followed by the appellant some ten minutes later. For some reason or other the deceased did not go away straight on leaving the police station. When the appellant came out she found the deceased at the traffic lights very close to the police station and then the two of them set out together to go away. As they did so the appellant invited the deceased home for a drink of soda and further offered to give her some money for taxi fare from there to her other destination. The deceased accepted and on arriving home the appellant went to buy some beer and soft drink. They drank a beer each or shared one between them. In the course of this the appellant raised the issue of the deceased's relationship with Dr. Hauli and told the deceased to stop it. The deceased replied, using abusive language, to the effect that the appellant was now an old woman whom nobody could care for; that her time had gone by and she should now give way for the young ones including the deceased; that if Dr. Hauli had valued such an old and barren woman as the appellant, he would not have slept at her (the deceased's) home leaving the children alone in the house and that Dr. Hauli was hers (the deceased's) for life. The deceased was uttering these words as she was washing her hands in the kitchen after the drink. Such abuses greatly angered the appellant to the extent that she suddenly picked up a piece of metal that was lying near the kitchen door and hit the deceased with it on the head causing her to fall down and faint. She inflicted a further blow injuring the deceased in the head and on the arm. The deceased bled profusely from these injuries. The appellant tried to prevent the excessive bleeding but in vain. She applied artificial respiration also to no avail. The deceased died only shortly following the attack. At a later stage in the course of investigations the appellant told the police that she had killed due to much anger because of the attempt by the deceased to ruin her (the appellant's) house. In the meantime the appellant then dragged the dead body to the bathroom, poured kerosene on it and set fire on it in an attempt to prevent further bleeding. She further wrapped the dead body in a bed sheet and a mat, and buried it in a grave or hole which P.W.2,

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her house servant, said he had noticed in the garden during the morning before the killing took place. There was nobody else at home during the incident and the appellant managed it all by herself. P.W.2, the said house servant, had been sent to town by the appellant earlier that morning to buy a charcoal stove, with instructions not to return to the house before noon. Upon his return some time after midday the appellant disclosed to him either that same day or some time later that she had finished off the deceased, her enemy or adversary, by killing her and required him not to disclose this to anyone. However, it was too much for P.W.2 to keep it secret and so he eventually reported it to the police who exhumed the body on 28.11.83. The post-mortem examination report shows that the body was semi burnt. There were two injuries on the head - (1) a depressed and commuted fracture measuring about 5 cm. in diameter over the right temple region with extensive brain damage, (2) a stellate hairline fracture of the occipital bone. Then there was a fracture of the left middle ulnar and radius bones. Medical opinion was that death was due to the fractured skull and brain damage.

Defending herself on oath at the trial the appellant gave a lengthy account which, with only a few exceptions, agrees in the main with the prosecution story summarized above. The main points of difference were as follows: The appellant in her evidence testified that when she and the deceased left the police station to go away on the day of the incident, the deceased had asked to be shown where she could buy something to eat as she was feeling hungry, and the appellant offered to lead her to a kiosk near her own home where chicken and soft drinks were sold. This is inconsistent with the prosecution story as contained in Exh. P.5 and Exh. P.6 that it is the appellant who had taken the initiative and requested the deceased to her own home for a drink of soda. The greatest difference relates to what happened just before the appellant attacked the deceased. In court the appellant stated that in addition to the abusive words, as set out earlier in the summary of the prosecution case, the deceased abused her further

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using Kipare words,

"Chebakie ni kushoshorwa hena mzuci kwa kugerwa vichaa"

which when freely translated mean,

"What is left is for you to have someone put fingers in your anus".

The appellant went on to say that the deceased after uttering all these abuses proceeded to push her towards the store as a result that a rake pierced her foot. She was very angry and on that account she attacked the deceased as she did. In short, the appellant's defence was that she killed in sudden provocation.

The prosecution had claimed that the hole or grave in which the appellant buried the deceased had been prepared before the killing took place, but the appellant in her defence refuted this stating that she dug it only after the killing. Again according to the prosecution the appellant confided in P.W.2, her house servant, that she had killed the deceased, her enemy, but the appellant testified that she merely told P.W.2 that there had been bad luck and that she killed someone. And lastly, while the prosecution alleged that on the day of the incident the appellant had sent P.W.2 to town and instructed him not to come back before noon, the appellant stated that she merely cautioned P.W.2 to be careful lest he was picked by the police for having no identity card. The rest of the defence substantially agrees with the prosecution version.

In convicting the appellant the trial judge with his two assessors held that the appellant had formed the intention to kill the deceased and that the acts of the appellant both before and after the killing were consistent with the execution of that intention. On that account they rejected the appellant's defence that she killed the deceased in sudden provocation.

The memorandum of appeal filed by Mr. Marando contains eleven grounds altogether, but the thrust of counsel's argument was that the appellant's defence of provocation was wrongly rejected. Mr. Marando vigorously contended that that defence ought to have been accepted and the appellant's

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conviction should be not of murder but of manslaughter. He attacked the court's finding that the appellant enticed or persuaded the deceased to her own home in order to kill her there. According to him there was no evidence to support such finding. With respect to the learned counsel, we cannot agree. The appellant and the deceased were coming from the police station where the deceased had just made serious allegations against the appellant of threatening to stab her with a knife. The matter was not yet settled; it was put off pending the return of Dr. Hauli into the country. Quite clearly in those circumstances the two women cannot be said to be friends. Indeed the appellant in her evidence at the trial rightly stated that, "..... anyone who accuses you at the police station cannot be your friend." In such circumstances it cannot reasonably be said that the appellant invited the deceased, who was clearly an enemy, to her own home and offered to pay her taxi fare from there with an innocent motive or intention. According to Mr. Marando, the trial court ought to have found that the appellant did not entice or persuade the deceased to her own home but that, as she said in her defence at the trial, she merely offered to show the deceased the kiosk where she could buy something to eat. But the question which immediately arises is: Then how come the deceased found her way not to the said kiosk but to the appellant's house? The appellant has given no explanation for that, and Mr. Marando only submitted in effect that this is a difficult question. In our view the trial court was entitled to find, as it did, that the deceased went to the appellant's house because the appellant invited or persuaded her into doing so. This was amply supported by the appellant's own cautioned statement to the police (Exh. P.5) and her extra-judicial statement to the justice of the peace (Exh. P.6).

Counsel further contended that it was wrong on principle for the court to accept the evidence as contained in her cautioned statement to the police (Exh. P.5) and her extra-judicial statement to the justice of the piece - which evidence incriminated her, but to reject her evidence in court which was favourable to her. According to the learned counsel, where

the accused gives conflicting or inconsistent accounts, the court should accept the version which is favourable to the accused. We cannot agree. We think that in such circumstances the court would be justified to reject that version which is patently untenable having regard to the totality of the evidence. We are satisfied that the appellant's version that she merely offered to show the deceased a kiosk where she could buy something to eat could not possibly stand in the light of the other evidence, and the trial court was justified to reject it.

Turning directly to the issue of provocation, Mr. Marando bitterly criticised the trial court for rejecting the appellant's story that she attacked the deceased because the deceased abused her and pushed her causing the rake to pierce her foot. Observing that the appellant was the only eye-witness to the killing, the learned counsel submitted with much force that the trial court had no justification to reject the appellant's account of the circumstances immediately giving rise to the killing. He said in effect that in the circumstances of this case it was impracticable to sever the evidence of the killing from that of the circumstances immediately surrounding the killing itself. He took the view that if the appellant's account of the circumstances immediately surrounding the killing were to be rejected, then there would be no apparent reason for the appellant killing the deceased. With great respect to the learned counsel, however, we are not at all persuaded by these arguments. The evidence of the killing and that of the circumstances immediately giving rise to the killing itself were clearly severable in this particular case because there were sufficient intervals between the time the appellant committed the killing and the time she gave the various accounts of the killing. During such intervals she had ample opportunity to choose what to say or to change what she had earlier said by way explanation of the killing. Nor can it properly be contended that if the appellant's account of the abuses etc. by the deceased were to be rejected then there would be no motive or reason for the killing. The appellant in Exh. P.5 clearly stated that she killed

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the deceased because the deceased wanted to ruin her marriage. The trial judge accepted this to be the reason behind the killing. We think that he was perfectly entitled to come to that conclusion, and that considering all the circumstances of the case he was justified to reject the appellant's story as to the abuses etc. by the deceased.

Mr. Marando also complained that the trial judge erred in finding that the appellant had hit the deceased twice. Again this complaint is quite unjustified. The appellant in her cautioned statement (Exh. P.5) stated that she hit the deceased twice. When giving evidence at the trial she repeated this during her examination-in-chief and this is fully supported by the post-mortem examination report which shows that the deceased had sustained fructures on the head and the arm. The appellant's claim that she hit the deceased only once was made only during her cross-examination, but in our view such a claim could not possibly be sustained in the light of the other evidence before the court. Therefore the finding that the appellant hit the deceased twice was sufficiently supported by the evidence and in our view such conduct of the appellant was not quite consistent with her defence of killing in sudden provocation.

The rest of the grounds consisted mainly of allegations of misdirections by the trial judge as to the credibility of P.W.2 and to the assessors during his summing up to them. Counsel criticised the learned judge for believing Musa James (P.W.2), the appellant's house servant, when he testifie that he had seen the dug out hole or grave before leaving the house that morning, that as he was leaving that morning the appellant instructed him not to come back before noon and that after the killing the appellant confided in him that she had finished off the deceased, her enemy or adversary. The trial judge specifically directed the assessors and himself on the issue of credibility and found P.W.2 to be a witness of truth. He rejected the defence suggestion that P.W.2 might have been induced to give evidence unfavourable to the appellant because he comes from the South as does the

appellant's husband. Mr. Marando tried to suggest that the witness might have given false testimony against the appellant in an attempt to implicate the appellant and to save his own skin because he was a likely suspect. There is no substance whatsoever in that suggestion. Looking at the evidence on record, and considering the submissions by counsel before us we can find no good ground for interfering with the finding on the issue of credibility by the trial judge who had the advantage of seeing and hearing the witness.

On the complaints of misdirections by the judge to the assessors during his summing up, we can find merit in only one. The learned judge failed to direct the assessors on the burden of proof and the standard of proof in a criminal case and in a case resting on circumstancial evidence such as this one. Indeed we may add that the learned judge too, in his judgement, did not direct himself at all on these matters. This was clearly wrong. But we are satisfied that had he properly directed the assessors and himself, he would have come to the same conclusion. The cogent evidence which the court accepted was as follows: The appellant invited the deceased to her house ostensibly for a drink but in fact in order to harm her. She prepared a hole or grave for burial in advance of the killing. She got her house servant out of the way by sending him shopping in town with instructions not to be back to the house before noon, and after the killing she confided in him that she had finished off her enemy, the deceased, by killing her. She sought to conceal the killing by burying the dead body single handed, by cleaning up any traces which might lead to detection and by requiring her house servant not to disclose it to anyone. All these pieces of circumstancial evidence were sufficient to warrant a finding that the killing was in circumstances amounting to murder.

In the last ground Mr. Marando complained about the failure by the trial judge to consider the appellant's defences of intoxication and self-defence. At the hearing of the appeal, however, the learned counsel did not wish to urge that ground, and we are of the settled view that those

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defences were not open to the appellant.

Upon a careful review of the evidence on record, and having given due consideration to submissions by counsel who appeared before us, we are satisfied that the appellant's conviction for murder was amply justified and we could find no reason to interfere. Thus we find no merit in the appeal which is accordingly dismissed in its entirety.

DATED at DAR ES SALAAM this 30th day of October, 1986.

A. MUSTAFA
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

A. M. A. OMAR
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(J. H. MSOFFE)
DEPUTY REGISTRAR