

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, Aq. C.J., OMAR, J.A., And LUBUVA, J.A.)

CRIMINAL APPEAL NO. 21 OF 1994

BETWEEN

LUCAS NGALYOGELA. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the decision of the High  
Court of Tanzania at Morogoro)

(Kyando, J.)

dated the 9th day of April, 1992

in

Criminal Sessions Case No.36 of 1991

JUDGEMENT OF THE COURT

OMAR, J.A.:

The appellant Lucas Ngalyogela was charged with and convicted of Murder c/s 196 of the Penal Code. He is now appealing. His ground of appeal is that there was provocation and if considered would have reduced the offence of murder to one of manslaughter. The appellant does not dispute that on the evening of 16th September, 1989 while inside their house with his wife Consolata he attacked his wife by hitting her not with an axe pestle but with an ordinary stick and not in the living room as was said by PW.1 their 20 year old son, but in the bed room.

PW.1 in his evidence stated that on the material night he was present in the house with his parents and other children and he heard his father tell his mother the deceased that she had sent her children to arrest him for being a thief and she was also telling neighbours that the appellant was a petty thief i.e. "Mdokozzi". His mother did not reply to these

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allegations. PW.1 left the house and went to sleep in another house with his two young brothers. But before his departure PW.1 also heard his father the appellant, telling the deceased to prepare more food for him; this was after the family had eaten their dinner together. What transpired after that between his parents he PW.1 did not know. But shortly afterwards he heard the cries of "mama mama" from the three youngest children he left behind with their parents. And he rushed there only to find his mother lying on the bed with axe pestle near her and bleeding from the head. The appellant was nowhere to be seen, he having fled from the house. PW.1 took the deceased to the cell leader and from there to the Police Station and thence to the dispensary for treatment. The case of assault causing actual bodily harm was opened against the appellant who incidentally was found in the bush and arrested the same evening. The appellant was sentenced to six months imprisonment. Ten days after this incident the deceased whose wounds had not healed but became septic, died in the hospital where she was rushed the same day her condition deteriorated. It was then that the appellant who was in prison serving his sentence, was charged for the offence of murder and when the charge was read to him he agreed that he attacked his wife but he did not expect her to die.

Considering the evidence as a whole there is the statement of the deceased which she made when she was still able to walk and speak and she said that as she bent down to pick the flour in order to prepare for the extra meal for her husband she was hit on the head and she became unconscious. PW.1's contribution to the evidence mentioned the outburst of the appellant to his wife about her attitude of considering her husband a petty thief and setting her children against him. Then there is the evidence

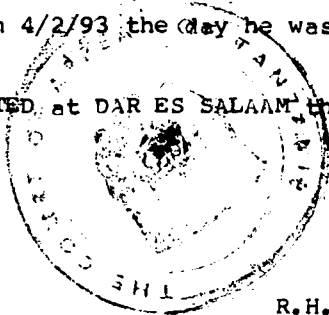
of the appellant who described the abusive words of the deceased to him when he asked where she had been from 5 p.m. when she had finished her work of selling liquor at the bar to 7 p.m. when she returned home. In her explanation about this absence of two hours she said she was collecting utensils used for selling liquor and then her husband replied her that this work could have been done by her young sister who was there at the bar helping her. It was at this juncture that according to the appellant, his wife let out a cascade of abusive words which infuriated him so much that he picked a stick and hit her on the head. They were alone in the house but for the three very young children. The outburst is as follows: "You are telling me to let my young sister to collect utensils, why? You old-man you have no brains. Your brains are like those of your mother. And the mother that gave birth to you I do not know in what form you were then".

On the available evidence we cannot say for certain that these words were not uttered they may well have been uttered and led to the attack on the deceased. After all the time this couple lived together was too long, 22 years, and too peaceful with a gift of eight children which they were blessed with. This has reinforced our belief that this was probably an isolated and unfortunate incident in their lives and had led to such a tragedy. The evidence of the appellant on this provocation was not controverted by the prosecution. PW. 1 their son was not around to have witnessed events that preceded the attack.

In the result we agree with the submission of Mr. Msellem the learned defence Counsel that the appellant may have attacked the deceased under provocation which was sudden and grave. We

therefore quash conviction for murder and set aside the sentence of death. We find the appellant guilty of the lesser offence of manslaughter and sentence him to a term of eight years imprisonment from 4/2/93 the day he was convicted in the High Court.

DATED at DAR ES SALAAM this 7th day of October, 1994.

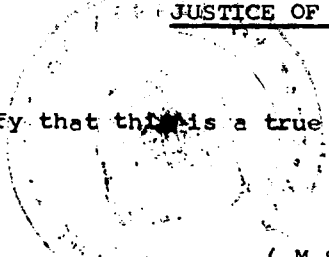



R.H. KISANGA  
Aq. CHIEF JUSTICE

A.M.A. OMAR  
JUSTICE OF APPEAL

D.Z. LUBUVA  
JUSTICE OF APPEAL

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



  
( M.S. SHANGALI )  
DEPUTY REGISTRAR