IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 77 OF 2002

BETWEEN

GEORGINA VENANCE ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Bukoba)

(Lugakingira, J.)

dated the 9th day of August, 1995
in
Criminal Sessions Case No. 135 of 1990

JUDGMENT OF THE COURT

MROSO, J.A.:

The appellant, Georgina w/o Venance, was convicted by the High Court, late Lugakingira, J., as he then was, of the murder of one Theonestina w/o Venance, a co-wife, and was sentenced to the usual statutory punishment of death by hanging. She was aggrieved by the conviction and sentence. Through Mr. Muna, learned advocate, she appealed to this Court, filing one ground of appeal. The complaint is that the learned trial judge in convicting her had erred in law in holding that a defence of provocation was not proved. At the

hearing of the appeal the respondent Republic was represented by Mr. Rwabuhanga, learned State Attorney.

The appellant had been married to Venant Tinkamanyire (PW1) in 1981. The deceased used to be the wife of a brother of PW1. In 1987 the brother died and his wife was inherited as a wife by PW1 in 1988. The deceased continued to live in the same house in which she used to live with her late previous husband. She also continued to look after the coffee shamba of the late husband. PW1 spent his nights alternately in the houses of the appellant and the deceased.

On 24th August, 1989 PW1 spent the night in the house of the deceased. On the following morning he went to the house of the appellant and asked her to get milk and make tea for him. The appellant refused to do so, arguing that he should have taken his tea in the house where he had spent the night. There was an exchange of words between the two. Then PW1 required the appellant to proceed to a coffee shamba to pluck coffee. That is the shamba which had belonged to the late previous husband of the deceased

and the deceased was there at the time plucking coffee. The appellant adamantly refused to do the work and said that as from that day she would no longer work. However, she eventually proceeded to the shamba but was sobbing and grumbling. When the appellant got to where the deceased together with Venancia Vincent (PW2) were plucking coffee, she said to them "pole na kazi". PW2 responded but the deceased did not. It was then the appellant used a panga she had been holding behind her back to hack the deceased on the head several times and elsewhere on her body, killing her on the spot. She then fled from the scene but was later, on the same day, arrested by villagers. When arrested she was in a poor condition because she had swallowed a poisonous vermicide. Subsequently, she made an elaborate statement to a Justice of the Peace and, thereafter, a caution statement to the police. In both statements she admitted attacking the deceased viciously with a panga she was carrying, killing her instantly, and that she only fled from the scene after she was sure the deceased had died.

Mr. Muna attempted to argue that the trial judge should have found that the defence of provocation was available to the appellant. He said there was evidence of accumulated instances of provocative incidents earlier and immediately before the appellant killed the deceased. He said that the day before the fateful day the appellant and the deceased had a verbal exchange. The deceased, according to appellant's extra-judicial statement to a Justice of the Peace, told the appellant – "tutauana sitakuachia kula mali yangu hujui kwa nini nilivumilia kukaa na kurithiwa", to which the appellant retorted – "sitakuachia mume wangu na mali zangu." PW1 intervened and the exchange stopped.

Another incident, according to Mr. Muna, was when, on the morning of the fateful day, PW1 required the appellant to pluck coffee in the shamba which was looked after by the deceased. When she refused to do so, PW1 threatened that at 2 pm on that day she would know her fate – "saa nane utakuwa umepata uamuzi", suggesting he would take a decision to expel her from the home at 2 pm. Those words gave her a lot of anxiety. She could not

contemplate being driven back to her parents. Earlier on that same morning, according to the appellant, the deceased had told her – "Leo wewe na mimi tutaonana."

Although the appellant did not say so, Mr. Muna suggested that the conduct of the deceased in refusing to respond to the greeting "Pole na kazi" enraged the appellant because such conduct was an insult in the Haya community and that it provided the immediate cause for the provocation on the part of the appellant.

With respect, like the trial judge, we are unable to appreciate that any, or a combination, of all those instances constituted provocation within the meaning of the law.

Section 202 of the Penal Code, Cap. 16 of the Laws defines provocation as meaning and including –

> "any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to

> another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation, or in relation to a master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult was done or offered ...
>
> A lawful act is not provocation to any person for an assault."

From that provision it is clear that for an act or insult or conduct to constitute provocation in law, at least the following conditions must be satisfied. First, the act or insult causing provocation must be wrongful. A lawful act or conduct cannot provide provocation. Second, the person assaulted because of the provocation must be the one who offered the provocative act, insult or conduct. Third, the provocative act, insult or conduct must have been directed to the person committing the assault or a person who stands to him in the relationship as explained in the section. Fourth, the provocative act or insult must have been done or offered in the presence of the

person committing the assault. Fifth, the test is the ordinary person in society. That is to say, peculiar or eccentric qualities of the person committing the assault are not relevant when considering whether a person would be provoked by the act or insult. Seventh, the person provoked must have been deprived of the power of self control.

If we apply those conditions to the appellant we find that the words or conduct of PW1 to the appellant could not constitute provocation for the assault which the appellant committed on the deceased. Furthermore, the fact that the deceased refused or failed to respond to the appellant's greetings may have offended the appellant but since there was nothing unlawful about that conduct by the deceased, there could be no basis for provocation in law. The words "tutauana" or that "leo wewe na mimi tutaonana" which appellant claims were uttered to her by the deceased on the day before the day of killing and on the morning of the day of the fatal assault respectively were probably threats, if they were actually uttered. But the question would be whether an ordinary person in the Tanzanian society would be so enraged by them as to deprive

him of the power of self control and induce him to commit the kind of brutal assault which the appellant inflicted on the deceased.

The appellant herself in fact did not, in her defence in court, blame the deceased so much as being the cause for the killing that occurred. She attributed her conduct to her husband, PW1. She said –

> "I agree, I killed the deceased, but I was confused at the material time I did not know what I was doing. I was driven into a state of rage by my husband's threats. I did not intend the death of the deceased."

As we said earlier, if it was the husband who drove her into a rage, the defence of provocation would not be available to her for killing the deceased who was not the person who drove her into a rage.

We are satisfied that the trial judge very adequately dealt with the question of provocation and came to a correct conclusion that the defence of provocation was not available to the appellant. He cited

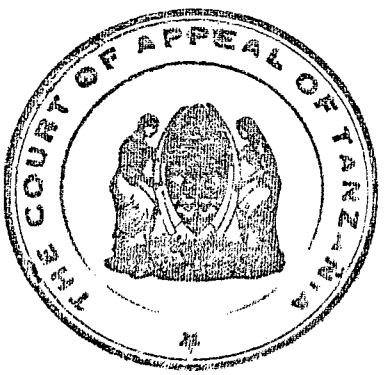
various cases of persuasive value like **R v. Alexander,** 9 Cr. App. R. 139 where it was held that the test on whether a particular act or insult was provocative was the ordinary person. The other was **R v. Simpson,** 11 Cr. App. R. 128 where it was stipulated that provocation in order to be available to an accused person it must be shown that it was offered by the person murdered.

The conduct of the appellant prior to killing the deceased suggested that she had premeditated it well before she committed the act. Quite early, at the time she left home to go to the coffee shamba where she killed the deceased, she had made up her mind to go and dispose of the deceased and, thereafter, kill herself as well. That was the reason she took with her the bottle into which she had put the poisonous vermicide. She was to use the vermicide after killing the deceased, as she indeed did, in order to cause her own death. On the way to the shamba she collected the panga, hid it on her back so as not to alarm the deceased or PW2 who was with her. She sent away Fikiri and Mbekeize from the shamba so that they would not provide resistance. It was then she hacked deceased

several times on the head and elsewhere on her body until she died. So, there was no question of the appellant being so enraged as to lose her power of self-control when she killed the deceased. We noted that even Mr. Muna was in great difficulty when he was trying to argue a case of provocation for the appellant.

We dismiss the appeal in its entirety as it has no merit at all.

DATED at MWANZA this 28th day of June, 2004.



D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR