IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 202 OF 2006

DANFORD CHIZUWA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the Resident Magistrate's Court of Dodoma at Dodoma (Extended Jurisdiction))

(Mzuna, PRM - E/J)

dated the 26th day of May, 2006
in
Dodoma RM's Court E/J Criminal Sessions
Case No. 42 of 2003

JUDGMENT OF THE COURT

25th & 28th November, 2008

RUTAKANGWA, J.A.:

The appellant and the deceased Sehewa Chizuwa, contracted a Christian marriage in 1995. They apparently lived happily and were blessed with children. As marriage is not a perpetual honeymoon, the couple had their own misunderstandings. On 14th September, 2001, the deceased left her matrimonial home and returned to her mother Elika d/o Chilendu (PW1) taking with her the appellant's Shs. 40,000/-. PW1 was staying with Christina Sumisumi (PW2), the elder sister of the deceased and one Sylivester who was mentally retarded. PW2 was divorced.

The deceased told PW1 that she will never return to her matrimonial home because her husband was ill-treating her. This decision notwithstanding, the appellant was determined to have his wife back to their matrimonial home. The same day he went to his in-laws, being accompanied by one Azaria Muchakila, to seek reconciliation with her. He was rebuffed. PW1 bluntly told him that her daughter will never return to him. He tried again on 15.9.2001, but all was in vain. The appellant involved other people but PW1 and the deceased remained adamant. He then referred the matter to the area Conciliation Board but withdrew it in favour of a church reconciliation which was slated for 17th September, 2001.

On the morning of 17.9.2001, PW1 went to the shamba with the deceased. PW2 also went to her own shamba which was not far from PW1's shamba. So the appellant had to follow PW1 and the deceased to the shamba to inform them of the church reconciliation meeting that day. As is customary for Gogo men to go around carrying a bill hook, the appellant had a bill hook with him. But he had carried it for the purpose of cutting "trees" for the construction of one Agnes Chiyanga's latrine.

At the shambas, the appellant first met PW2 who was with her daughter, Clen Mazengo. He told her the purpose of his visit. PW2 used the appellant's bill hook for some time, before he went to meet PW1 and the deceased. According to the extra-judicial statement (exhibit P4), PW1 told the appellant that her daughter will never return to him. She further told him that his wife shall beget children with other men but in his name. The appellant wept bitterly and left them. After covering a short distance, the deceased caught up with him. The deceased reminded him of her mother's earlier words and she repeated them with greater emphasis thus:-

> *"Mimi nitazaa na wanaume wengine na nitaandika majina ya hao watoto ukoo wako. Hata dada yangu amezaa watoto wa nje akaandika jina la mwanamume waliyeachana naye na fedha Shs. 40,000/- nilizochukua sikurudishii na siolewi na wewe ."*

On hearing these words the appellant there and then slashed at her with his bill hook. The appellant ran away and surrendered himself subsequently. The deceased died later that day. The Report on Postmortem Examination (exhibit P1) shows that the cause of

death was a "severe multiple cut wound on the head." The appellant was then arraigned for her murder in the Court of the Resident Magistrate, Dodoma with Extended Jurisdiction.

Before Mzuna, Principal Resident Magistrate – Extended Jurisdiction, the appellant did not deny killing the deceased. He told the trial court that he killed his wife, whom he loved so much, in a heat of passion after being provoked by her words.

The learned trial Principal Resident Magistrate and the three assessors who tried the case with him were unanimous in their verdict. The appellant killed with malice aforethought, they held. He was convicted as charged and sentenced to suffer death by hanging. Being aggrieved by the conviction and sentence, he has lodged this appeal, through Mr. Zakayo Njulumi, learned advocate.

Mr. Njulumi has come to this Court with only one ground of appeal. This sole ground of appeal reads as follows:-

> *"That, the trial court erred in fact and law in holding as it did that the charge of murder was proved against the accused person at*

the required standard of proof beyond all reasonable doubts."

Mr. Njulumi appeared before us to prosecute this appeal on behalf of the appellant. For the respondent Republic, Mr. Anselm Mwampoma, learned Principal State Attorney, appeared.

Submitting in support of the appeal, Mr. Njulumi contended that the trial court erred in law and on the facts in not finding the appellant guilty of manslaughter on the basis of section 201 of the Penal Code, Cap.16 R.E. 2002. To Mr. Njulumi, the appellant unlawfully killed the deceased out of provocation. Pressing us to differ with the trial court, Mr. Njulumi argued that the words uttered by the deceased were inherently provocative and caused the appellant to lose self-control before he inflicted the fatal wounds. He accordingly urged us to allow the appeal by quashing the conviction for murder and setting aside the death sentence and substitute therefor a conviction for manslaughter.

The respondent Republic supported this appeal. In his submission, Mr. Mwampoma asserted, and correctly in our view, that the fact that the deceased uttered those provocative words was not

disputed at all. To him, those words spoken in succession by PW1 and the deceased, when in fact the latter had prior to that told him that she was actually staying and having an affair with one Chilendu, amounted to provocation in law. He invited us to look at the decision of **BENJANI MWANSI V. R.** [1992] TLR 85 for support of his stance. He criticised the learned trial Principal Resident Magistrate with extended jurisdiction for misdirecting the assessors in his summing up to the effect that in fact the appellant harbored grudges against PW1. He further attacked the holding of the learned trial Principal Resident Magistrate to the effect that the appellant killed the deceased not because he was provoked by the words uttered but because of jealous as there was no evidence to support it. He accordingly urged us to allow this appeal by quashing and setting aside the conviction for murder as well as the death sentence and substituting a conviction for manslaughter.

This is a first appeal. It is settled law that we are obliged to re-evaluate the evidence and draw our own conclusions and/or inferences, without overlooking the conclusions reached by the trial court. We have to do so because that is what the appellant would

legitimately expect from us: see, **D.R. PANDYA V. R.** [1957] E.A. 336 (C.A.), among many others.

In this appeal the death of Sehewa Chizuwa is not disputed. Equally undisputed is the cause of death and the author of her death. Although in the trial court the prosecution had persistently pressed that the appellant killed the deceased with malice aforethought and it was upheld by the trial court, it has had a change of heart since then. In this appeal, as shown above, the respondent Republic has joined hands with the appellant, and it is satisfied that the appellant killed on provocation.

In law, **provocation** is a mitigatory defence alleging a total loss of control as a response to another's provocative conduct or words sufficient to convert what would otherwise have been murder into manslaughter. It does not apply to any other offence. This is recognized under section 201 of the Penal Code, Cap.16 R.E. 2002. The said section provides as follows:-

> *"When a person unlawfully kills another under circumstances which, but for the provisions of*

this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in section 202, and before there is time for his passion to cool, he is guilty of manslaughter only."

Section 202(1) defines provocation as follows:-

"The term 'provocation' means, except as hereinafter stated, 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 a conjugal, parental, filial or fraternal relation, or in relation of 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 is done or offered."*
[Emphasis is ours].

It is further provided thus in section 202 (6):-

"For the purposes of this section, the expression 'an ordinary person' means an

> *ordinary person of the community to which the accused belongs."*

In view of the provisions of section 202(6), in murder cases which by law are tried with the aid of assessors as "judges" of fact with an advisory role, it becomes imperative, in our view, that such trials ought to be conducted with the aid of assessors hailing from the accused community, particularly when it is known much earlier that the defence will rely on provocation. This is not difficult to know because almost all criminal trials are preceded by preliminary hearings held under the provisions of section 192 of the Criminal Procedure Act, Cap.20 R.E. 2002. Failure to observe this might result in an unfair trial and occasion grave injustice to the accused. This view finds strong support from the decisions of this Court in the cases of **DAMIAN FERDINAND KIULA & CHARLES V.R.** [1992] T.L.R. 16 and **BENJEMIN MWANSI V. R.** (supra).

In the case **DAMIAN KIULA** (supra), the Court said:-

> *"For the defence of provocation to stick, it must pass the objective test of whether an ordinary person* ***in the community to which the accused belongs would have***

> ***been provoked in the circumstances, and the best judges to determine this question are the assessors,*** *for they are the ordinary persons of the community to which the accused belongs."*
> *[Emphasis is ours).*

We have already reproduced the insulting words which the deceased said to the appellant. The question whether an ordinary man of the community to which the appellant belongs would have been provoked by those words was unanimously answered in the negative by trial court. In this appeal we are being urged to find that trial court erred in so holding. Counsel for both sides have pressed us to hold that those words were highly provocative and the appellant ought to have been found guilty of manslaughter. That's why Mr. Mwampoma has urged us to seek inspiration from **BENJAMINI MWANSI'S** case (supra) in which the appellant and the deceased were only fiancées unlike this case where they were **husband and wife**.

We have no doubt that the deceased uttered those words. But we cannot hold with the same degree of certainty that the assessors

who downplayed the significance of those words on the psyche of the appellant were ordinary persons of the community to which the appellant belonged when the killing took place. In our endeavours to make sure that justice is done in the case, we took the liberty of perusing the trial court's original record. We have found out that the offence was committed at Sazima Village in **Mpwapwa District**. The three assessors who assisted in the trial of the case came from different areas of KONGWA DISTRICT and one of them was urbanized as she came from Kongwa town. It cannot, therefore, be seriously argued that these were ordinary persons of the community to which the appellant belonged. The matter is further complicated by the summing up made to them.

The entire summing up is a summary of the entire evidence and an examination of the law on provocation. However, nowhere in his summing up did the learned trial magistrate direct the assessors on the issue of the legal burden of proof which lies throughout on the prosecution in cases of this nature, which should always be given at the beginning of the summing up. Furthermore, the learned trial magistrate did not direct the assessors on the duty of the prosecution

to disprove the claim of provocation and not for the defence to establish it. This non-direction might have left the assessors under the impression that the appellant had the duty to call evidence to prove that an ordinary man in his community would have been provoked by those words.

In his summing up, the learned trial Principal Resident Magistrate, said:-

> *"The crucial point, I remind you once again, if you were placed in the accused shoes, would you have acted as the accused did as an ordinary man in the community. That is would you have been provoked?*
>
> *Are you then, satisfied beyond reasonable doubt, that the accused is guilty of murder or of manslaughter or he be acquitted? Let me get your opinions."*

After a day's recess they came up with these opinions:-

> ***"1ST ASSESSOR AGNESS DEDEDE***
>
> *The deceased did nothing bad by her decision of not going back to her husband because she found she was mistreated.*

The deceased's allegation that he was undermined and that if she (deceased) was divorced could bear children and name them in his name is unknown in our tradition because they do not belong to him. The accused took an action which was unjustified ... He be found guilty of murder.

2ND ASSESSOR MICHAEL DEDEDE

The accused intended to cause death. They were heading for reconciliation to the priest who is like "Mungu wa hapa duniani." The alleged words that the deceased if divorced could have born the children and name them in his name was not the ground to cut him thrice on her head. He is found guilty of murder.

3RD ASSESSOR NAOMI BOMA

I find the accused ought to have kept on waiting until when they went to the priest. He took an action which he was not supposed to take. Since those words were repeatedly uttered he ought to have waited until they went to the priest."

The learned trial P.R.M.-E.J. bought these opinions unreservedly. In his judgment, he said:-

> *"The accused reaction was however taken so prematurely because, as the ladies and gentlemen assessors rightly said, that was subject to their reconciliation before a priest, where after all, the deceased was prepared to go. If I understood well the second assessor and I think I did for Christian Marriages, priests have very convincing power to cement their misunderstandings."*

That is where they all went wrong.

We are not going to question the assertion that "priests have very convincing power..." May be that's why the appellant had opted for that route. But the trial magistrate and the three assessors appear to have been lancing a boil and leaving a cancer unattended. The 1st assessor premised her opinion on the evidence of PW3 Joshua Mkononi, who admitted in court that his evidence contradicted his statement to the police given immediately after the incident. The issue was not the existence or otherwise of a custom of giving names to children born out of wedlock. The issue was

whether the words uttered by the deceased to her husband, said when he was making efforts to be reconciled with her, would have deprived an ordinary man in the community to which the appellant belonged of his power of self-control and induce him to commit that assault. The assessors did not adequately address their minds to this question. The trial P.R.M. – E.J. failed to do so, but concluded that the appellant had a motive because he had "harboured grudges against the deceased mother." If that was the case then he would have killed PW1 or both at the shamba. That he did not do so and had left them, when in fact PW1 uttered similar insulting words to him, is proof that he had gone there with innocent intentions. If the appellant had a premeditated plan, to murder the deceased then he would have waited until they were at a safer place not within the sight of PW1 and PW2. Had the deceased not followed him to continue their insults, definitely the appellant would not have acted as he did.

In **BENJAMINI MWANSI** (supra), the appellant was incensed by these words from his fiancée: "Wewe bwana achana na mimi. Sina habari na wewe." He went wild, broke into the mud hut, picked

up a plank wood and administered a number of blows on her dead. Death was instant. This Court held that there was provocation.

The appellant has claimed all along that he was provoked by the deceased utterance. In our view that was not a slight insult. Given the facts of this case we are tempted to give him the benefit of doubt. The undisputed facts prove beyond any doubt that the appellant acted at the spur of the moment. According to his evidence which was supported by exhibit P4, the loss of self-control was sudden and as such struck the deceased with the bill hook, which in our view was an accident of availability as it was in his possession. There was no time for reflection or for cooling. We cannot pretend not to recognize the realities of life that such words by a wife to her loving and frustrated husband (and vice versa) would not have had a devastating effect on the mind of the appellant as to suddenly cause him to lose self-control. It was a killing done in the heat of passion.

All said and done, we find the appellant not guilty of murder, but of manslaughter. We accordingly allow the appeal and quash the

conviction for murder. We set aside the death sentence and impose one of imprisonment for a term of twelve years.

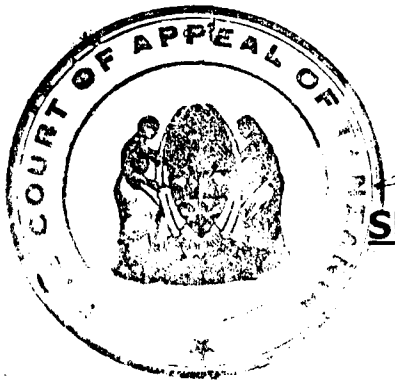
DATED at DODOMA this 27th day of November, 2008.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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



(S.S. MWANGESI)
SENIOR DEPUTY REGISTRAR