IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MUNUO, J.A., MSOFFE, J. A. And KIMARO, J. A.)

CRIMINAL APPEAL NO. 352 of 2009

BAKARI ALLY @ JUMA MIRAJI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mussa, J.)

dated the 20th day of March, 2009
in
Criminal Sessions Case No. 18 of 2007

JUDGEMENT OF THE COURT

18 & 22 March, 2010

MUNUO, J.A.:

In Tanga Criminal Sessions Case No. 18 of 2007, the appellant, Bakari Ally *alias* Juma Miraji was convicted of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2002. It was alleged that on the 26th October, 2005 at Magomeni A area within the Municipality and District of Tanga, the appellant murdered one Senorina d/o John Mkenda.

The facts of this case are straight forward. The appellant admitted that he fatally slashed the deceased with a double edged machete on the fateful evening at Magomeni A within Tanga Municipality. An eye witness, PW2 Margaret James, a business woman saw the killing. She deposed that she was a co-tenant of the deceased, at the house of the latter's father's house at Magomeni. So was the appellant Bakari Ally who also operated a shop at the material premises. The appellant lived with his wife and children. PW2 stated that while she was chatting with the deceased at the backyard of Mzee John Mkenda's house, the appellant emerged from his room, passed by and walked towards Upendo Bar which was in the neighbourhood. Twenty minutes later, the appellant returned and walked straight to his room. Shortly after, the appellant emerged from his room carrying a machete. He immediately started cutting the deceased with the machete. The deceased ran away and he pursued her at a distance of about 70 paces, inflicting severe multiple cut wounds on the head, face, arms, and compound fractures on the radius and ulna. Per the postmortem report, Exhibit

P1, the deceased died from severe haemorrhage and severe multiple cut wounds, inflicted by a sharp instrument, in this case a machete.

The ten cell leader of the area, PW1 Asa Tamelwai responded to the death alarm at Mzee Mkenda's house which is about 50 paces from his residence. He found the appellant pursuing the deceased as the latter ran away into a path. Seeing the appellant hack the deceased ruthlessly, PW1 chased and managed to knock the assailant killer from the back *(nikampiga ngwara* – meaning I jumped on him) and successfully wrested the machete from him. Other neighbours who had responded to the murder alarm subdued the appellant and turned him over to the police. At that time, PW1 observed, the deceased had expired. PW1 kept the blood stained machete and gave it to the police on the next day. The deceased was taken to the mortuary at Bombo hospital for postmortem examination.

As stated earlier on, the appellant admitted killing the deceased by hacking her with a machete. He raised a defence of provocation saying that the deceased had been spreading rumours around the

streets that the appellant was HIV positive. Although she never directly confronted the appellant, the deceased would utter words of innuendo insinuating that the appellant should go to Angaza for HIV counseling. The straw which broke the camel's back, the appellant claimed, was when the deceased saw him coming home with his wife who had been on *safari* to Singida and said –

"Afadhali mwenyewe karudi, sasa vitulie ---"

Meaning that the appellant would no longer stray searching for women now that his spouse was back.

The appellant stated that he was provoked by the above utterances which was why he rushed to his room, brought out a machete and fatally hacked the deceased.

At the trial the appellant raised the defences of insanity and provocation but the learned judge and the three assessors who assisted him in conducting the trial, did not find either defence probable so he was convicted of murder as charged. Aggrieved, the appellant lodged this appeal to challenge the conviction of murder, and the sentence of death by hanging, imposed on him.

Mr. Akaro, learned advocate for the appellant filed two grounds of appeal namely:

1. *That the learned judge erred in law and fact in rejecting the defence of provocation.*
2. *That the learned judge erroneously held that the appellant killed with malice aforethought.*

At the hearing, learned counsel for the appellant stated that the learned judge properly rejected the defence of insanity so it would not be pursued in this appeal. With regard to provocation, Mr. Akaro contended that the deceased seriously provoked the appellant by insinuating that he was suffering from HIV. Implying that the appellant would stop straying searching for lovers now that his wife was back highly provoked the appellant, counsel submitted. In the heat of passion, the appellant went for the machete in his room and killed the deceased, Mr. Akaro further submitted. He however, conceded that apart from uttering words by innuendo, the deceased did not directly abuse or pick up a quarrel with the appellant.

On provocation, Mr. Akaro cited the case of **Maina Thuku** *alias* **Maina Nyaga versus Republic** (1965) E.A. 497. In that case the

appellant saw his step father beating his mother outside their house. The appellant's move to separate the acrimonious spouses failed because his step father hit him with a stick. The appellant went to sleep and was awakened by his step father some hours later. When the appellant went outside he was shocked to see his mother lying on the ground dead with severe injuries on the back and on the head. The appellant put the body of his mother in a shade and then pursued his step father with a machete for about 300 yards. There was an exchange of words between the step father and the appellant. The appellant walked back towards the body of his mother in the company of the step father. Suddenly the appellant fatally cut his step father with the machete.

The trial judge rejected the defence of provocation on the ground that sufficient time elapsed to enable the appellant to cool down. On appeal, the Court of Appeal of East Africa reduced the conviction for murder to manslaughter because:-

> *(i) The events were continuous as to make the act of killing the mother so proximate to the*

appellant as constructively to have been done in his presence.

(ii) The degree of provocation is a relevant factor in considering whether the heat of passion in an accused person, regarding him from the standard of the ordinary man, had had time to cool or whether the provocation would still be bearing on his mind so as to deprive him of the power of self control.

(iii) When the appellant killed the deceased he was still acting in the heat of passion without regaining his self control.

The Appeal Court held that the plea of provocation was available to the appellant. The conviction of murder was accordingly reduced to manslaughter.

Urging us to reduce the conviction to manslaughter upon finding the defence of provocation probable in the circumstances, the learned counsel for the appellant referred us to the case of **Salum Abdallah Kihonyile versus Republic** (1992) TLR 349. In that case, Masais had persistently been grazing their herds of cattle in the farms of the peasant, the appellant included. On the fateful day, the appellant

found Masai cattle in his farm so he cut the hind legs of the cow, immobilizing it. The herdsboy rushed home to tell his parents who went to the scene of the wounded cow. The deceased traced the appellant at home to find out why he had wounded the cow. The appellant went into his house and came out wielding a spear. He chased the Masai. Unfortunately, the deceased stumbled so the appellant caught up and pierced the sharp spear into his back killing him instantly. At the trial the learned judge rejected the defence of provocation thereby grounding a conviction for murder as charged. However, on appeal the Court of Appeal held that the defence of provocation was available to the appellant by stating:-

> *"----- But having in mind all the background incidents, the continuous almost deliberate trespassing of thelr farms by the Masai cattle, the aggressive approach by the Masai and the subsequent attack on the appellant which resulted in his being injured on the forehead, convince us all that at the time the deceased, he was still affected by this provocation which is sufficient to reduce the offence of murder to the lesser offence of manslaughter.-----*

All in all, Mr. Akaro submitted that the defence of provocation, like in the above cases, was available to the appellant who was provoked by the deceased's utterances that now that his spouse was home, the appellant would settle and not searching for women and by extension, spreading HIV.

Mr. Oswald Tibabyekomya, learned Senior State Attorney, supported the conviction and sentence. He submitted that the defence of provocation was not available to the appellant because the deceased spoke in innuendo, she did not directly confront him. Besides, the appellant had sufficient time to cool down because he passed by the deceased who was chatting with P.W.2 Margaret James, did not say a word, but went into his room to collect the machete for severely and fatally hacking the deceased. The killing was in cold blood because the appellant pursued the defenseless deceased for 70 paces, inflicting severe multiple wounds on the head, face and hands, all delicate parts of the body. Hence, the defence of provocation was not available to the appellant in those circumstances, the Republic argued.

Distinguishing the cases cited by the learned counsel for the appellant, Mr. Tibabyekomya submitted that in both cases there was direct confrontation between the deceased and the appellant whereas in this case the fatal attack was in cold blood and against an unarmed woman while the male attacker was armed with a double edged machete.

The issue before us is whether the defence of provocation was available to the appellant when he fatally hacked the deceased. The law on the defence of provocation is provided for under Sections 201 and 202 of the penal Code, Cap R.E. 2002 which state verbatim:

> *201: When a person who unlawfully kills another under circumstances which, but for the provision of this section would constitute murder, does an 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.*

except as hereinafter stated, any wrongful act or insult of such 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 the relation of master 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.

(2) When the unlawful act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any relationship referred to in subsetion (1), the former is said to give the latter provocation for an assault.

(3) -----

(4) -----

(5) -----

(6) *For the purposes of this section, the expression "an ordinary person" mean an ordinary person of the community to which the accused belongs.*

It appears to us that the cases of **Maina Thuku** and **Salum Kihonyile** cited *supra* by the learned counsel for the appellant are, as urged by the learned Senior State Attorney, distinguishable. In both cases, the adversaries were armed. In **Maina Thuku** his deceased step father had fatally wounded his mother on the head and back so he must have used some lethal weapon, otherwise the big cut wounds on the back and head of the appellant's mother would not have been there. Provoked by the killing of his mother, Maina fatally slashed his step father so the defence of provocation was available to him because he killed his step father in the heat of passion of seeing his mother brutally killed by the deceased. The case is indeed distinguishable from the present case where the

heard in the streets that the deceased said that he was HIV positive. Perhaps because those were rumours, the appellant had not taken any legal action against the deceased. We are, furthermore, satisfied that the Masai case is also distinguishable from the present case. In that case there had been skirmishes over Masai cattle grazing in the farm of the appellant. The latter had suffered a cut wound on his forehead in a Masai confrontation. Then the wounded farmer cut the hind legs of a Masai cow rendering it immobile because it grazed on his farm. The war with the Masai herders culminated in the appellant spearing the deceased Masai when he stumbled and fell down during a hot pursuit by the appellant. The Court held that the aggression of the Masai and their wantonly grazing on the farmers' land constituted provocation so the appellant killed the Masai in the heat of passion. There was no exchange of words in the present case. There was no confrontation either. The appellant acted on rumours that the deeased had been stigmatizing him as being HIV positive. On the fateful evening she uttered offensive words implying that the

appellant who was straying around hunting women would be checked now that his spouse was back home.

With respect, we are not satisfied that the defence of provocation was available to the appellant. Like the learned judge, it appears the deceased avenged by fatally punishing the deceased who, per rumours, had stigmatized him as HIV positive. The appellant chose to act on rumours, hacked the deceased, a purported rumour monger in cold blood. This, in our considered opinion, was not provocation because there were no exchange of words, no skirmish of any kind, and the deceased was unarmed and unaware that the appellant had gone into his room to collect a machete for killing her. Had she been aware that the appellant was out to kill her she would have escaped. To our minds, no unlawful act or insult had been uttered by the deceased to provoke the appellant. Assuming that the deceased uttered the innuendo of the spouse of the deceased containing him sexually, that would not arouse an ordinary person within the meaning of section 202(6) of the Penal Code to kill in the heat of passion. The appellant could, if he wanted to act on rumours and inuendos sue for damages for defamation, but certainly

as illustrated by the severe multiple wounds.

In view of the above, we find no merit in this appeal. We accordingly dismiss the appeal.

DATED at TANGA this 20th day of March, 2010.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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

(N. N. CHUSI)
DEPUTY REGISTRAR